CIVIL RIGHTS INSIDER

Federal Bar Association Civil Rights Law Section's Newsletter

Winter 2021

Message from the Chair

Dear Civil Rights Section Members,

Robin B. Wagner

The holiday season and turn of the calendar from December to January always provides an opportunity for reflection. Particularly now, as I am writing this message during the week when the first vaccine doses are being administered around the county, it feels right to focus on the positive opportunities that have come out of this past year. In that spirit, here are two wonderful bright spots to bring us hope and good cheer in 2021:

A surge in civil rights lawyers may be coming our way!

It looks like there is reason to believe that our field of civil rights law will see a rush of new, engaged talent. First, a group of current and former federal law clerks is organizing a new FBA section for law clerks, and one of their first program goals is to partner with our Section to co-sponsor the Civil Rights Étouffée on January 28-29! [At this point I would be remiss if I did not stop and remind you that if you are reading this and have not yet signed up, please do so now! Registration must close on January 22, 2021. Go to www.etouffeelaw.com and learn more!] As I was saying … And then not a day later, I heard from another law clerk, this one clerking for a judge in the Eastern District of Michigan (Detroit), asking how she could become more involved in the FBA's civil rights activities, because she and a bunch of her co-clerks are very interested in practicing civil rights law after their clerkships! What a wonderful thing to realize that the last four years, not to mention the Black Lives Matters movement and the rising prominence of voices focused on ideas

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In this Issue:

Meet the Civil Rights Section Officers

Robin B. Wagner, *Section/Division Chair*

Robin B. Wagner

Robin Wagner is an associate at the Detroit-region law firm, Pitt McGehee Palmer Bonanni & Rivers. She works exclusively on plaintiff-side civil rights matters, primarily in the areas of employment and housing discrimination. She clerked for the Hon. Judith E. Levy of the Eastern District of Michigan and the Hon. Michael H. Dolinger, ret. Magistrate Judge, Southern District of New York.

A native of Baltimore and third-generation lawyer (mom, dad, grandmother and grandfather!), Robin graduated from DePaul University College of Law in 2014, summa cum laude and Order of the Coif, with a certificate in public interest law. Robin authored "Are Gay Rights Clearly Established? The Problem with the Qualified Immunity Doctrine," 63 DePaul L. Rev. 869 (2014). Robin's undergraduate degree is in East Asian Studies from Princeton University, and she earned her Ph.D. in East Asian Languages and Civilizations from Harvard University. For many years, she worked in higher education administration as an associate dean, dean and vice president at various institutions.

Robin and her wife Sharon live in Ann Arbor, Michigan with their dog Casper.

Stephen Dane, *Committee on Discrimination/Employment/ Housing/Public Accommodation & Co-Editor of the Section Newsletter*

Stephen Dane

Stephen M. Dane practices law in the areas of fair housing and mortgage lending and insurance discrimination.

He is nationally recognized in the mortgage lending and insurance discrimination fields, and has litigated a number of significant lending and insurance discrimination cases. Mr. Dane was lead counsel for the plaintiffs in the class action litigation *Toledo Fair Housing Center v. Nationwide Mutual Insurance Co.* ($5.35 million settlement) and was co-counsel for the plaintiffs in *HOME of Richmond v. Nationwide Mutual Insurance Co.* ($100.5 million jury verdict). Mr. Dane has testified before both houses of Congress on mortgage lending discrimination issues, and is the author of many articles in the field, including *Eliminating the Labyrinth: A Proposal to Simplify Federal Mortgage Lending Discrimination Laws*, 26 U. Mich. J. L. Ref. 527 (1993); ***Disparate Impact Analysis in the Mortgage Lending Context***, 115 Banking L.J. 900(1998); *Application of the Federal Fair Housing Act to Homeowners Insurance*, Chapter Two of Insurance Redlining (G. Squires, ed., 1997); *The Exposure of Securitization Trustees to Liability Under the Federal Fair Housing Act for Poorly Maintained Real Estate Owned Properties*, Banking L. J. (Feb. 2014), at 153-164.

Mr. Dane is currently the owner of Dane Law, LLC, a firm dedicated to representing fair housing agencies, non-profits, legal aid organizations, and their clients. He is an honors graduate of The University of Notre Dame (B.S., Mathematics, 1978), and received his law degree from The University of Toledo College of Law (J.D., *magna cum laude*, 1981). He is a former law clerk to the Honorable Pierce Lively of the U.S. Court of Appeals for the Sixth Circuit. In 1998 Mr. Dane was selected as one of eight *Lawyers of the Year* by Ohio Lawyers Weekly, and is listed in *The Best Lawyers in America* in the field of Civil Rights. In 2000 Mr. Dane received the Public Interest Award from a consortium of legal services organizations, including Advocates for Basic Equality and the Equal Justice Foundation. For 17 years Mr. Dane served as Acting Judge of the Perrysburg, Ohio Municipal Court, and is a former Chairman of the Human Rights Commission of the Diocese of Toledo. Mr. Dane also served as President of the Toledo Bar Association in 2010-2011.

