



FBA newsletter

Summer 2007

Federal Bar Association - Eastern District of Michigan Chapter - 49 years of service to our Federal Bench and Bar

Jim Thomas Receives Gilman Award

On April 26, 2007, the Chapter hosted its 23rd Annual Leonard R. Gilman Award Luncheon at the Gem Theatre. The Gilman Award is given annually to an outstanding practitioner of criminal law who exemplifies the excellence, professionalism, and commitment to public service of Len Gilman, who was U.S. Attorney at the time of his death in 1985. The selection is made by prior recipients of the award, many of whom served with and knew Len.

The lunch opened with a welcome from Chapter President Grant P. Gilezan. Then, Judge Gerald E. Rosen delivered remarks honoring James (Jim) C. Thomas, the recipient of the 2007 Gilman Award. Thomas graduated from Wayne State University in 1969 and from Detroit College of Law in 1974. He has been practicing law for more than thirty years and is on the board of directors for the Criminal Defense Attorneys of Michigan.

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Supreme Court Adds Teeth to Rule 8 . . . or Maybe Not

By Bryan Schneider*

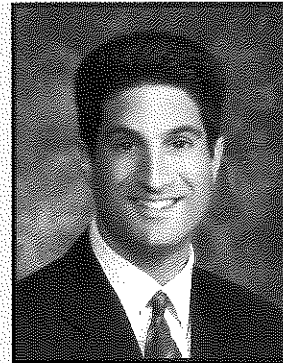
A divided case . . . Debate raging . . . A marked departure from past decisions . . . Partial-birth abortion? Affirmative action? The death penalty? No, it's civil procedure time in the Supreme Court.

On May 21, the Court decided *Bell Atlantic Corp. v. Twombly*, an antitrust case with potentially vast implications for federal practitioners. In *Twombly*, the plaintiff alleged an antitrust conspiracy based on allegations of parallel

conduct between the defendants. The complaint merely alleged a conspiracy based on parallel behavior, with no specific allegations relating to the existence of an agreement among the defendants. The Court upheld the district court's dismissal of the action under
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President's Column

Grant P. Gilezan

In concluding my year as Chapter President, there is one reflection about my experience that not only stands apart from the others, but it defines, in my mind, our Chapter's

longstanding recipe for success. And that is we remain a Chapter abundant with leaders who, despite our dramatic growth in size over the past half century, maintain a close-knit brand of stewardship and friendship. It has been a privilege and inspiring to lead an organization of such capable and impressive leaders. To serve as President of our Chapter is not like running a marathon; rather, even in these challenging economic times for Michigan, I liken it more to the pleasure of getting behind the wheel of one of the finest automobiles and enjoying a drive fueled by an active spirit of mission and camaraderie.

I am proud and grateful to have had a chance to serve as your President, and I want to take this occasion to recognize and thank the many volunteer leaders in our Chapter listed below, who generously gave their time and talents to our Chapter's 600 members over the past year in organizing twenty-five Chapter events, operating twenty-two committees, actively participating in the National FBA and running a \$100,000 organization.

- Chief Judge Friedman, for leading all the support and participation extended by the Eastern District of Michigan to our Chapter that is so important to the mission and success of our Chapter.

- My fellow Chapter Officers – Hon. Mark Goldsmith, Barbara McQuade, Elisa Angeli, Barbara Rom, Laurie Michelson and Julie Pidgeon – for their energy, enthusiasm, dedication and friendship.

- Chapter Executive Board Members Hon. Robert Cleland, Hon. George Steeh, Hon. Mona Majzoub, Cameron Evans, Claretta Evans, Dan LaCombe, David Lerner, Dan Manville,

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WINNER
4 YEARS
National FBA
Outstanding
Newsletter
Award

President's Column (continued)

Tom McNeill, Kathie Nesi, Mike Riordan, Jeff Sadowski, Theresa Serra, Miriam Siefer, Adam Strauss, Dona Tracey, Bob Vercruysse, and Kelly Walters, for their guidance, vision and committee leadership.

