Quarterly Review

Volume 5 **Issue No. 1** **Winter 2012**

OHIO ASSOCIATION *of* CIVIL TRIAL ATTORNEYS

A Quarterly Review of Emerging Trends In Ohio Case Law and Legislative Activity...

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OHIO ASSOCIATION *of* CIVIL TRIAL ATTORNEYS

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2012 Officers

President
Kevin Connell
Freund, Freeze & Arnold
One Dayton Centre
Dayton, OH 45402-2017
(937) 222-2424
Fax: (937) 222-5369
kconnell@ffalaw.com

Vice President
Kurt D. Anderson
Of Counsel
Davis & Young, LPA
1200 Fifth Third Center
600 Superior Avenue, E.
Cleveland, OH 44114
(216) 377-4201
kanderson@davisyoung.com

Treasurer
Anne Marie Sferra
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215
(614) 227-2394
asferra@bricker.com

Secretary
James L. Mann
Mann & Preston LLP
18 E. 2nd St.
Chillicothe, OH 45601
(740) 775-2222
Fax: (740) 775-2625
jmann@horizonview.net

Immediate Past President
Gary L. Grubler
Grange Insurance
610 South Front Street
Columbus, OH 43215
(614) 449-5900
grublerg@grangeinsurance.com

2012 Board of Trustees

Thomas J. Antonini
Robison, Curphey & O'Connell
Four SeaGate - 9th Floor
Toledo, OH 43604-1520
(419) 249-7900 • Fax: (419) 249-7911
tantonini@rcolaw.com

Michael W. Krumholtz
Bieser, Greer & Landis
400 National City Center
6 N. Main St.
Dayton, OH 45402
(937) 223-3277
mwk@bgllaw.com

Anthony E. Brown
Baker, Dublikar, Beck,
Wiley & Mathews
400 S. Main Street
North Canton, OH 44720
(330) 499-6000 • Fax: (330) 499-6423
tonyb@bakerfirm.com

Amy Mass
The Hanover Insurance Group
808 N. Highlander Way
Howell, OH 48843
(614) 404-2479
amass@hanover.com

Lynnette Ballato Dinkler
Dinkler Pregon, LLC
2625 Commons Boulevard
Suite A
Dayton, OH 45431
(937) 426-4200
Lynnette@dinklerpregon.com

Mark F. McCarthy
Tucker Ellis & West LLP
1150 Huntington Building
925 Euclid Ave.
Cleveland, OH 44115
(216) 592-5000 • Fax: (216) 592-5009
mark.mccarthy@tuckerellis.com

Richard M. Garner
Davis & Young, LPA
1200 Fifth Third Center
600 Superior Avenue E
Cleveland, OH 44114
(216) 348-1700 • Fax: (216) 621-0602
rgarner@davisyoung.com

Paul W McCartney
Rendigs, Fry, Kiely &
Dennis, L.L.P.
One West Fourth Street
Suite 900
Cincinnati, OH 45202
(513) 381-9200 • Fax: (513) 381-9206
pwm@rendigs.com

John J. Garvey, III
Garvey Shearer, PSC
300 Buttermilk Pike, Suite 336
Ft. Mitchell, KY 41017
(859) 308-1484
jgarvey@garveyshearer.com

Jill K. Mercer
Nationwide Insurance
One Nationwide Plaza
1-30-302
Columbus, OH 43215
(614) 677-7924
mercerj3@nationwide.com

Thomas Glassman
Smith, Rolfes & Skavdahl
600 Vine Street , Suite 2600
Cincinnati, OH 45202
(513) 579-0080
tglassman@smithrolfes.com

David W. Peck
Rendigs, Fry, Kiely & Dennis
One West Fourth St., Suite 900
Cincinnati, OH 45402
(513) 381-9226 • Fax: (513) 381-9206
dpeck@rendigs.com

Brian Kerns
Wiles, Boyle, Burkholder & Bringardner
46 Public Square, Suite 200
Medina, OH 44256
bkerns@wileslaw.com

Crystal Richie
Grange Mutual Casualty Co.
610 South Front Street
Columbus, OH 43215
(614) 449-5900 • Fax: (614)449-5980
richiec@grangeinsurance.com

James N. Kline
Ulmer & Berne, LLP
Skylight Office Tower
1660 W.Second Street, Ste 1100
Cleveland, OH 44113-1448
(216) 583-7160
jkline@ulmer.com

Brian L. Wildermuth
Subashi & Wildermuth
50 Chestnut Street, Suite 230
Dayton, OH 45440
(937) 427-8800 • Fax: (937) 427-8816
bwildermuth@swohiolaw.com

Executive Director
Debbie Nunner, CAE
OACTA
17 South High Street, Suite 200
Columbus, OH 43215-3458
(614) 221-1900 • Fax: (614) 221-1989
E-mail: debbie@assnoffices.com

Executive Assistant
Rhonda Weidman
OACTA
17 South High Street, Suite 200
Columbus, OH 43215-3458
(614) 221-1900 • Fax: (614) 221-1989
E-mail: rhonda@assnoffices.com

President's Letter

Kevin C. Connell
Freund, Freeze & Arnold – Dayton, Ohio
March 2012

In the Business of...(Business)

Often at cocktail parties or networking events, we are asked what we do for a living. We are asked: "What business are you in?" Sometimes I have a witty response ready, such as "I'm in the business of making others miserable." Or, "I'm in business of learning other people's secrets." One time, at my daughter's school cafeteria, a young kindergartener asked (because I was the only one in the room with a suit and tie) if I was the "mayor?" I said: "Yes young child, I am the mayor. The mayor of Lunch Town." I guess the way I was dressed made this youngster believe that I meant business.

Other times, my response is more thoughtful, meaningful response. Instead of a witticism, I give a mission statement or a tagline: "I am in the business of representing those who get sued." Or, if my practice has gravitated elsewhere at that moment: "I am in the business of representing businesses." Whatever the occasion, we lawyers always have a way to answer this question.

At OACTA, we are in the business of helping our members represent their clients effectively. With that mission in mind, we are always looking for opportunities to broaden our horizons and branch into areas where our members are active, or becoming active. In the case of the Business and Commercial Law Committee, expansion has been difficult. Yet, with increasing frequency, our members have expressed to us that they are becoming more involved in business litigation. We listened and created this committee to meet a need. OACTA is committed to providing this outlet to meet the growing demand and committed to giving business and commercial litigators an Ohio home. As our interim chair Kurt Anderson will tell you, this committee is full of opportunity which is ripe for the taking.

In short, OACTA is in the business of business and commercial litigation. OACTA is in the business of civil defense practices, construction law, governmental liability, professional malpractice defense, employment law, environmental and toxic tort defense, and insurance coverage and defense. We are in the business of making our members better lawyers by providing first class CLE, endless opportunities to network and foster professional development.