Alison Slagowitz, *Membership Committee*

Alison Slagowitz

Alison Slagowitz is an Attorney in the Savannah Regional Office of Georgia Legal Services Program, a statewide non-profit law firm whose mission is to provide access to justice and opportunities out of poverty. Ms. Slagowitz's casework includes both defensive and affirmative housing and employment actions on behalf of individuals living below the federal poverty level. Ms. Slagowitz currently serves on the City of Savannah Mayor's Committee on Reentry Housing and is a 2020 Cohort of the Shriver Center of Poverty Law's Racial Justice Institute.

Previously, Ms. Slagowitz served as a Contract Law Clerk for the Affirmative Civil Enforcement Unit in the Civil Division for the United States Attorney's Office for the Southern District of Georgia, where her casework included actions and qui tams under the False Claims Act, civil violations of the Controlled Substances Act, and the Servicemembers Civil Relief Act.

Ms. Slagowitz graduated *summa cum laude* and Order of the Oak from Savannah Law School in May 2016 as part of the inaugural part-time, four-year, evening program. Throughout these four years, Ms. Slagowitz worked eight-hour days in order to support her household. Ms. Slagowitz served on the Executive Board of Savannah Law Review for over three years. Prior to law school, Alison received her undergraduate Bachelor's Degree in Liberal Arts from Sarah Lawrence College in 1995 where she concentrated in Latin and Ancient Greek. Additionally, Ms. Slagowitz served as the Permissions Director of a commercial fine art licensing company in New York City, where she was employed for 20 years prior to law school.

Kyle J. Kaiser, *Chair-Elect*

Kyle J. Kaiser

Kyle Kaiser is an Assistant Attorney General and Senior Trial Counsel in the Litigation Division of the Utah Attorney General's Office. He has been with the office since July 2011. Kyle's practice focuses on defending claims of constitutional or civil rights violations brought against the State of Utah, its agents, agencies, and subdivisions, and Utah colleges and school districts. Kyle is also appointed as a judge pro tempore for the Salt Lake City Justice Court, presiding over civil small claims matters. Before working for the Utah AG's Office, Kyle was employed as Staff Attorney for Justice Dale Wainwright of the Supreme Court of Texas, where he not only assisted Justice Wainwright in researching and preparing opinions and analyzing petitions for review, but was in charge of the Court's annual hot pepper eating competition. Before that, Kyle was a litigation and intellectual property associate with the law firm of Winthrop & Weinstine, P.A. in Minneapolis, Minnesota, and served as a law clerk for Richard Dorr, United States District Judge for the Western District of Missouri, in Springfield.

Kyle received his J.D., with high distinction, from the University of Iowa College of Law in 2003, where he was Senior Managing Editor of the Iowa Law Review, was awarded the Hancher-Finkbine Medallion, and was inducted into Order of the Coif. Kyle received his bachelor's degree in journalism from Drake University, summa cum laude, in 2000.

Away from work, Kyle enjoys spending time with his wife Pearl, their daughter Cora, and their cat Milo; camping around Utah in a 1983 Chevy RV; competing in pub trivia events (mostly virtually this year); playing percussion with the local community band and piano in the privacy of his own home; and judging mock trial competitions.

Eric Andrew Foley, *Secretary*

Eric Andrew Foley

Eric A. Foley is a staff attorney in the New Orleans office. Before joining the MacArthur Justice Center in January 2015, Foley was a staff attorney at Southeast Louisiana Legal Services (SLLS) in New Orleans. During his three years at SLLS, Foley represented low-income clients in administrative hearings, trial court, and appellate court. His practice areas included evictions, disputes with the public housing authority, denials of Social Security benefits, and advocacy for the homeless. Before joining SLLS, Foley was a judicial clerk at the U.S. District Court for the District of Puerto Rico from 2009-2011.

Foley is a 2009 graduate of the University of Pennsylvania Law School, where he was president of the student-run Guild Food Stamp Clinic and a student attorney in the Civil Practice and Criminal Defense clinics. Foley graduated summa cum laude from Tulane University in 2004 with a bachelor's degree in political science and history.

Kate Marples Simpson, *Treasurer*

Kate Marples Simpson

Kate Marples Simpson is an associate at Stevens & Brand, L.L.P., in Lawrence, Kansas. She previously clerked for the Honorable Carlos Murguia of the United States District Court for the District of Kansas in Kansas City, Kansas and for the Honorable K. Gary Sebelius for the United States District Court in Topeka, Kansas. Kate graduated from KU Law in 2014, where she started the KU FBA Student Division, and KU in 2011 with a BA in Germanic Languages and Literatures. Kate was awarded the Outstanding Chapter Leader for a Large Chapter for 2020 for her year as President of the Chapter for the Districts of Kansas and Western Missouri, and is currently treasurer of the Civil Rights Section and a member of the FBA Judiciary Division's Federal Judicial Law Clerk Committee. Kate is president of the Judge Hugh Means American Inn of Court and chair of the Kansas Bar Association Young Lawyers Section. In her free time, Kate enjoys training for triathlons and teaching interval training and spin classes, playing the viola, beekeeping, tending to her chickens and garden, cooking, and spending time with family.