- Committee Co-Chairs Bill Abbatt, Brian Akkashian, Kim Altman, Christine Dowhan-Bailey, Leslie Berg, Ray Carey, Meghan Cavanaugh, Peggy Costello, Sue Evans, Kevin Fanning, Brian Figot, Rita Foley, Holly Gottschalk, Geneva Halliday, Dan Hurley, Dennis Levasseur, Michael Leibson, John Mayer, Mike Palizzi, Barbara Radke, Meghan Kennedy Riordan, Tom Schehr, Bill Schikora, Dan Sharkey, Elizabeth Stafford and Cathrine Wenger, for their outstanding program, education and community outreach efforts.

- Past Presidents Chris Dowhan-Bailey, Dennis Clark and Dennis Barnes, for their active level of ongoing support and involvement with the Chapter Officers, and Past President Joe Dillon, for his kind sponsorship of the Past Presidents Luncheon Meeting and Chapter Annual Dinner at the Detroit Athletic Club.

- Chapter Bar Foundation Trustees Dennis Clark, Bob Forrest, Geneva Halliday, Ed Kronk and Charlie Rutherford, for their promotion of scholarship and charity on behalf of the Chapter.

Chapter Executive Director Brian Figot is also most deserving of special recognition for his tremendous efforts in handling with such profession-

alism, creativity and dedication all of the Chapter's daily administrative and operational needs, demonstrating time after time that he really is one of our Chapter's most valuable assets. As a personal note, I am very grateful for Brian's unwavering sponsorship of my involvement in the Chapter since I first became a member (particularly this past year) and for his reliably good humor and friendship at all times of the day.

A large expression of thanks is due to my law firm, Dykema Gossett, for enthusiastically supporting my involvement in the Chapter

To my parents, Peter and Star Gilezan, I can't thank them enough for generously affording me every opportunity to become a lawyer and for always being such an incredible source of wisdom and encouragement.

Lastly, I want to thank my wife, Krisztina, and daughters, Lauren and Holly, for enabling me to serve the Chapter with a deep sense of commitment and passion, allowing me the precious extra time to do so and making every provision for me to really enjoy my time as Chapter President.

As I said at our Annual Dinner, the view from the top of our fine organization is a pretty darn good one, with the future being propelled by a formidable 50-year legacy. It has been an honor to serve such a fine organization, and while I am proud of the many accomplishments we achieved, none rank higher in my case than the friends I've made along the way. Best wishes for a terrific summer.

Supreme Court Adds Teeth to Rule 8 (from page 1)

Rule 12(b)(6) for failure to state a claim. In doing so, the Court "retired" its famous Rule 12(b)(6) standard set forth in *Conley v. Gibson* (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."

The *Twombly* Court reasoned that, taken literally, this language would permit conclusory, speculative claims to survive a motion to dismiss "whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery." Such a rule, the Court held, does not adequately encompass the requirement of Rule 8 that a plaintiff set forth his "grounds" for relief. In the Court's view, complying with this pleading requirement obligates a plaintiff to provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Rather, "[f]actual

allegations must be enough to raise a right to relief above the speculative level."

With this understanding of Rule 8, the Court explained, *Conley's* "no set of facts" language is best seen as speaking not to the pleading requirements under Rule 8, but to the plaintiff's evidentiary burden. *Conley*, the Court explained, is thus best read as providing that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." In other words, "*Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival."

At first blush, *Twombly* appears to represent a significant alteration in the standard the federal courts should use to evaluate claims attacked by a Rule 12(b)(6) motion to dismiss. A number of commentators initially reacted to the decision by commenting that, as Professor Scott Dodson put it, under *Twombly* "Rule 8 requires 'notice-plus' pleading." This is the clear implication of the Court's language rejecting the *Conley* "no set of facts" standard. However,

Twombly may not be as earth-shattering as it first appears. Justice Souter's opinion for the Court focuses extensively on the high costs associated with discovery in an antitrust case, and specifically disavows any intention to create a heightened pleading standard.