Enjoy the *Quarterly* which was put together with the hard work of some new members. This issue is just the first chapter of the many to be written by the Business and Commercial Litigation Committee. We welcome their new involvement. This issue is the true culmination of the OACTA ethos. Coming together to get something done, as opposed to the alternative of letting something slide because of perceived challenges. Thank you to all of the contributors!

As your new president, I'm here to tell you that OACTA has never been stronger, deeper, or more committed to improving the administration of justice in Ohio. This is an organization we can all be proud to support. I hope you will join me in the coming year to help OACTA continue our positive momentum. All the best!

Introduction

Business and Commercial Litigation Committee

Kurt D. Anderson
OACTA Vice President
Interim Chair

Opportunity Knocks!

Greetings from the OACTA Business & Commercial Litigation Committee! As you read this, you are holding opportunity in your hand. Opportunity to learn. Opportunity to connect. And opportunity to shine. We invite you to jump on board!

Learn to Grow

It's no secret that professional development requires staying informed of the myriad events, trends, and issues that impact your practice. The Business & Commercial Litigation Committee is here to help you efficiently find the information and tools you need to address whatever you are confronting in your practice. This edition of the *Quarterly* contains several useful articles on cutting-edge issues, but it's only a small part of the resources you can tap into by joining the Committee. Whether your concentration is in contract litigation, business torts, intellectual property, class action, franchise disputes, consumer claims, securities, mergers & acquisitions, or any other area of business litigation, the Committee is dedicated to helping you develop the knowledge base necessary to succeed and thrive.

There are two "don't miss" opportunities for learning that should already be on your calendar. On May 16-18, DRI is conducting the "Business Litigation and Intellectual Property Seminar" at the Sheraton Hotel in New York City. For more information on topics, the line-up of blockbuster speakers, and registration, go to www.dri.org. And of course, OACTA's Annual Meeting will be on November 8-9 at the Crowne Plaza Hotel in Dayton, Ohio. You can register online at www.oacta.org.

Connect to Grow

Remember the old cliché, "It's not what you know, it's who you know?" While knowledge is essential, relationships are critical. It's been said that networking is the lifeblood of professional development, and the Business & Commercial Litigation Committee is committed to providing many such opportunities. By joining the Committee and connecting with its members, you will develop a network of colleagues whose experience and insight is far more valuable than mere data. The collaborative efforts of the Committee members can help you identify and even influence trends in the law. Of course, committee members can also be a source of referrals.

Shine to Grow

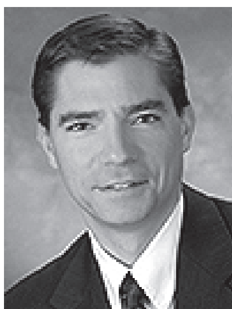
Getting noticed and recognized is always important, but it's even more critical to stand out when the economy is down and competition is high. The Committee can provide a platform for you to gain visibility in many ways beyond networking. Show your expertise by writing articles for OACTA publications and generating material for the Committee's webpage. Speak at seminars. Become the "go-to" person for your practice area. And if you really want to sparkle, become active in the Committee's leadership.

You may have noticed I'm writing this as interim chair. OACTA is deeply grateful to the Committee's former chair, Stephen Gray, who has returned to public service as a Senior Assistant Ohio Attorney General. But the loss has created an opportunity for someone with vision and motivation to take the Committee, and perhaps their own career, to the next level. I'd love that person to be you!

For more information on how you can become active in the Committee, contact OACTA President Kevin Connell at kconnell@ffalaw.com, myself at kanderson@davisyoung.com, or Executive Director Debbie Nunner at Debbie@assnoffices.com.

The Report and Recommendation of the Supreme Court of Ohio Task Force on Commercial Dockets: Needs and Opportunities

Kurt D. Anderson
Davis & Young, LPA



On July 1, 2008, the Supreme Court of Ohio enacted Temporary Rules of Superintendence which created four commercial docket pilot project courts. The goal of the 4-year commercial docket pilot project was to improve the business climate in Ohio by streamlining litigation between businesses (whether commercial or non-profit) using specialized case management techniques, an accelerated motion and trial schedule, and judges with experience and specialized training in business law. The project also hoped to reduce commercial litigation overall by generating more published decisions, thus providing more guidance and predictability. By March of 2009, experimental commercial dockets were in operation in Cuyahoga, Franklin, Hamilton, and Lucas counties, with two general division judges in each county assigned to handle qualifying commercial cases.

On January 18, 2012, the Supreme Court's Task Force on Commercial Dockets submitted a final report, recommending the program be continued permanently and expanded to counties able and willing to support a specialized docket. This article discusses the Task Force's most significant recommendations, which revealed significant challenges and needs confronting the commercial docket program.

SIGNIFICANT RECOMMENDATIONS

1. Permanently Establish and Expand the Commercial Docket Program.

The Task Force recommended that the four experimental commercial dockets in Cuyahoga, Franklin, Hamilton, and Lucas become permanent. The Task Force also recommended that any county having at least 6 general division judges, or a population of at least 300,000, be allowed to create a commercial docket. Presently, this would allow the addition of commercial dockets in Butler, Lorain, Montgomery, Stark, and Summit counties.

The Task Force also recommended that each commercial docket have at least two judges. This would avoid forum shopping, minimize recusals due to conflicts of interest, and improve efficiency. Judges would be assigned to the commercial dockets by the Chief Justice of the Supreme Court, based upon the recommendation of a newly-created Commission on Commercial Dockets, once a qualified county has agreed to create a commercial docket and at least two judges volunteer to handle such cases.

2. Designate Cases at Filing for Direct Assignment to the Commercial Docket

The Temporary Rules of Superintendence currently require a qualified case to be filed in the general division's non-commercial docket, and then assigned to the commercial docket by the county's administrative judge upon motion by one of the parties or at the request of the assigned non-commercial docket judge. The Task Force recognized that a two-step assignment process is unnecessarily time-consuming, especially since the 2-day time limit for the administrative judge to rule on the motion makes the motion and transfer order mere formalities. The Task Force recommends streamlining the process by allowing the filing party to designate the case for direct assignment to the commercial docket. A case can be transferred back to the non-commercial docket if it is later deemed unqualified.