Stephen J. Haedicke, *Immediate Past Chair*

Stephen J. Haedicke

Stephen Haedicke represents individuals and entities in complex cases in state and federal court. His practice focuses on civil rights and criminal defense. He regularly represents plaintiffs in civil rights cases involving wrongful death, false arrest, excessive force, and First Amendment violations. He also represents clients in criminal matters ranging from fraud and white collar crimes to drug conspiracies, medicare crimes, and weapons charges.

Stephen graduated cum laude in 2001 from Northwestern University School of Law, where he was a member of the Order of the Coif and worked on the Journal of Criminal Law and Criminology. He has worked as a staff attorney for the Seventh Circuit Court of Appeals in Chicago; a public defender in Athens, Georgia; and at a large law firm in New Orleans, Louisiana. He is currently a solo practitioner in New Orleans.

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like environmental justice, and criminal justice and immigration reform, has created a new generation of attorneys who want to practice civil rights law. You might want to reach out through your local FBA chapter to see what can be done to coordinate networking opportunities for law clerks and local civil rights practitioners in your area.

We are hosting perhaps the biggest and most extraordinary Étouffée yet!

Why, the Civil Rights Étouffée, of course! I'm bursting with pride over what our team has put together this year—and as a member of our section, you will be proud, too, when you log in and learn from such an extraordinary array of practitioners discussing cutting-edge topics. Artificial intelligence. Election law. Social media and legal ethics. 1st Amendment challenges to LGBTQ rights. Environmental justice. Title IX and #metoo. Vulnerable kids and COVID-era schooling. Implicit race bias. These are as hot as civil rights topics get and the speakers are the very people on the front lines of these topics! Alas, we won't be in New Orleans together, but we are working hard to ensure that our program is engaging and worthwhile—and brings you the valuable legal education credits that are worth your time. And we are leaders for the entire FBA—we already have 29 chapters, sections, and divisions signed up as co-sponsors! Our not-so-immediate past Chair Wylie Stecklow is leading this extraordinary effort, and we are so grateful to him for all the creativity it has taken to create our on-line Étouffée!

As always, thank you for being a part of our section, and please let me know how our section can better serve your needs.

Appear in the Civil Rights Insider!

Call for Articles for the Civil Rights Insider

The editors of The Civil Rights Insider invite submissions for publication. Publication allows you to announce your latest win (or loss,) publicize a successful appeal that offers a valuable precedent, share a local phenomenon in the law that may have national implications, invite others to a conference that will be addressing novel issues of civil rights law, provide your personal take on a recent Supreme Court decision and its implications for your practice, or highlight a member whose work you believe should be acknowledged. We welcome your contributions as well as suggestions of subjects that should be addressed so that the newsletter serves us all.

Articles need only be between 500 – 1000 words. If interested, contact Steve Dane, Dane Law LLC, at sdane@fairhousinglaw.com or Violet Rush at vrush@hobbsstraus.com.

"Preservative of All Other Rights": Voting and Social Justice in the Post-Trump Era

By Vinay Harpalani, J.D., Ph.D, Henry Weihofen Professor and Associate Professor of Law, University of New Mexico School of Law

As social justice advocates rejoice over Donald Trump's defeat and look for paths forward, the biggest lesson comes from the 2020 presidential election itself. The right to vote is "preservative of all other rights[,]" and this past year underscored its importance more than ever. In the midst of the COVID-19 pandemic, high voter turnout—and especially high Black voter turnout—propelled Joe Biden to victory. Even as the Electoral College and partisan gerrymandering continue to undermine the popular will, America's changing demographics favor people of color and progressives. Moreover, the elected branches of government have become more significant because Trump packed the federal judiciary with conservative judges. Social justice advocates should not expect too many revolutionary legal rulings such as Brown v. Board of Education (1954). Most progressive change for the next generation will begin at the ballot box rather than the courthouse.

There are many barriers to expanding the franchise. With its ruling in Shelby v. Holder (2013), the U.S. Supreme Court greatly compromised the Voting Rights Act of 1965 (VRA). Section 5 of VRA requires the covered jurisdictions to gain preclearance: federal authorization before enacting any laws that affect voting qualifications or procedures. The covered jurisdictions included states and localities with a particularly egregious history of discrimination in voting. Section 4 of VRA contained the coverage formula for Section 5, setting the criteria for preclearance to be applicable. The Court ruled that the coverage formula in Section 4 was unconstitutional because Congress had not updated it since 1975. Although the Court did not rule on the constitutionality of Section 5, its holding eliminated preclearance, allowing previously covered jurisdictions to enact restrictive voting laws.[1]

States have passed restrictions on the franchise, especially through purging of voter rolls and requiring voter identification. Through its ruling in Husted v. A. Phillip Randolph Institute (2018), the Supreme Court made it easier for localities to remove registered voters from their rolls. And even before Shelby, the Supreme Court had upheld strict voter ID laws in Crawford v. Marion County Election Board (2008), citing the state's interest in preventing voter fraud. The Court made reference to voter ID provisions in the National Voter Registration Act of 1993 and the Help America Vote Act of 2002, although Congress intended these laws to make voting easier. With Trump's numerous, baseless accusations of voter fraud in the 2020 presidential election, the climate is set for conservative state legislatures to pass more restrictions on voting.