And, just one week after its *Twombly* decision, the Court issued a per curiam summary reversal softening the impact of *Twombly*. In *Erickson v. Pardus*, decided June 4, the Court reversed the district court's dismissal of a prisoner civil rights complaint alleging inadequate medical care. The Court found that the dismissal of the prisoner's complaint—which alleged the treatment he was denied and the consequences he suffered as a result—departed in a “stark . . . manner from the pleading standard mandated by the Federal Rules of Civil Procedure.” The Court reiterated that Rule 8 provides a liberal pleading standard, and requires only that the complaint allege facts sufficient to give the defendant fair notice of the grounds of the claim. The Court explained that the district court's decision was particularly inappropriate in light of the liberal treatment given to pro se complaints.

It remains to be seen how this will play out. It could be that *Twombly* will be applied by the lower courts in such a way that notice pleading and Rule 12(b)(6) practice will be significantly altered, and that plaintiff's will be required to allege significant facts to survive dismissal for failure to state a claim. Or, in light of *Erickson*, it could be that the courts will treat *Twombly* as merely emphasizing that purely speculative allegations are insufficient to state a claim, but not as significantly altering the pleading standard.

Finally, in light of the language of *Twombly* focusing on the cost of antitrust litigation and the nature of concerted action allegations, the courts may adopt a middle ground, requiring somewhat heightened pleading for cases involving expensive litigation and conspiracy or similar allegations, but following the *Conley* approach in run-of-the-mill cases. While this issue is being played out in the courts, however, practitioners certainly will need to be familiar with *Twombly* and to keep abreast of post-*Twombly* developments.

*Bryan Schneider is Career Law Clerk to Hon. Paul J. Komives.

Gilman Award *(from page 1)*

Following the award presentation, past Gilman Award recipient David F. DuMouchel introduced the keynote speaker, Justice Maura D. Corrigan of the Michigan Supreme Court. A Gilman Award winner herself, Justice Corrigan spoke about Lenny Gilman's legacy, the lessons he taught, and what a wonderful mentor and role model he was.

Approximately 215 people attended this event, including eight Gilman award winners; Mr. Thomas's wife, Jackie; two of Thomas's three daughters and members of his office.

The following paragraphs capture the essence of Judge Rosen's remarks honoring Jim Thomas.



*Jim Thomas, Judge Rosen, Grant Gilezan,
Justice Corrigan and David DuMouchel*

“I'll start with what Jim's adversaries say about him. To a person, they describe him as both an extremely talented defense lawyer who fights passionately and tenaciously with complete dedication to his clients' cause, but yet at the same time as a thorough professional of great integrity and complete trustworthiness. One senior federal prosecutor described Jim by saying ‘He's not only a very effective lawyer who never sells out a client for a quick deal,

but he's a gentleman whose word is his bond. Unlike with some lawyers, with Jim, a handshake is good enough for me.’ Another prosecutor described Jim as ‘a class act, both in the courtroom and personally.’ Yet another said that he always appreciates having Jim on a case because he knows that there will be ‘no game playing and that only the real issues in the case will be contested.’

“Jim's colleagues in the defense bar are equally fulsome in their praise. Before I survey their comments, I think it's interesting to note that in my conversations with these lawyers, I never once detected even a hint of rancor or professional envy. Jim's colleagues were not only unanimous in their admiration and respect for him as a lawyer and as a professional, but were genuinely happy that Jim has been recognized with this very prestigious award — in fact, a couple of them said, ‘it's about time.’ . . .