3. Reduce the Workload of Commercial Docket Judges

The greatest challenge confronting Ohio's commercial docket program is the significant workload imposed on commercial docket judges by the paradoxic goals of achieving quicker and more cost-effective results while handling more sophisticated cases and issuing more sophisticated decisions. It is clear from the Task Force's report that workload concerns will be a continuing hurdle, despite the following recommendations:

Continued

a. Reduction of Criminal and Non-Commercial Caseload

Because commercial docket judges continue to handle other general division cases, the Temporary Rules of Superintendence allow a commercial docket judge to re-assign a non-commercial civil case "of similar complexity" in exchange for each assigned commercial case. But this quickly proved inadequate, partly because few non-commercial cases match the complexity of commercial cases, and also because the judges' most burdensome caseload was often their criminal dockets. In fact, the lack of a criminal docket relief valve prompted the Cleveland Metropolitan Bar Association to issue a resolution within only months of the creation of Cuyahoga County's commercial docket, asking the Supreme Court to "adjust the civil case exchange and criminal caseload borne by the Commercial Docket judges in Cuyahoga County, or make other appropriate adjustments…to relieve the burden on the Commercial Docket judges…." As a result, the Cuyahoga County Court of Common Pleas arranged for a 50% reduction in the non-capital criminal caseload of the commercial docket judges.

However, the Task Force discovered this solution might not work best for other counties. Accordingly, the Task Force recommends that counties with commercial dockets be permitted to either (1) exempt a commercial docket judge from receiving fourth or fifth degree felonies (since these rarely go to trial), (2) a reduction up to 50% in a commercial docket judge's overall criminal caseload, or (3) "some meaningful degree of relief" in the judge's non-commercial caseload, such as exemption from administrative appeals, foreclosure cases, etc.

b. Extension of Deadline for Ruling on Motions

The Temporary Rules require that commercial docket judges rule on all motions within 60 days from the date they are filed. This has often left commercial judges with the dilemma of choosing between a timely ruling and the benefit of full briefing or oral argument. This is exacerbated by counsel's proclivity for requesting briefing extensions, and further by the burden of meeting the program's competing goal of generating sophisticated written decisions. Accordingly, the Task Force recommends that instead of computing from the date of filing, the deadline for ruling be computed from the date of completion of briefing or oral argument, whichever is later, and that further that decisions on dispositive motions be allowed within 90 days instead of 60.

c. Consider use of commercial docket law clerks provided by third parties, and greater use of special masters.

Even with the extension of decision deadlines, commercial docket judges still need help timely handling the sophisticated issues they confront. The Task Force thus recognizes the benefit of using dedicated commercial docket law clerks, as well as special masters.

But the Task Force recognizes inherent difficulties in these recommendations. Both law clerks and special masters create additional costs which the courts are unable to bear, and which the Task Force is reluctant to impose on the parties, as reflected in its concurrent recommendation not to impose special filing fees on commercial docket cases. The Task Force also recognizes the paradox of greater cost in using a law clerk having the business law experience necessary to provide efficient assistance, contrasted with inherent inefficiency in needing to closely supervise the work of a less expensive but less experienced law clerk fresh out of law school.

To fill the gap between economic resolution and sophisticated assistance, the Task Force suggests the Supreme Court investigate "utilizing commercial docket law clerks provided and compensated by appropriate third parties." The Task Force's report offers no specific description of potential "third parties."

Special masters are often associated with specific fact-finding reports to court, or assisting the parties with dispute resolution. But the Temporary Rules allow broad discretion to commercial docket judges in using special masters, who can bring

expertise to help the court efficiently address specifically assigned pre-trial, evidentiary, or post-trial matters. Unfortunately, such expertise generally comes with a price-tag, which can be a disincentive to economic resolution of cases.

The survey responses attached as an appendix to the Task Force Report reflect both the potential and the pitfalls of the commercial docket pilot project. While praising the availability of specialized treatment, many attorneys expressed frustration with the delays resulting from overburdened judges. Plainly, adjustments are needed to achieve the program's goal of efficient and streamlined court procedures for commercial litigation.

INTO THE GAP?

What commercial docket judges appear to need most is assistance in the form of affordable expertise. Although logistic and ethics issues would need to be addressed, local bar associations generally, and commercial litigation attorneys specifically, may be in position to address the need by volunteering to accept specific, limited assignments as special masters, such as mediating and resolving discovery disputes, providing reports and recommendations, serving as arbitrators, or other services as the judges may deem helpful and appropriate. By drawing from a pool of qualified volunteers, overloaded commercial docket judges may be able to appropriately delegate some of their burden, while volunteering commercial litigation attorneys will reap the benefit of promoting the efficiency of the court.

The entire Task Force Report is available on The Supreme Court of Ohio's website. Questions, comments, and suggestions can be directed to John S. VanNorman, Policy and Research Counsel from the Office of the Administrative Director of the Supreme Court, at:

John VanNorman,
Policy and Research Counsel
65 S. Front St., Seventh Floor
Columbus, OH 43215
or john.vannorman@sc.ohio.gov.

Kurt Anderson has been Of Counsel to Davis & Young since January, 2011. Kurt brings 20 years of experience in insurance defense, insurance coverage, and general civil and commercial litigation.

Since obtaining his law degree from Case Western Reserve University, where he received the Distinguished Advocate award, Kurt has been active in local and state bar organizations. He has chaired the Amicus Curiae committee and served on the Board of Trustees for the Ohio Association of Civil Trial Attorneys ("OACTA"), and presently serves as OACTA's Vice President. He is also secretary for the Lorain County Bar Association.

Kurt resides in Elyria with his wife and four children.

Dampened Dreams

Jack Gatlin and Julie Hein
Freund, Freeze & Arnold, LPA

Borrowers and Lenders are both forced to look to the courts for guidance regarding new government regulations and programs aimed at keeping borrowers in their homes.

Thomas Jefferson once said, *"If the American people ever allow private banks to control the issue of their money . . . , the banks . . . will deprive the people of their property until their children will wake up homeless on the continent their fathers conquered."*

While Thomas Jefferson's opinions may not be popular on Wall Street, or Main Street for that matter, there is a certain truth to his prophecy. Unfortunately, subsequent leaders of our nation have not followed his wisdom. Former President William Jefferson Clinton, taking a contrary position, once said, while promoting his "National Homeownership Strategy", a strategy that many academics and economists estimate to be the breaking point for the housing industry, *"One of the greatest successes of the United States in this century has been the partnership forged by the National Government and the private sector to steadily expand the dream of home ownership to all Americans."* President Clinton was certainly not the first President to begin intertwining the mortgage industry with government. This entanglement arguably began with Franklin Delano Roosevelt's creation of the Federal Housing Administration in 1934 and we as a nation have faced decades of increasing regulations and government involvement in the lending industry.