Nevertheless, the state of Georgia provides hope and vision for social justice advocates. Georgia's voter registration law is the most stringent in the nation, mandating an exact match of all required documents. Georgia also has a strict photo identification requirement at the polls. An ACLU report from September 2020 found that Georgia had wrongfully removed 200,000 voters from its voting rolls. But in spite of these restrictions, Georgia voters—especially Black voters—turned out in huge numbers, lifting Joe Biden to victory in the state. Biden became the first Democratic presidential candidate to win Georgia since 1992, and only the third since 1960. Turnout for the Georgia Senate runoffs in January was also excellent, leading Democrats Raphael Warnock and Jon Ossoff to surprising victories.

Former Georgia House Minority Leader and 2018 gubernatorial candidate Stacey Abrams deserves the most credit here. Abrams, who believed that voter suppression cost her the 2018 gubernatorial race, founded Fair Fight Action—an organization which fights voter suppression. Abrams and Far Fight Action were extremely effective in registering and turning out Georgia voters. They serve as a model for stopping voter suppression and increasing the franchise. And this is particularly important in Georgia, as it becomes a swing state and eventually a Democratic-leaning state. Similar political trends have begun in other Southern states, such as North Carolina and Texas. Social justice advocates in these states should follow Stacey Abrams' lead.

There have also been other positive developments for voting rights. Although some states have made voting more difficult in particular ways, the polls have become more accessible in other ways. An increasing number of states now have automatic voter registration. Forty-two states allow some form of early voting, and 35 have either automatic or "no excuse" absentee voting. States do vary in the level of authentication required for absentee and mail-in ballots, and progressives should work to ensure that voters are not disenfranchised for minor errors. In the wake of Trump's baseless claims, social justice advocates will also need to continue fighting for liberal registration and mail-in/absentee ballot laws. In the wake of Trump's baseless claims, social justice advocates will also need to continue fighting for liberal registration and mail-in/absentee ballot laws. Additionally, advocates should ensure that there are a sufficient number of accessible polling places in all jurisdictions.

Advocates should also capitalize on growing support to end felon disenfranchisement. Forty-one states allow all felons to have their voting rights restored, and 48 allow this for at least some felons. In 2018, Florida voters approved, by a 2:1 margin, an amendment to the Florida Constitution that restored voting rights for most felons when they completed their sentences. Soon thereafter, the Florida legislature made this standard

more difficult to meet by including payment of fines and fees as part of a "sentence." Nevertheless, Florida does illustrate that even in states which have recently favored Republicans, restoration of felon voting rights can gain traction among the electorate.

Voting technology can also affect the franchise. After the fiasco with Florida's recounts in the 2000 presidential election,[2] the Help America Vote Act of 2002 aimed to modernize voting machines across the nation. But all of its goals have not been met, and many states still use old voting machines. Modernization of voting technology across jurisdictions is another important undertaking to ensure that votes are properly cast and counted.

Finally, although conservative judges now dominate the federal courts, social justice advocates can still look to state courts. Historically, state supreme courts, including some from traditionally conservative states, have rendered groundbreaking rulings on issues ranging from school desegregation to same-sex marriage to education funding. Voting rights are no exception: even as the U.S. Supreme Court continues to rule that partisan gerrymandering is non-justiciable, state high courts in Pennsylvania and North Carolina struck down gerrymandered districts on state constitutional grounds. With a conservative federal judiciary in place for many years, state courts provide an alternative judicial venue to increase the franchise.

Social justice advocates have always needed to be flexible in their approaches. It will take a combination of political engagement, impact litigation, direct action, and voter education and enthusiasm to expand voting for marginalized groups in our society. And while this will not be an easy undertaking, it is the first step in securing all other basic rights.

Vinay Harpalani *is Henry Weihofen Professor and Associate Professor of Law at the University of New Mexico School of Law.*

Endnotes

[1]Although Congress could still make new findings and use that evidence to create a new coverage formula, this would be difficult to accomplish in the current political climate. Moreover, the Supreme Court also noted in *Shelby* that Section 5 raises federalism issues. With its new conservative appointees, the Court could rule that Section 5 itself is unconstitutional.

[2]In *Bush v. Gore (2000)*, the U.S. Supreme Court halted the Florida recounts on equal protection grounds, due to the variation in recounting standards used by different localities. Although the Supreme Court's ruling was widely critiqued on federalism grounds, seven Justices and many commentators agreed that there were equal protection problems with the recounts.

Social Media Announce-ment

Do you have civil rights news to share?