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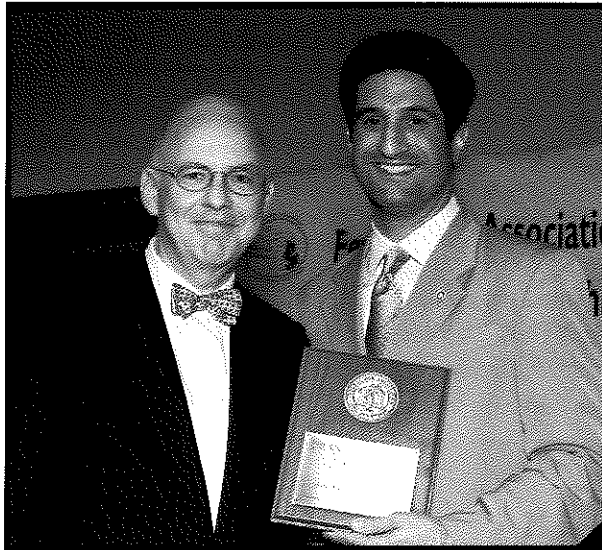
Gilman Award *(from page 3)*

“So, what did Jim’s colleagues say? Well, one said that what he admired most about Jim was his passion and dedication. He observed that unlike some lawyers, Jim has never become calloused or cynical, and that he never ‘mails it in.’ He always provides his clients with the very best defense they could possibly have – sometimes a lot better than they deserve. A senior federal defender said that one of the things that was most admirable about Jim was that he is always willing to take the toughest and most unpopular panel assignments with some of the most difficult clients, often at great financial sacrifice, and that he does so cheerfully and without complaint, always handling these cases professionally and with dedication.

“Another very prominent defense lawyer said ‘Jim is unflappable. No matter how tense the situation, Jim is the coolest head in the room.’ Echoing what the prosecutors told me, another lawyer said, ‘Sometimes your greatest potential problem in a case is not the Government, but your co-counsel. Jim is completely trustworthy – he will watch your back and never blind-side you. At the end of the trial, there will be no teeth marks on your back.’ And finally this, perhaps the highest praise possible, from one of our most prominent lawyers, ‘Quite simply, Jim has become one of the very best criminal defense lawyers in the state. If I

were in trouble, he’s one of the first lawyers I’d call.’

The complete text of Judge Rosen’s remarks honoring Jim Thomas may be found on the Chapter website www.fbamich.org under Speeches/Remarks.



Incoming President Mark A. Goldsmith and Outgoing President Grant P. Gilezan



Mark Lezotte, Sara Fischer, Mike Leibson, Joe LaBella, Justin Klimko, Angela Williams, Brian Figot, Judy Zorn and Jim Robb



A (Habeas) Chorus Line performs at the Annual Dinner. Pictured from left to right are Mike Leibson, Mark Lezotte and Brian Figot.

Annual Dinner Celebrates Chapter's 50th Year

On June 7, 2007, the Chapter held its 28th Annual Dinner at the Detroit Athletic Club. This year, we honored the judicial officers of the Eastern District of Michigan and celebrated our Chapter’s 50th year of service to the bench and bar. The celebration began with an outdoor cocktail reception at the Stadium Pavilion with its panoramic view of Comerica Park and continued indoors in the elegant Main Dining Room.

The event was well-attended. There were over 240 guests, including four Oakland County Circuit Court Judges: President-elect Hon. Mark Goldsmith, Hon. Edward Sosnick, Hon. Wendy Potts, and Hon. Fred Mester; Federal Appellate, District Court and Magistrate Judges; private practitioners; U.S. Attorneys; Federal Defenders; judicial law clerks; and their guests. State Bar Executive Director Janet K. Welch was also in attendance. All gathered to celebrate our Chapter’s 50th Anniversary, to pay tribute to and mingle with the judicial officers, to conduct some business, and to enjoy the