Unfortunately all of the good intentions of making it easier for borrowers to receive money from lenders, along with government assistance to fill in the gaps of traditional qualification guidelines, have added to the foreclosure debacle. Coupled with the overall economic recession of the millennium and the United States is plagued with the worst foreclosure crisis in its history. A congressional oversight panel recently noted that one in eight U.S. mortgages is currently in foreclosure or default. In January 2012, Ohio had 8,325 foreclosure filings; a decline of 7 percent from a year ago. Even with the decline, Ohio has the twelfth highest foreclosure rate in the country. Increased foreclosures have a detrimental effect not just on the borrowers who lose unique property and face homelessness, but also on the surrounding neighborhoods that suffer decreased property values and municipalities that lose tax revenue.[1]

However, the combination of coerced government involvement in lending and a negative turn in the economy are not the only things that have created the "perfect storm" of a foreclosure crisis. Because of the radically increased numbers in foreclosures, both the lenders and the courts were ill-equipped to manage the caseloads, resulting in several technical legal issues that have kept trial lawyers well-fed. These technical legal issues, which have caused the rate of foreclosures to decline, are most likely a short-term occurrence and are not a signal that the industry is healing. Ultimately, this only results in stockpiling potential foreclosures. Processes like "robo-signing" slow down the rate of foreclosures. In the foreclosure industry, "robo-signing" is the practice of a bank employee signing thousands of documents and affidavits without verifying the information contained in the document or affidavit.

The "robo-signing" issue has recently been addressed with the nation's biggest mortgage lenders and 49 state Attorney Generals. As a result of the Department of Justice ("DOJ") inquiry and mounting lawsuits nationwide, the lenders have agreed to pay a $25 billion settlement regarding inconsistencies in foreclosure practices. In the settlement, the DOJ addresses the lack of response from the lenders as well as the disregard of foreclosure law that prevents the lender from pursuing foreclosure if the borrower is under consideration for loan modification. The DOJ also realizes that changes need to be made quickly to

the regulations that have been burdening the industry for decades, and if the banks do not respond quickly there will be additional monetary ramifications—additional monetary ramifications that ironically will be again borne by taxpayers through additional incentive programs and further government regulations. With the “robo-signing” issue behind lenders and the courts, and lenders being more prepared to handle the volume of foreclosures, it is likely the foreclosure rate will rise again in 2012 and continue for years to come.

In an effort to reduce the volume of foreclosures on the courts and to comply with the Government’s continuing mission to make sure every American owns their own home, Congress passed the Emergency Economic Stabilization Act of 2008 on October 3, 2008, and amended it with the American Recovery and Reinvestment Act of 2009 on February 17, 2009 (together, the “Act”). 12 U.S.C.A. §5201 et. seq. (2009).

The purpose of the Stabilization Act is to grant the Secretary of the Treasury the authority to restore liquidity and stability to the financial system, and to ensure that such authority is used in a manner that “protects home values” and “preserves homeownership.” 12 U.S.C.A. §5201. On February 18, 2009, pursuant to their authority under the Act, the Treasury Secretary and the Director of the Federal Housing Finance Agency announced the “Making Home Affordable” program.

The “Making Home Affordable” program consists of two sub-programs. The first sub-program creates refinancing products for individuals with minimal or negative equity in their home. The program is known as the Home Affordable Refinance Program, or HARP. The second sub-program creates and implements a uniform loan modification protocol, and is known as the Home Affordable Modification Program, or HAMP.

HAMP is funded by the federal government, primarily by funds allocated to the Trouble Asset Relief Program, or TARP. The Treasury Department has allocated at least $75 billion to HAMP, of which at least $50 billion was provided through TARP. Under HAMP, the federal government incentivizes Participating Servicers to enter into agreements with struggling homeowners that will make adjustments to existing mortgage obligations in order to make the monthly payments more affordable. Servicers receive $1,000.00 for each HAMP modification.

A HAMP modification involves two stages. First, a Participating Servicer is required to gather information and, if appropriate, offer the homeowner a three-month Trial Period Plan (“TPP”) during which the homeowner makes mortgage payments based on a formula that uses the initial financial information provided. Generally, the goal of a HAMP modification is for owner-occupants to receive a modification of a first-lien loan by which the monthly mortgage payment is reduced to 31% of their gross monthly income for the next five years.

HAMP was intended to help struggling Americans in danger of losing their homes and to prevent the domino effect of mass amounts of foreclosures. Unfortunately, the most prevalent result of the program is extensive litigation involving lenders and borrowers. Borrowers engage in the program and the servicers fail to follow up and finalize the modification. Whether your practice involves primarily the representation of borrowers or the representation of lenders, HAMP litigation is a very active and controversial area of the law.

The first series of cases that were filed directly attacked HAMP.[2] In these cases, borrowers and their attorneys were filing direct actions against lenders based on lenders failing to offer them HAMP modification or applications. Most courts throughout the country, with the exception of the Ninth Circuit[3], prohibit direct actions against HAMP. After courts began dismissing cases in favor of lenders, attorneys representing borrowers continued to seek recourse for perceived or real HAMP wrongs.

Borrowers began filing breach of contract claims, Consumer Protection Act claims, and unjust enrichment claims relating to the TPP process. Borrowers claimed they were offered HAMP, accepted the offer, and provided consideration by making their modified mortgage payments over a three-month period, providing necessary documents, and in some cases, submitting to credit counseling. The unjust enrichment arguments stemmed from the lenders taking the TPP payments indefinitely and then ultimately foreclosing on the borrowers that had jumped through all the necessary hoops they were presented with.

Continued

The current landmark case regarding these types of HAMP claims is in the First Circuit, a Massachusets case, *Bosque v. Wells Fargo Bank, N.A.*[4]. In *Bosque,* Wells Fargo conducted a net present value analysis and examined plaintiffs' financial documents finding each plaintiff eligible to participate in the HAMP program. Each plaintiff signed and returned a TPP Agreement to Wells Fargo and then timely made all three required monthly payments under the terms of their individual TPP. Each plaintiff also submitted all additional financial documents requested by the Servicer and otherwise complied with their obligations under the TPP.

Plaintiffs alleged that Wells Fargo failed to provide them with a permanent modification agreement on the "modification effective date" specified in their TPPs.

Further, they failed to notify plaintiffs of any decision with regard to their loan modification status. Three of the Plaintiffs continued to pay their modified payments beyond the date they were to receive loan modifications. Despite alleged compliance with the TPP Agreement, Wells Fargo sent letters to plaintiffs indicating that the paperwork submitted was not compliant or that plaintiffs were delinquent in their underlying mortgage payments. Wells Fargo then initiated foreclosure on two of the Plaintiffs' properties and threatened foreclosure on another Plaintiff's property.