We'd like to keep the conversation going on social media. If you have civil rights news from your city, state, region, or circuit that you would like to share with the Section, please email Benjamin de Seingalt (bdeseing@tulane.edu) with links to source material. Court decisions, journal articles, legal journalism (e.g. ATL, Law360), and non-legal journalism are welcome, so long as the focus is on unfolding issues that may affect civil rights law. These news items do not need to relate to specific ongoing or settled cases or legal challenges – we welcome any news that may be relevant to the practice of civil rights law now or in the future. If you would like to start a discussion about a current issue in civil rights, please let us know even if you aren't able to find related articles. We look forward to hearing from many of you soon!

Has *Comcast* Altered the Standards For Pleading Civil Rights Claims?

By Stephen M. Dane, Dane Law LLC, Toledo, Ohio

One of the Supreme Court's civil rights decisions of the 2019 Term involved the question of what standard of causation applies to claims asserted under the Civil Rights Act of 1866, 42 U.S.C. §1981, *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*.[1] The Ninth Circuit had concluded that a §1981 plaintiff must only plead and prove that race discrimination played "some role" in the defendant's decision making process, whereas other circuits had concluded that to be actionable under §1981, racial prejudice must be a "but-for" cause of the defendant's decision. The Supreme Court resolved the issue by concluding that the text and history of §1981, considered alongside the general common law of torts, requires a plaintiff to initially plead and ultimately prove that, "but for" race, the plaintiff would not have suffered the loss of a legally protected right under §1981.[2]

Although much attention has been paid to the doctrinal outcome of the Court's holding, little attention has been paid to the procedural posture of the case, and more specifically to certain language in the Court's opinion that seemingly contradicts well-established principles of pleading. The Court had much to say about what a plaintiff must "plead" about causation to survive an early motion to dismiss, but without referring to any of the civil rules that apply to pleadings.

1. *Comcast Suggests That "What Must Be Proved Must Be Pled" – But Without Authority.*

The issue came to the Court at a very early stage of the case -- an appeal of a motion to dismiss filed under Rule 12(b)(6).[3] While focusing almost exclusively on the role that "causation" plays in proof of §1981 claims, the Court had some alarming things to say about pleading practice. Throughout its opinion, the Court repeatedly equated the standards applicable to *pleading* claims of discrimination under §1981 with those applicable to *proof* of those claims, as if the same rules applied to both. For example, the Court wrote:

- "Few legal principles are better established than the rule requiring a plaintiff to establish causation. *In the law of torts, this usually means a plaintiff must first plead and then prove* that its injury would not have occurred "but for" the defendant's unlawful conduct."[4]
- "Normally, too, the essential elements of a claim remain constant through the life of a lawsuit. What a plaintiff must do to satisfy those elements may increase as a case progresses from complaint to trial, but the legal elements themselves do not change. So, *to determine what the plaintiff must plausibly allege at the outset of a lawsuit, we usually ask what the plaintiff must prove in the trial at its end*."[5]
- "[The plaintiff] appears to concede that a §1981 plaintiff does have to prove but-for causation at trial, but *contends the rules should be different at the pleading stage."*[6]

Yet *Comcast* never once mentioned or referred to the Federal Rules of Civil Procedure governing pleading, or any of the Court's prior opinions interpreting how those Rules are to be applied in discrimination cases alleging civil rights violations. In its previous opinions interpreting and applying the pleading rules, the Court has repeatedly distinguished between the standards governing *pleading* a cause of action and the rules governing the *proof* necessary to establish a discrimination claim at trial.

2. *What Comcast Does Say Conflicts With The Court's Opinions Interpreting the "Pleading Rules."*

According to the Court's prior opinions, the pleading standards set forth in Civil Rule 8 require only fair notice of what the "plausible facts" are that form the basis of the claim. But Rule 8 does *not* require the application of evidentiary standards of proof or any exposition of legal argument or recitation of legal elements that may be applicable later in the proceedings, such as at summary judgment.

For example, in *Swierkiewicz v. Sorema N. A.*,[7] which involved discrimination claims under Title VII and the Age Discrimination in Employment Act, the issue presented was "whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)." In a unanimous opinion based on a plain reading of Rule 8, the Court answered this question in the negative: "We hold that an employment discrimination complaint need not include such facts and instead must contain only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Fed. Rule Civ. Proc. 8(a)." The Court arrived at this conclusion by observing that the prima facie case formulation set out in *McDonnell Douglas* "is an evidentiary standard, not a pleading requirement."[8] Given that the prima facie case operates as a flexible evidentiary standard, the Court said, it should not be transposed into a rigid pleading standard for discrimination cases.[9]

The Court again had occasion to interpret and apply Rule 8 in the civil rights context in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Iqbal* presented a *Bivens* claim of alleged unconstitutional discrimination because of race, religion, or national origin. Here the Court focused on the *factual plausibility* of a complaint to survive a motion to dismiss, and rejected the reliance on bare formulaic recitations of the "elements" of a claim:

> "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action' will not do. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[10]

The Court went on to explain that "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[11]

The Court once more eschewed reliance on pleading the elements of any specific legal theory in *Johnson v. City of*