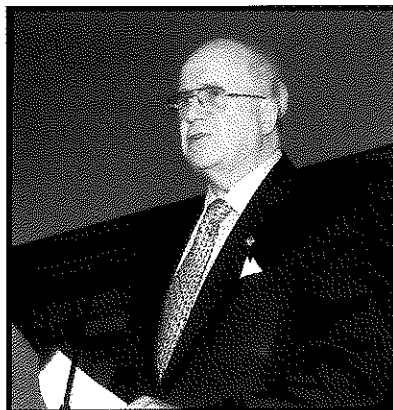


Past Presidents attending the Annual Dinner: Richard A Tarnas, Christine Dowhan-Bailey, Hon. Fred M. Mester, Brian D. Figot, Grant P. Gilezan, Dennis J. Clark, Wallace D. Riley, Hon. Ralph B. Guy, Jr., John P. Mayer, Alan C. Harnisch, Thomas W. Cranmer, Joseph F. Dillon, Charles R. Rutherford, Russell M. Paquette, Daniel P. Malone, John R. Runyan, Jr., Hon. Virginia M. Morgan, Lawrence G. Campbell, Michael C. Leibson, Richard A. Rossman, and Edward M. Kronk.

camaraderie of fellow FBA members.

Chief Judge Bernard A. Friedman administered the oath to new officers – Hon. Mark A. Goldsmith, President; Barbara L. McQuade, President-Elect; Elisa M. Angeli, Vice President; Barbara J. Rom, Secretary; Laurie J. Michelson, Treasurer; and Michael J. Riordan, Program Chair.

As his first official act, President Goldsmith acknowledged the dedication and leadership of outgoing President Grant Gilezan. He then introduced Charles R. Rutherford and Brian D. Figot, who provided historical remembrances from our Chapter's earlier days. The following past presidents were then introduced and proceeded to the Pontchartrain Room for their group photograph (and some spontaneous singing): Richard T. Tarnas, Christine M. Dowhan-Bailey, Hon. Fred M. Mester, Brian D. Figot, Grant P. Gilezan, Dennis J. Clark, Wallace D. Riley, Hon.

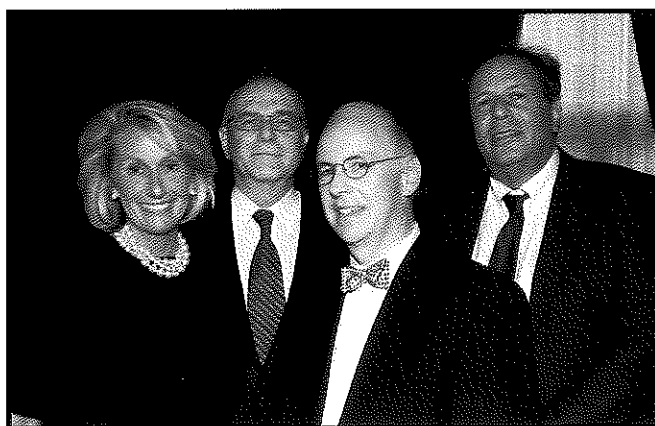


Charlie Rutherford at the Annual Dinner.

Ralph B. Guy, Jr., John P. Mayer, Alan C. Harnisch, Thomas M. Cranmer, Joseph F. Dillon, Charlie R. Rutherford, Russell M. Paquette, Daniel P. Malone, John R. Runyan, Jr., Hon. Virginia M. Morgan, Lawrence G. Campbell, Michael C. Leibson, Richard A. Rossman, and Edward M. Kronk.

The evening concluded with a performance by our legal community's talented musical parody troupe, A (Habeas) Chorus Line, consisting of Brian Figot, Sara Fischer, Justin Klimko, Joseph LaBella, Michael Leibson, Mark Lezotte, James Robb, Angela Williams, and Judith Zorn.

The Chapter thanks its sixteen sponsor firms for the 28th Annual Dinner. Thanks in large part to these sponsors, our Chapter is once again able to contribute several thousand dollars to the Federal Bar Foundation. This year's sponsors were:



Oakland County Circuit Judges Wendy Potts, Fred Mester, Mark Goldsmith and Ed Sosnick.