Lawyers for the borrowers in *Bosque* argued "that the TPP is a contract governing the three-month trial period, and that compliance with its obligations entitles plaintiffs to either (1) a new contract with a permanent loan modification, or (2) a decision on whether plaintiffs are entitled to the permanent modification by the modification effective date stated in the TPP." The *Bosque* court held that "modified mortgage payments standing alone would likely not represent consideration under the TPP." The First Circuit did hold, however, that because plaintiffs "were required to provide documentation of their current income, make legal representations about their personal circumstances, and agreed to undergo credit counseling if requested to do so" they had suffered a "new legal detriment," and that was sufficiently alleged consideration. Closer to home in Ohio, the Sixth Circuit[5] has yet to find issue with *Bosque,* and cases filed by borrowers have survived initial FRCP 12(b)(6) motions. In *Darcy v. Citifinancial, Inc.*, a Sixth Circuit case, the borrower was laid off from her job of ten years in the midst of the 2008 financial downturn. When faced with the inability to pay her mortgage, the borrower sought assistance under HAMP and submitted financial information and a hardship affidavit to CitiFinancial, CitiFinancial responded by offering the borrower a HAMP Trial Period Plan (TPP). The plan reduced the borrower's mortgage payment for the three-month trial period from $595.01 to $324.89 per month and the borrower made all requisite payments for eleven months and then was mysteriously foreclosed on. The borrower filed suit against CitiFinancial asserting that the lender breached their contract relating to the TPP process by failing to comply with its obligations, in that it did not send her either a signed copy of the Plan, written notice that she did not qualify, or a mortgage modification under the HAMP program. Lender was denied summary judgment on the breach of contract claim and the case is still pending.

Additionally, the Court of Appeals for the Seventh Circuit considered whether common-law state claims are preempted by the Home Owner's Loan Act, which regulates federal savings associations, preempts state regulation of federal savings associations, and, like HAMP, provides no private right of action for enforcement of the statute.[6] Noting that "[i]t would be surprising for a federal regulation" to bar state actions for breach of contract or fraud, the court determined that the "assertion of plenary regulatory authority does not deprive persons harmed by the wrongful acts of savings and loan associations of their basic state common-law-type remedies."[7]

But other circuit courts have begun to erode the *Bosque* decision.[8] Courts reason that TPP itself is not a contract that will result in permanent modification but that the claim that lenders failure to evaluate the borrowers after the three-month period could be breach of contract or promissory estoppel.[9] Borrowers claim they were led to believe by engaging in the TPP process and fulfilling the requirements, they would be considered for permanent modification. Many borrowers have been waiting several months to a year to find out if their loan will be permanently modified. When borrowers made their TPP commitment and requisite payments, they had entered into a binding contract with the lenders, with the lenders being required to evaluate their options under a

permanent modification in a timely manner. A lender taking several months to a year making a decision on whether to permanently modify the mortgage is a breach of that contract.[10]

As the HAMP litigation continues to create a cottage industry for trial attorneys representing both lenders and borrowers, the courts continue to sort through the proper legal analysis; for borrowers not in litigation and still waiting on decisions from the lenders, the Government is taking action. President Barack Obama, by executive order, recently made changes to the HAMP program by streamlining the process and placing clearer parameters on lenders duties and responsibilities.

The question that remains: are the mortgage lenders really the responsible party? Is it possible that the lenders who were coaxed into the HAMP program did not have the manpower or financial ability to make the program a success? Or are borrowers milking the system by taking advantage of loopholes and using the courts as a sword to fence away lenders that have legitimate rights to collect on their notes and have their collateral returned after a borrower has defaulted? While these programs can be beneficial and we must find a way to limit further economic problems and rising foreclosures, the hurried government action and lack of planning may be root of the problem. If our recent leaders had listened to Thomas Jefferson and stayed out of banking, the foreclosure problem might not be occurring at the current alarming rate. But then, the lack of government intervention and confounding regulations may just result in many trial lawyers who are practicing in these areas facing foreclosure themselves.

Endnotes

1 Congressional Oversight Panel, Oct. 9, 2009 report at 3. Available at *http://cop.senate.gov/reports/library/report100909-cop.cfm.*

2 Many courts, including at least one in the Eastern District of Michigan, have ruled on whether HAMP provides for a cause of action. Virtually every court has held that HAMP does not provide for a private cause of action.
See, e.g., Hart v. Countrywide Home Loans, Inc., U.S. Dist. LEXIS 85272, *13-14 (E.D. Mich. Aug. 19, 2010) (Duggan, J.).
See also
Singh v. Wells Fargo Bank, 2011 U.S. Dist. LEXIS 3563, *23 (E.D. Cal. Jan. 7, 2011);
Inman v. Suntrust Mortg., Inc., 2010 U.S. Dist. LEXIS 91804 (E.D. Cal. Sept. 3, 2010);
Zeller v. Aurora Loan Servs. LLC, 2010 U.S. Dist. LEXIS 80449, *2 (W.D. Va. Aug. 10, 2010); *Hoffman v. Bank of Amer.*, 2010 U.S. Dist. LEXIS 70455, *6 (N.D. Cal. June 30, 2010);
Simon v. Bank of Amer., 2010 U.S. Dist. LEXIS 63480, *26-27 (D. Nev. June 23, 2010);
Marks v. Bank of Amer., N.A., 2010 U.S. Dist. LEXIS 61489, *13-15 (D. Ariz. June 22, 2010)

3 The Court classified a borrower as a third party beneficiary with regard to certain contract terms. In determining whether a party is an intended beneficiary of a government contract, a court must examine “the precise language of the contract for a clear intent to rebut the presumption that the third parties are merely incidental beneficiaries.”
County of Santa Clara v. Astra USA, Inc., 588 F.3d 1237, 1244 (9th Cir. 2009), cert, granted sub. nom, Astra USA, Inc. v. Santa Clara County, 131 S.Ct. 61, 177 L. Ed. 2d 1151 (2010)

4 *Bosque v. Wells Fargo Bank, N.A.*, No. 10-10311-FDS, 762 F. Supp. 2d 342, 2011 U.S. Dist. LEXIS 8509 (D. Mass. Jan. 26, 2011).

5 *Darcy v. CitiFinancial, Inc.*, 2011 U.S. Dist. LEXIS 95238 (W.D. Mich. Aug. 25, 2011); *Bolone v. Wells Fargo Home Mortg., Inc.*, 2011 U.S. Dist. LEXIS 94714 (E.D. Mich. Aug. 24, 2011).

6 *In re Ocwen Loan Servicing, LLC Mortg. Servicing Litig.*, 491 F.3d 638, 642-44 (7th Cir. 2007).

7 *Id.* at 643-44.

8 *v. J.P. Morgan Chase Bank, N.A.*, 2011 U.S. Dist. LEXIS 35507 (E.D. Va. Apr. 1, 2011); *Senter v. JPMorgan Chase Bank, N.A.*, 2011 U.S. Dist. LEXIS 105414 (S.D. Fla. Aug. 9, 2011).