Shelby, 574 U.S. 10 (2014). The plaintiffs in *Johnson* claimed their constitutional rights had been violated by the defendant, but did not cite to any specific statute in support of their claims. In a unanimous *per curiam* opinion, the Court held that a plaintiff need not allege any specific legal theory in order to survive a motion to dismiss, so long as the facts alleged will support a claim under some theory. Once again looking to the plain language of Rule 8, the Court observed that "federal pleading rules . . . do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted."[12] Rather, the Court explained, its decisions in *Bell Atlantic Corp. v. Twombly*,[13] and *Ashcroft v. Iqbal* concerned what *factual* allegations a complaint must contain to survive a motion to dismiss. In *Johnson*, having informed the defendant of the factual basis for their complaint, the plaintiffs "were required to do no more" in order to stave off threshold dismissal for want of an adequate statement of their claim, citing Rules 8(a)(2) and (3), (d)(1), (e).[14]

Taken together, the Court's prior Rule-based opinions make clear that the *facts* alleged in the complaint are important to withstand dismissal at the outset of a lawsuit, whereas the inclusion of labels, legal elements, or conclusions are not.[15] *Comcast* makes no mention of these principles. Indeed, *Comcast* never cites to any of the Federal Rules of Civil Procedure, including the pleading standards contained in Rules 8 through 12. In sharp contrast to its previous discouragement of "a formulaic recitation of the elements of a cause of action,"[16] the Court in *Comcast* did indeed reverse the Ninth Circuit because of the plaintiffs' failure to articulate the correct *legal formulation* of causation, presumably an "essential element" of their legal theory under §1981. The Court made no attempt to evaluate whether the facts alleged in the complaint were sufficient to state "any claim" for relief; instead, the Court remanded the case back to the Ninth Circuit to determine whether the complaint contained sufficient facts "under the but-for causation standard."[17]

Comcast calls into question how the Court's prior opinions applying Rule 8 are to be squared with *Comcast's* unequivocal merging of "pleading" and "proof." The text of Rule 8 contains no such merging principle, and is completely silent on the notion of "proof" or "causation" or the pleading of "elements" of a cause of action. By requiring "what the plaintiff must plausibly allege at the outset of a lawsuit" to be the same as "what the plaintiff must prove in the trial at its end," *Comcast* appears to impose far more exacting pleading requirements than the Court's prior Rule-based opinions demand.

Stephen M. Dane *is Co-Editor of the Federal Bar Association's Civil Rights Law Section Newsletter. His complete background and biographical information are available at www.fairhousinglaw.com. A more comprehensive version of this article appeared in the Nov./Dec. 2020 issue of The Federal Lawyer.*

Endnotes

[1] 206 L.Ed. 2d 356, 2020 U.S. LEXIS 1908 (Mar. 23, 2020).

[2] 206 L.Ed. at *367.

[3] 2016 U.S. Dist. LEXIS 197757 (Oct. 5, 2016).

[4] 206 L.Ed. at *360.

[5] 206 L.Ed. at *361 (citing *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 561 (1992); *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 346-347 (2005); *Ashcroft v. Iqbal*, 556 U. S. 662, 678-679 (2009)).

[6] 206 L.Ed. at *356.

[7] 534 U.S. 506 (2002).

[8] 534 U.S. at 510.

[9] 534 U.S. at 512.

[10] 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (Sherman Act case).

[11] 556 U.S. at 678. See also *Erickson v. Pardus*, 551 U.S. 89, 90 (2007) (vacating and remanding a decision of the 10th Circuit that "departs in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure.").

[12] 574 U.S. at 11. See also *Skinner v. Switzer,* 562 U.S. 521, 530 (2011) ("Rule 8(a)(2) of the Federal Rules of Civil Procedure generally requires only a plausible 'short and plain' statement of the plaintiff's claim, not an exposition of his legal argument.").

[13] 550 U.S. 544, 556 (2007). Although not a civil rights case, *Twombly* itself recognized that under Rule 8(a)(2) a well-pleaded complaint need only allege "enough fact to raise a reasonable expectation that *discovery will reveal evidence*" of the proof necessary to establish a violation of the statute at issue. Id. at 555 (emphasis added).

[14] 574 U.S. at 12. For additional comparison, see *Leatherman v. Tarrant County Narcotics Intel. & Coord. Unit*, 507 U.S. 163 (1993), in which Chief Justice Rehnquist, writing for a unanimous court, chastised the 5th Circuit for adding a "particularity requirement" into Rule 8 for civil rights claims against municipalities. The Rule requires no more than "fair notice" of the basis for a claim, and "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." 507 U.S. at 168-69.

[15] In *Texas Dept of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), the Court held that disparate impact claims are cognizable under the Fair Housing Act, 42 U.S.C. §3601 *et seq*. Although procedurally the case had reached the stage of summary judgment and did not involve an interpretation of the Civil Rules, in one sentence of its opinion the Court suggested that a plaintiff would need "to allege facts at the pleading stage" demonstrating a causal connection sufficient to "make out a prima facie case of disparate impact." 135 S. Ct. at 2523. Despite the facial inconsistency of this statement with the holding of *Swierkiewicz* which flatly rejected the requirement to plead the elements of a prima facie case of discrimination, note the emphasis on the pleading of "facts," as distinct from labels or legal requirements.

