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JUSTICE MORENO TO SPEAK AT MARIN COUNTY BAR ASSOCIATION GENERAL MEETING ON "DIVERSITY AND THE ART OF DISSENTING."

The MCBA is thrilled to announce that California Supreme Court Justice Carlos R. Moreno will speak at the **August 26** general membership meeting, to be held at the Four Points Sheraton Restaurant in San Rafael.

The topic will be "Diversity and the Art of Dissenting." Justice Moreno will take questions at the end of the presentation (subject, of course, to ethical limitations).

Justice Moreno, who earned a B.A. from Yale and a J.D. from Stanford Law School, has been on the California Supreme Court since 2001. Before that, he served as a federal district court judge for the Central District of California, and a judge of the municipal and superior courts in Los Angeles. As an attorney, he worked for the Los Angeles City Attorney's office and in private practice.

He was the lone dissenter in *Strauss v. Horton*, the recent state supreme court decision upholding Proposition 8, which banned same-sex marriages in California. According to press reports, he was on President Obama's short list for an appointment to the United States Supreme Court to replace retiring justice David Souter.

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Calendar of Events

Aug 26th
General Membership Meeting
12 – 1:30 pm

Aug 19th
Probate & Estate Planning Section Meeting
12 – 1:30 pm

Aug 20th
Real Property Section Meeting
12 – 1:30 pm

Aug 24th
Probate & Trusts Mentor Group
12 – 1:30 pm

Look for details each month in *The Marin Lawyer*

In This Issue

Jordan A. Lavinsky was Guest Editor of this issue of *The Marin Lawyer.* Philip R. Diamond is Series Editor for 2009.

STIPULATIONS FOR ENTRY OF JUDGMENT: PLAINTIFFS BEWARE

By Jordan A. Lavinsky

Stipulations for entry of judgment, pursuant to which a judgment will be entered for a larger amount if the defendant fails to timely pay a lesser agreed upon amount, are commonly used to facilitate settlement. This seemingly effective tool is not, however, without risk as illustrated by the recent decision in *Greentree Financial Group, Inc. v. Execute Sports, Inc.* (2008) 163 Cal.App.4th 49. Consider the following scenario:

Tenant enters into a retail lease with a 10-year term and then fails to pay rent for the last two months

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ASHCROFT V. IQBAL: GIVING TEETH TO THE FEDERAL PLEADING STANDARD

By Megan Oliver Thompson

The pleading standard in federal court recently got a little bit tougher. Of course, that means that the standard for dismissing a federal complaint also got a little bit easier. In *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), decided on May 18, 2009, the United States Supreme Court solidified and expanded on its earlier decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) regarding the pleading standard of Federal Rule of Civil Procedure 8(a)(2).

In an opinion by Justice Kennedy, the Court held that Rule 8 requires a complaint to contain sufficient facts to "state a claim to relief that is plausible on its face." "Facial plausibility" means that the facts pled allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Plausibility is somewhere between possibility and probability. A plaintiff's goal in pleading should be to "nudge" the claim "across the line from conceivable to plausible."

Iqbal established a two-step process for determining whether a complaint satisfies the plausibility standard:

The first step is to identify any allegations that are not entitled to the assumption of truth. Conclusory allegations, unlike factual allegations, are not entitled to be assumed as true. Thus, a complaint based on conclusory statements or "threadbare recitals of the elements of a cause of action" will not survive a motion to dismiss.

The second step is to consider whether the factual allegations plausibly suggest an entitlement to relief. This will be a "context-specific task" requiring the court to "draw on its judicial experience and common sense." The allegations must allow the court to "infer more than the mere possibility of misconduct" and show "that the pleader is entitled to relief."

Requiring plausibility gives the standard some teeth in the context of the Rule 12(b)(6) motion to dismiss. Before *Iqbal* and *Twombly*, plaintiffs might have found some protection from dismissal in the oft-quoted "no set of facts" language of *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957): "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Indeed, the language was interpreted and applied by the Court of Appeals in *Iqbal* as the Rule 8 pleading standard. But in *Twombly*, the Court recognized that the language was never meant to set a minimum standard for pleading. Rather, it was meant to establish that *after* "a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations of the complaint." Citing years of "puzzling the profession," *Twombly* officially retired the "no set of facts" language as "an incomplete, negative gloss on an accepted pleading standard."

Iqbal also rejected the invitation to relax the Rule 8 pleading standard on the basis that groundless claims could be weeded out early in the discovery process through "careful case management." *Iqbal* strongly cautions that whether a complaint should be dismissed for insufficient pleading "does not turn on the controls placed upon the discovery process." In other words, courts should not allow the discovery process to serve the function of weeding out claims that should have been dismissed in the first place.

Iqbal made clear that the plausibility standard applies to all civil actions and proceedings filed in the federal courts, not just antitrust suits like *Twombly*. Practically speaking, *Iqbal* is a significant decision for both plaintiffs and defendants in federal court. Although the Court recognized that "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era," plaintiffs better come to federal court armed with more than mere legal conclusions. And when presented with a factually deficient complaint, defendants may find some comfort in a standard that actually has some teeth.

Megan Oliver Thompson is an associate at Hanson Bridgett LLP in San Francisco representing public agencies, businesses, and individuals in state and federal court, including bankruptcy court. Her practice covers a full range of business-related litigation involving breach of contract, fraud, breach of fiduciary duty, accounting malpractice, UCC issues, and real estate issues.