9 *Bourdelais v. J.P. Morgan Chase Bank, N.A.*, 2011 U.S. Dist. LEXIS 35507 (E.D. Va. Apr. 1, 2011); *Senter v. JPMorgan Chase Bank, N.A.*, 2011 U.S. Dist. LEXIS 105414 (S.D. Fla. Aug. 9, 2011).

10 *Id.* at 643-44.

Jack Gatlin, a shareholder at Freund Freeze & Arnold, LPA, regularly practices in the areas of commercial litigation, construction litigation and personal injury defense. For more information on HAMP litigation and current cases in Kentucky and Ohio, please feel free to contact Mr. Gatlin at (513) 665-3500.

Julie Hein, an associate at Freund Freeze & Arnold, LPA, regularly practices in the areas of civil litigation. For more information on HAMP litigation and current cases in Ohio, please feel free to contact Ms. Hein at (513) 665-3500.

What's the Deal with Forensic Imaging?

When is it Allowed and How Do I Protect My Client's Privileged, Private and Confidential Information?

Adam C. Armstrong
Freund, Freeze & Arnold, LPA

In the world of business litigation, the breadth of sources from which information can be discovered continues to expand. Gone are the days in which the main source of discoverable materials was the file cabinet in your client's office. Now, we have obligations to retrieve discoverable information from computers, external hard drives, flash drives, smart phones, SIM cards and the "cloud."

It is not only dizzying to track down all potential sources of electronically stored information; it is downright debilitating to scour that information for privileged, confidential and private information. Litigants involved in business disputes want ALL the electronically stored information (what you can see and what you cannot) and are now seeking forensic imaging to ensure it is all produced.[1] Ohio courts are putting procedural safeguards in place to determine when forensic imaging is warranted, and to prevent the disclosure of privileged, private and confidential information when forensic imaging is ordered.[2]

As noted by the Tenth District Court of Appeals in 2009 in *Bennett v. Martin*, and recently adopted by the Twelfth District Court of Appeals (February 6, 2012) in *Nithiananthan v. Toirac*, courts generally "are reluctant to compel forensic imaging, largely due to the risk that the imaging will improperly expose privileged and confidential material contained on the hard drive."[3] Drawing from Federal case law, "a court must weigh the significant privacy and confidentiality concerns inherent in imaging against the utility or necessity of the imaging" before compelling forensic imaging.[4] Consideration of these competing interests involves three things:

> First, whether the responding party has withheld requested information,
>
> Second, whether the responding party is unable or unwilling to search for the requested information,
>
> Finally, the extent to which the responding party has complied with discovery requests.[5]

Notwithstanding this three-part consideration, the language of *Bennett* arguably favors compelling forensic imaging simply by demonstrating either, a **discrepancy** in a response to a discovery request, or the responding party's **failure to produce requested information**.[6] Does an objection to written discovery that has a less than concrete basis constitute a "discrepancy" for purposes of compelling forensic imaging? Can legitimate disputes over the production of requested information lead to an order compelling forensic imaging? What does it take?

Presumably recognizing the potential ambiguity in *Bennett*, the Twelfth District, in adopting *Bennett*, provided further guidance as to what tips the scales in favor of ordering forensic imaging. "Our decision today does not set forth the proposition that parties requesting forensic imaging are entitled to such if they are able to demonstrate a single discovery violation, or periodic discrepancies in discovery responses because complex litigation can often entail discovery issues that need to be resolved. Furthermore, it is not our intent to issue a ruling that encourages litigants to create discovery difficulties just so they can seek an order to tromp through the opposing parties' electronically stored garden. Instead, the party must demonstrate the '**background of noncompliance**,' set forth in *Bennett*."[7]

By way of example, the defendants in *Bennett* produced approximately 30,000 documents, 15,800 pages of which were email strings, in disorganized order and refused to reproduce the documents in sequential order. They also made generic objections that lacked any basis, failed to respond to over twenty-five document requests and disregarded trial court discovery orders.[8] However, even when a "background of noncompliance" is proved and forensic imaging is ordered, "a court must [still] protect the [party's] confidential information, as well as preserve any private and privileged information."[9] Accordingly, and borrowing from the Federal courts, an appropriate protocol

to protect the privileged, confidential and private information with forensic imaging, would include at a minimum:

1. Retention of an independent forensic computer expert, subject to a confidentiality order, to create a forensic image of the computer system;
2. Submission, by the requesting party, of search terms to be used by the expert to retrieve responsive files from the forensic image;
3. Review, by the responding party, of the responsive files for privilege;
4. Creation, by the responding party, of a privilege log; and
5. Production, by the responding party, of non-privileged files and privilege log.[10]

Courts, when ordering forensic imaging may adopt additional safeguards such as redaction of privileged information, or designation of certain information for "attorneys' eyes only."[11] Courts may also give consideration to format, extent, timing, allocation of expenses and other conditions for the discovery of electronically stored information.[12] As requests for forensic imaging continue to grow, we will likely see more Ohio courts adopt some version of the protocol set forth in *Bennett* and *Nithiananthan*.

Electronic devices, especially smart phones, were once restricted to the business arena. That is no longer the case. Now, company owned and issued electronic devices are increasingly being utilized for personal use. Many of us may not be able to stay ahead of what appears to be a daily growing menu of electronic devices and drives. Additionally, requests for forensic imaging are becoming more common, and are being made earlier in the discovery process. Common sense and cooperation in discovery should protect your client from an order compelling forensic imaging. However, even in the presence of a "background of noncompliance," privileged, confidential and private information stored on electronic devices and drives remains protected.

Endnotes

1 "Forensic imaging creates a 'mirror image' of stored information and data. 'A mirror image copy represents a snapshot of the computer's records. It contains all the information in the computer, including embedded, residual, and deleted data.'" *Nithiananthan v. Toirac*, 12th Dist. No. CA2011-09-098, 2012-Ohio-431, ¶2, fn.2, *quoting Ferron v. Search Cactus, L.L.C.*, S.D. Ohio No. 2:06-CV-327, 2008 WL 1902499, *3, fn.5, (Apr. 28, 2008).

2 See *Nithiananthan v. Toirac*, 12th Dist. No. CA2011-09-098, 2012-Ohio-431, *see, also, Bennett v. Martin*, 186 Ohio App.3d 412, 2009-Ohio-6195 (10th Dist.).

3 *Bennett*, ¶40.

4 *Id.*, ¶41.

5 *Nithiananthan*, ¶8, *quoting Bennett*, ¶41.

6 *Bennett*, ¶41.

7 *Nithiananthan*, ¶9.