[16] *Iqbal*, 556 U.S. at 677.

[17] 206 L. Ed. at 367.

Civil Rights Section CLE Activity

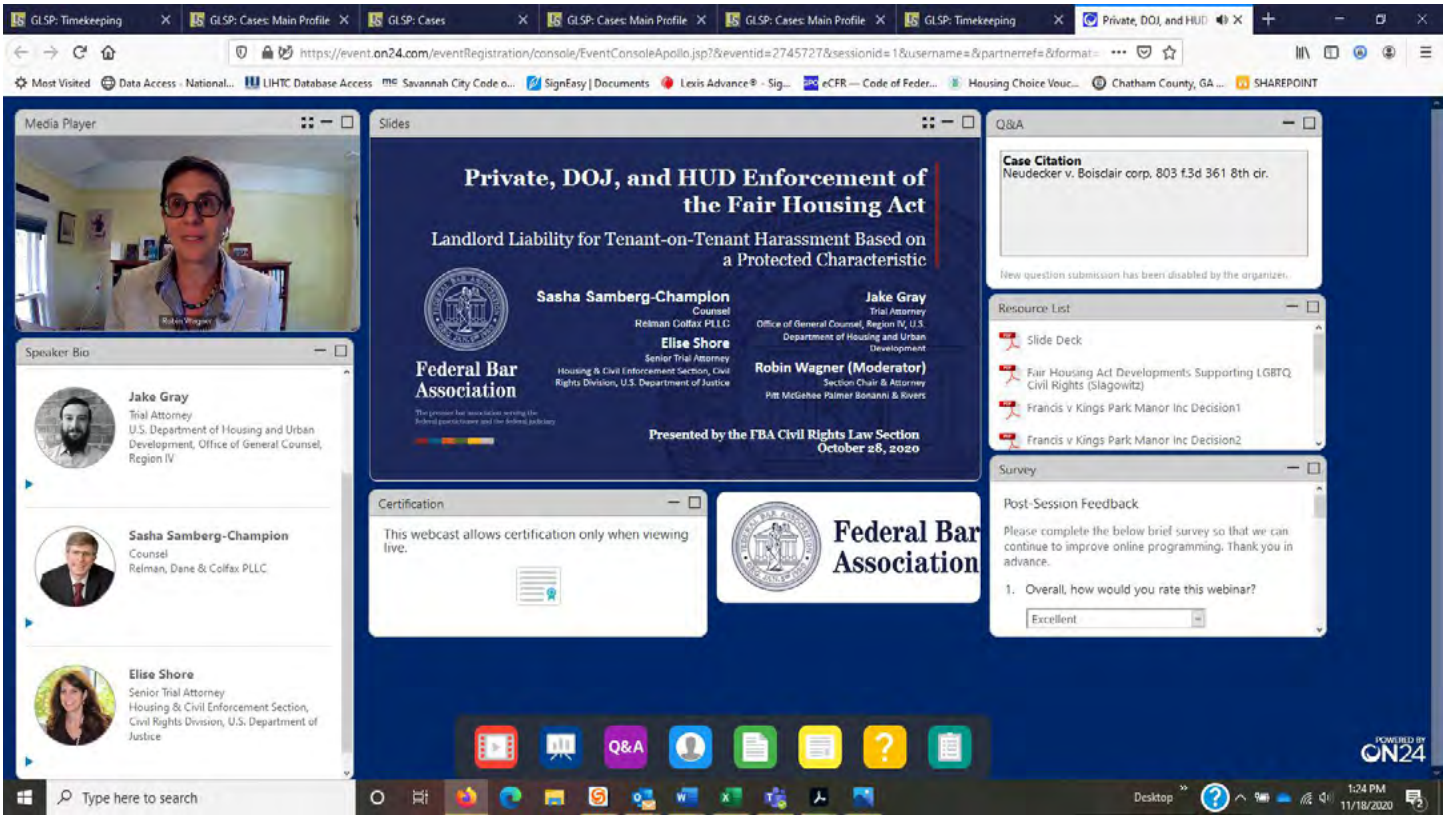
By Alison Slagowitz, Georgia Legal Services Program, Savannah, GA.