(continued page 6)

Annual Dinner *(from page 5)*

Barris Sott Denn & Driker PLLC
Bodman LLP
Brooks Kushman PC
Butzel Long PLC
Charles Taunt & Associates PLLC
Clark Hill PLC
Dickinson Wright PLLC
Dykema Gossett, PLLC
Foley & Lardner LLP
Harness, Dickey & Pierce PLC
Honigman Miller Schwartz and Cohn LLP
Howard & Howard Attorneys
Kitch Drutchas Wagner Valitutti & Sherbrook
Miller Canfield Paddock and Stone PLC
Pepper Hamilton LLP
Rader, Fishman & Grauer PLLC

We also thank Honigman Miller for providing the invitations and programs for the Annual Dinner and the Chairs, Theresa Serra, Cameron Evans, and Susan Evans, for their dedication in making this 28th Annual Dinner and celebration of our Chapter's 50th year so memorable.

Recent Targets on the IP Radar Screen

By William G. Abbatt*

Two targets recently popped up on the IP radar screen: (1) a Pricewaterhouse Coopers ("PWC") survey of federal district court IP cases; and (2) the United States Supreme Court's decision in *KSR Intern. Co. v. Teleflex Inc.*, 127 S.Ct. 1727 (2007) (Kennedy, J.), a case which originated in this district.

The PWC Survey -- PricewaterhouseCoopers recently studied damages awards in patent and trademark cases. Of the 2193 federal district court cases studied, 1367 were patent cases, 797 were trademark cases, and 29 cases included both patent and trademark issues. Of the 350 Court of Appeals for the Federal Circuit cases considered, 273 were patent cases, 70 were trademark cases, and 7 cases included both issues.

The survey considered twenty-five filed in the Eastern District of Michigan that were decided between 1996-2006. Seventeen were decided on summary judgment, and 8 were tried. Plaintiff won 3 times, and lost 22 times (12%). How these cases fared on appeal was not reported.

Concluding that the lowest win rate nationwide for plaintiffs occurred in the Eastern District of Michigan, the

study noted that the Western District of Wisconsin was the most favorably disposed to plaintiffs, with a win rate of 63% overall. Interestingly, that court is one of the jurisdictions that has adopted patent rules for litigation. Others include California, Texas, Georgia and Pennsylvania.

The survey observed that "carefully choosing the right . . . venue . . . has never been more important to achieving success in IP litigation." A copy of the report can be obtained from Kathryn Oliver. Her e-mail address is kathryn.oliver@us.pwc.com.

KSR v. Teleflex -- Imagine that you drive a car and that you are short in stature. Depending on the car, an accelerator pedal assembly may be available that includes an adjustment apparatus which allows the position of the pedal arm and/or a pedal pad to be moved upwardly so that it can be situated closer to you. As technology advances, an electronic throttle control assembly may replace traditional mechanical linkages between the pedal arm and the engine throttle. Problem solution assumes problem recognition. As an astute inventor, you realize that when a vehicle control pedal assembly includes an adjustment apparatus and an electronic throttle control, the pedal assembly can be quite complex. Such pedal assemblies can be expensive, time-consuming to assemble, and require a significant amount of packaging space. You ask yourself -- wouldn't it be nice to simplify things?

So you invent a vehicle control pedal assembly that is less expensive, uses fewer parts, and is easier to package within the vehicle. Your solution has an electronic throttle control that is responsive to a pivot for providing a signal corresponding to the pedal arm position as the pedal arm pivots about the pivot axis. You file a patent application. The patent examiner considers prior art that includes a sliding mechanism where both the pedal and the pivot point are adjusted. He allows your application to issue as a patent because your claims include a limitation: a fixed pivot position, which distinguishes your design from the prior art. Your patent issues. Your role in this scenario is akin to inventor Engelgau, who assigned his patent, U.S. Patent No. 6,237,565 to Teleflex.

General Motors (GMC) chose KSR to supply adjustable pedal systems for trucks using computer-controlled throttles. After learning of KSR's design, Teleflex sued for infringement, asserting that KSR's pedal system infringed the '565 patent. But KSR's view was that the patent was invalid under 35 U.S.C. § 103 of the Patent Act, which forbids issuance of a patent when ". . . the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art." In other words, Teleflex argued that the invention was obvious.