8 *Bennett*, ¶¶3-22; 42.

9 *Bennett*, ¶47; *see, also Nithiananthan*, ¶20.

10 *Id*.

11 *Bennett*, ¶48.

12 Civ. R. 26(B)(4).

Adam Armstrong was named an "Ohio Super Lawyers Rising Star" in the years 2010 and 2011, a list jointly prepared by Law and Politics Magazine and Cincinnati Magazine.

He has civil and criminal trial experience representing plaintiffs and defendants in state and federal courts in Ohio and a number of other states, before the U.S. Department of Labor Administrative Law Judges, and before the American Arbitration Association. Adam represents and counsels numerous businesses and individuals before, during and after trial on a wide-range of issues including medical malpractice defense, real estate, aircraft maintenance, environmental, employment, non-compete/confidentiality agreements, insurance coverage, creditor's rights, business transactions, contracts and quasi-contractual disputes.

Adam is also an Adjunct Professor at the University of Dayton School of Law, teaching a Medical Malpractice Tort Litigation Capstone.

Adam enjoys spending quality time with his wife, as well as cooking and playing golf. He volunteers his time to the University of Dayton School of Law, and serves as a mentor to undergraduate students through Miami University's Pre-Law Program and to new lawyers through the Supreme Court of Ohio. His interests extend to the Muse Machine, a dramatic arts outlet for the region's school districts, where Adam serves on its board of trustees as well as the development committee.

Adam is also an avid fan of the Pittsburgh Steelers and University of Kentucky basketball.

No Horseplay Here: Recess Appointment May Invite Constitutional Challenges

Anthony M. Sharett
Bricker & Eckler

While many consumer advocacy groups have enthusiastically applauded President Obama's recess appointment of Richard Cordray, former Ohio Attorney General, to the Consumer Financial Protection Bureau (CFPB), many Republican lawmakers and financial trade associations have called into question the legality of the recess appointment.

Director Cordray has already explained that he has been given broad authority under the Dodd-Frank Act and intends to exercise the authority to regulate large banks and virtually all non-bank lenders immediately. But Republicans argue that the chamber was not in recess, because it had been using "sessions," which lasted a few minutes in order to stay open during the holidays.

As a *Washington Post* article noted, some legal scholars predict that the appointment may lead to constitutional challenges by companies regulated by the CFPB. The Recess Appointments Clause, Article II, 2, cl. 3 states, "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their Session." This provision alone may provide for multiple interpretations and, to date, the Supreme Court has not affirmatively tackled this definitional issue. For example, the term "the Recess" is not clearly defined in this clause nor is the term "Vacancies."

The *Post* article details that the Justice Department briefed this issue in the early 1990's and concluded that where the Senate was in recess for four days or more, the president may make recess appointments. With Director Cordray's appointment, the President's advisors argue that the "pro forma sessions" aimed at blocking the appointment fell well short of breaking the recess. Republican House Speaker John Boehner of Ohio called President Obama's appointment an "extraordinary and entirely unprecedented power grab by President Obama that defies centuries of practice and the legal advice of his own Justice Department."

Another challenge to the appointment could concern an interpretation of the Dodd-Frank Act that the CFPB director can only take power upon Senate confirmation. More specifically, Republicans argue that the Treasury secretary's interim authority terminates and the director's full authority begins, only after confirmation. This theory could provide non-bank companies with ammunition to argue that the CFPB cannot regulate them at all since Director Cordray was never "confirmed."

For a comprehensive legal analysis as to the potential challenges to the appointment, D.C. attorney Adam White provides a solid summary on NPR.org. President Obama's advisors, however, will no doubt argue that the appointment was akin to confirmation.

Anthony Sharett is a member of the Bricker & Eckler Litigation practice group and co-chair of the Class Action practice group. He regularly defends financial institutions against regulatory actions and consumer led litigation in individual and class action matters, counsels clients concerning bank regulatory and transactional matters and consumer initiated matters. He has successfully argued in several Ohio appellate courts to uphold fees that nonbank lenders may lawfully charge customers, and has successfully first-chaired litigation concerning contested foreclosure matters for lending institutions in state and federal courts. He represents clients in business torts, restrictive covenants, insurance coverage issues, breach of contract claims, real property disputes, construction disputes and represents franchisors and franchisees involving business tort disputes. He spent more than three years as an attorney with the Ohio Department of Commerce where he regulated the banking, mortgage and credit union industries.

Class of Ohio Insureds Lacks Standing Because of Speculative Injuries

Drew H. Campbell
Bricker & Eckler

Article III of the U.S. Constitution continues to grab headlines in class action litigation as one of the most potent barriers to class certification. With increasing frequency, courts are asking whether class representatives — and the class members they seek to represent — have suffered injuries that are sufficient to satisfy the most fundamental test of Article III standing. Class plaintiffs are being tossed out of court with ever increasing frequency because their damage claims are simply too tenuous to pass constitutional muster.

For example, in *Hirsch v. CSX Transp. Corp*. 656 F.3d 359 (6th Cir. 2011), the Sixth Circuit recently affirmed denial of class certification in a medical monitoring case where it found that "alleged injuries consist solely of the increased risk of . . . certain diseases . . . ." *Id*. at 363. Plaintiff's own experts placed the risk "somewhere around 50% of a one in a million additional risk of developing cancer." *Id*. A mere "risk" was insufficient to confer Article III standing.

The United States Supreme Court is currently considering whether the mere violation of a statute — without more — will satisfy Article III standing. See *Edwards v. First American Title Corp*., 610 F.3d 514 (9th Cir, 2011), *cert. granted in part*, 131 S. Ct. 3022, 180 L. Ed.2d 843 (June 20, 2011). The Court will decide whether the Ninth Circuit was correct in permitting certification of a class alleging violations of the anti-kickback provisions of the Real Estate Settlement Procedures Act (RESPA). In *Edwards*, it is undisputed that the alleged RESPA violations neither raised the cost of title insurance premiums nor diminished the scope of coverage. Despite the lack of actual injury, the Ninth Circuit held that because "statutory text does not limit liability to instances in which a plaintiff is overcharged, . . . Plaintiff has established an injury sufficient to satisfy Article III." *Id*. at 517. Read more here. Now, an Ohio court has weighed in on this issue. In *Andrews v. Nationwide Ins. Co*., Case No. CV-11-756463 (McMonagle, J.), the Court of Common Pleas for Cuyahoga County dismissed class claims — on a Rule 12(B)(6) motion — brought by life insurance customers because it found the alleged injury was simply too speculative to satisfy the requirements of Article III. Read the order here. Here's what happened.