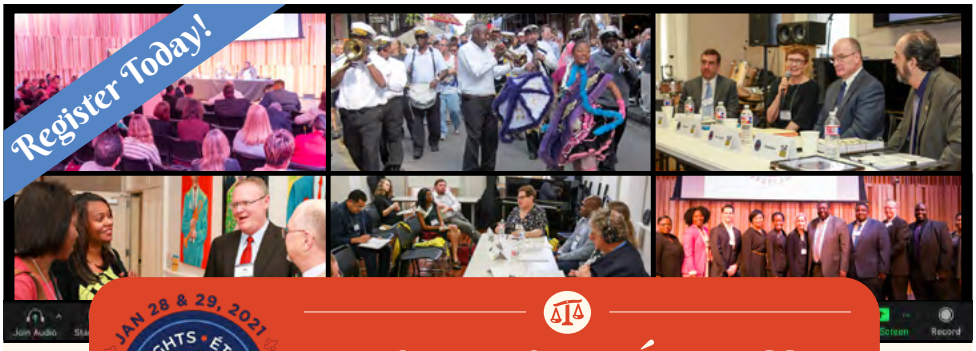
On October 28, 2020, our Section and the National FBA offered a webinar on a cutting-edge legal theory of the Fair Housing Act: Landlord liability for tenant-on-tenant harassment. The Fair Housing Act can be enforced three ways: HUD, DOJ, and through a private lawsuit. Thus, our presenters were trial attorneys representing the three ways to enforce the FHA:

- Jake Grey, Trial Attorney for Region IV of the U.S. Department of Housing and Urban Development Office of General Counsel discussed FHA enforcement by HUD, which published its final rule codifying its longstanding FHA interpretation that housing providers should be held liable for tenant-on-tenant harassment under a negligence standard and without regard to whether the housing provider's conduct was motivated by animus ("HUD's 2016 Rule").
- Elise Sandra Shore, Senior Trial Attorney in the Department of Justice's Civil Rights Division, Housing and Civil Enforcement Section, discussed FHA enforcement by the DOJ and specifically addressed landlord liability in the context of sex discrimination and sexual harassment, including tenant-on-tenant harassment.
- Sasha Samberg-Champion, Counsel at Relman Colfax PLLC, discussed FHA enforcement through a private lawsuit. Mr. Samberg-Champion discussed his pending case in the Second Circuit Court of Appeals, Francis v. Kings Park Manor, Inc. In that case, the court will decide en banc whether a landlord can be liable under the FHA for failing to take action to stop another tenant from harassing him based on his race, despite being informed by Mr. Francis and local law enforcement and even though the landlord had intervened in prior situations regarding non-race related lease and law violations for other residents.

Many thanks to our Section Chair, Robin Wagner, for moderating and providing further insights from her experiences serving as a cooperating attorney for the Fair Housing Centers of Metro Detroit and Southeast and Mid-Michigan.

FBA National reported "superb" attendance from registered members and nonmembers. Thank you to all who helped make this event so successful!





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DATE	TIME	PANEL	PRESENTERS
Jan 28	12:00pm ET	**Enhancing Justice: Ethically Reducing Bias in Policing and the Courts**	**Hon. Bernice Donald**, U.S. Court of Appeals for the Sixth Circuit **Col. Heston Silbert**, Director, Arizona Department of Public Safety **MODERATOR: Wylie Stecklow**, FBA Civil Rights Section
	1:15pm ET	**When Exceptions Become the Rule: LGBTQ Rights and Religious Exemptions**	**Camilla Taylor**, Director of Constitutional Litigation, Lambda Legal **Chris Lund**, Professor of Law, Wayne State University **MODERATOR: Robin Wagner**, FBA Civil Rights Section
	2:45pm ET	**Back to the Future: Artificial Intelligence & Civil Rights**	**Phil Mayor**, Senior Staff Attorney, ACLU of Michigan **Vincent Southerland**, Executive Director, Center on Race, Inequality and the Law, NYU School of Law **Jennifer Lord**, Pitt McGehee Palmer Bonanni & Rivers
	4:00pm ET	**KEYNOTE: How to Ethically Navigate Social Media When Your Case is in the Headlines**	**Joseph Bondy, The Law Offices of Joseph A. Bondy, Counsel for Lev Parnas, Creator of #LetLevSpeak**
Jan 29	12:00pm ET	**Making It Right: Vulnerable Kids, Education and COVID-19**	**Margie Wakelin,** Staff Attorney, Education Law Center **Carl P. Beard**, Beard Legal Group **MODERATOR: Caryl Andrea Oberman**, Law Offices of Caryl Andrea Oberman
	1:15pm ET	**Title IX in the Era of #metoo**	**Mica McKinney**, General Counsel, Utah State University **Ann Olivarius**, McAllister Olivarius **MODERATOR: Kyle Kaiser**, FBA Civil Rights Section
	2:45pm ET	**What is Environmental Justice?**	**Rebecca Bratspies**, Founding Director, Center for Urban Environmental Reform and Professor of Law, CUNY **Emily Posner**, Emily Posner Law **Marianne Cufone**, Director, Center for Environmental Law and Adjunct Professor of Law, Loyola University
	4:00pm ET	**KEYNOTE: Neither Rain nor Sleet nor Obfuscation: War Stories from the Front Lines of Voting Rights Litigation & the Post Office**	**Shankar Duraiswamy, Covington & Burling** **J. Remy Green, Cohen&Green, Counsel in SDNY USPS Litigation** **Samuel Spital, Director of Litigation, NAACP LDF**

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