Plaintiffs Stanley Andrews and Donald Clark, 77 and 81 years old, respectively, purchased life insurance policies requiring that Nationwide receive proof of their death before it is required to pay the death benefit to the beneficiaries. *Id*. at 2. According to the plaintiffs, Nationwide did not take proactive measures to determine when an insured's beneficiary has a claim. As a result, the plaintiffs alleged that "some unaware beneficiaries fail to file claims resulting in [Nationwide'] retaining money that would be otherwise owed on the policy if a claim had been filed." *Id*.

Of course, these plaintiffs hadn't been harmed by this alleged practice. They are still living, and their beneficiaries aren't entitled to a payment yet. Instead, they argued that due to their advanced age, they — and the prospective class members — enjoy a mortality rate of 70% or greater. As a result, "because their deaths are impending they fear that their life insurance policies will not be honored." *Id*. at 3. Plaintiffs argued that Nationwide's alleged "practice" of failing to be "proactive" violated the covenant of good faith and fair dealing, and asked that the court impose an affirmative obligation to cross-reference all insureds with similar mortality rates against the Death Master File (a publicly available database maintained by the US Department of Commerce) at least once a year to determine when the named beneficiaries of the plaintiffs and other class members were entitled to death benefits. *Id*.

The court held that the plaintiffs lacked standing to bring these claims because they failed to allege a sufficient injury to satisfy Article III. First, the court explained the alleged injury this way:

Continued

Plaintiffs contend the imminent injury occurs at the time of their death, and is predicated on [the] presumption, among others, that Plaintiffs' beneficiaries are unaware of the policy and will not be filing a claim and the Defendants will take no reasonable and/or ordinary steps to determine whether life insurance claims are due and payable.

Id. at 4.

The court recognized that the plaintiffs' theory was contingent on a number of future events that may never occur, such as:

- "Plaintiffs dying in the immediate term";
- "Correct entry of the Plaintiffs' names and identifying information in the public record";
- "Plaintiffs' beneficiaries not knowing of Plaintiff's death or life insurance contracts and failing to submit a claim"; and
- "Nationwide failing to investigate such claim."

Id. at 4.

The court found that the mere threat of a future injury was not enough to meet the standing requirement of Article III. While the court recognized that "there is nothing more certain in life than death," the other elements of the plaintiff's damage theory were far more speculative. Indeed, the "only fact certain to occur at some 'undefined time in the indefinite future' is that Plaintiffs will die." The rest was "mere speculation." *Id*. at 5. According to the court, "[s]peculative or possible future injury does not satisfy the requirements for Art. III standing."*Id*.

But the court went further. It also considered whether the plaintiffs' claims could be squared with the language of the policies they signed. The court first examined the operative provisions in each policy. Both contained express language requiring that death benefits could be paid only "upon receiving proof that the Insured died" and "immediately upon receipt of the death" of the insured. *Id*. at 6-7. According to the court, these "standard terms" were "clear and unambiguous," and it refused to "import additional unspoken duties and obligations onto the Defendants that will conflict with [the] parties' contracted terms." *Id*. at 8.To do otherwise "would go against well-established Ohio law refusing to impose such duties" on an insurance company.*Id*. at 9.

Several important lessons emerge from the *Andrews* case. First, those defending class actions should carefully consider whether the plaintiff has articulated a plausible theory of injury in fact. Courts are increasingly skeptical of attenuated and speculative damage claims. Damage claims that rely on the occurrence of contingent future events, mere risks of injury, fear of the unknown, technical violations of statutes, and the like are unlikely to pass constitutional muster.

Second, the procedural posture of this case is as important as its holdings. Both the standing issues as well as the contractual argument were before the court on a motion to dismiss under Ohio Civil Rule 12(b)(6). The court properly considered both arguments, since they were based on the pleadings and could be resolved as a matter of law. Practitioners need to remember that there can be no class where there is no claim.

Effective motion practice can eliminate the need for — and the risks associated with — class discovery. The *Andrews* case stands as authority for the proposition that legal defenses to class claims can — and should — be raised at the earliest possible point in the proceedings. It also stands for the proposition that novel theories of contract interpretation — and efforts to expand duties on insurers — may be addressed as a matter of law.

Finally, it is important to note that Judge McMonagle correctly invoked both *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) in his consideration of the pleading standard under Ohio Civil Rule 12(B)(6). These cases, which are cited with increasing frequency by Ohio courts, underscore the requirement that a complaint set forth a statement of facts — not legal conclusions — supporting each element of a claim. The now-familiar "plausibility" requirement of *Twombly* simply recognizes the mandate of Ohio Civ. Rule 8(A) that a complaint must contain a short and plain statement of facts showing that the pleader is entitled to relief.

Those defending class actions in Ohio courts may rely on *Andrews* as authority for holding plaintiffs to time-honored pleading standards when considering motions to dismiss. The rewards are potentially significant. According to Judge McMonagle: "[T]he doors of discovery are not unlocked for a plaintiff 'armed with nothing more than conclusions.'" *Id*. at 2.

Drew Campbell is chair of the Litigation and Class Action practice groups at Bricker & Eckler. His practice includes complex commercial litigation, class action defense, insurance, energy, and fiduciary litigation. Drew regularly appears in state and federal courts throughout the United States. His representation includes the defense of class claims asserting violations of premium tax collections laws in the Commonwealth of Kentucky; defense of class claims against a specialty financier arising from a shareholders derivative suit; defense of consumer class action challenging the business practices of a specialty lender; recovery of $5 million in damages for breach of an energy supply agreement; prosecution of fraud and contract claims against a California-based health care provider on behalf of a specialty financier; prosecution of an individual officer of a Texas-based company on behalf of a specialty financier; prosecution of contract and tort claims against an Illinois-based fiduciary trust institution; and defense of fraud and RICO claims asserted against a lender and lender's officers in $30 million multi-state lender liability litigation involving the collapse of nursing homes in 13 states.

Drew was appointed as Special Litigation Counsel for the estate of National Century Financial Enterprises, Inc., in connection with the collapse of NCFE's $3 Billion bond issuance and has been involved in numerous engagements on behalf of lenders and financiers located throughout the United States. He also served as a law clerk for Judge Joseph P. Kinneary, for the United States District Court, Southern District of Ohio, Eastern Division.

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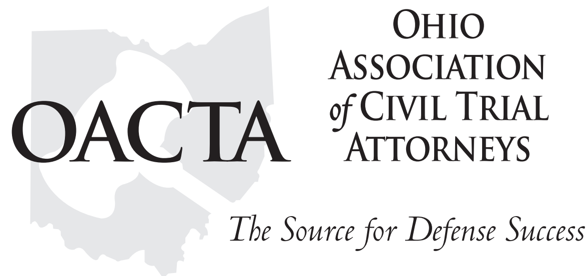

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