

# Much Ado About Cullen: *Twombly* Not Arizona Law... For Now

As I walked out of a Civil Litigation Rules and Case Law Update seminar at the 2008 State Bar Convention, an Arizona Supreme Court Justice asked me what topics had sparked the most interest and discussion. I replied that quite a few experienced litigators expressed uncertainty as to the controlling pleading standard in Arizona in light of the United States Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*<sup>1</sup> and the Arizona Court of Appeals' citation to *Twombly* in *Cullen v. Koty-Leavitt Insurance Agency, Inc.*<sup>2</sup> ("Cullen I").

Understandably, the Justice offered no opinion or comment. Mindful that the Arizona Supreme Court had granted review of *Cullen I*, I changed the subject. Just a few weeks later, the Court set the record straight on the present applicability of *Twombly* in Arizona with its decision in *Cullen v. Auto-Owners Insurance Co.*<sup>3</sup> ("Cullen II").

## Arizona and (Pre-*Twombly*) Federal Pleading Standards<sup>4</sup>

Challenges to the sufficiency of claims for relief are commonplace and, to most seasoned litigators, expected chapters in the lives of cases. Arizona's pleading standards are grounded in the Arizona Rules of Civil Procedure and the interpretation and application of the rules by our courts over many years. By reference to these standards, we attempt to craft complaints that will sustain attack by motion to dismiss for failure to

state a claim or, if defending a claim, we evaluate the likelihood that such a motion might succeed. Given the potentially case-dispositive nature of motions to dismiss, understanding the analysis our courts employ in deciding them is of paramount importance to litigators.

Last year, the United States Supreme Court's decision in *Twombly* and the Arizona Court of Appeals' treatment of *Twombly* in *Cullen I* sparked great interest. In some quarters, it also raised significant concern that the proper analysis to be conducted by the courts of Arizona in evaluating the sufficiency of claims for relief had dramatically changed.

What prompted this reaction? The starting place is identification of the standards by which our state courts have been directed to measure claims for relief when attacked by motion to dismiss.

Rule 8, adopted in 1956, lists the minimum requirements for a claim for relief as (1) a statement of the basis for the court's jurisdiction (unless previously established in a matter); (2) "a short and plain statement of the claim showing that the pleader is entitled to relief"; and (3) a request for judgment for the relief sought.<sup>5</sup> Rule 12(b)(6), in turn, furnishes the procedural mechanism by which to challenge the sufficiency of the statement of a claim. As observed by the Arizona Supreme Court in *Mackey v. Spangler* the same year as adoption of the Arizona Rules of Civil Procedure:

[T]he test as to whether a complaint is sufficient to withstand a motion to dismiss is whether enough is stated therein which, if true, would entitle plaintiff to some kind of relief on some theory. The court should not grant a motion to dismiss unless it appears certain that the plaintiff would be entitled to no relief under any state of facts which is

susceptible of proof under the claim as stated.<sup>6</sup>

The Court further identified the rule's purpose as avoidance of "technicalities" and giving "the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved."<sup>7</sup>

Prior to *Twombly*, the bulk of decisions interpreting the federal counterpart to Rule 12(b)(6) relied on the oft-repeated *Conley v. Gibson* standard that "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."<sup>8</sup>

## Along Came *Twombly*... and Its Aftermath

As many fine legal minds have expounded on the meaning of *Twombly*,<sup>9</sup> I will not do so here. However, a cursory understanding of *Twombly* is necessary to appreciate the context in which *Cullen I* and *Cullen II* arose, and to explain the public reaction.

By its 2007 decision in *Twombly*, a case involving federal antitrust law, the United States Supreme Court dismissed the *Conley* "no set of facts" standard as "an incomplete, negative gloss on an accepted pleading standard."<sup>10</sup> Rather, the Court held that a complaint must set forth such facts as render the plaintiff's claim "plausible," as opposed to merely "conceivable," and "raise a right to relief above the speculative level"—a more exacting standard by which claims for relief are to be measured.<sup>11</sup>

*Twombly* generated much discussion among those of us who (for better or worse) find ourselves thinking about such things as the United States Supreme Court's rejection of a 50-year-old federal pleading standard. Conventional speculation seemed to focus on the notion that, because *Twombly* involved antitrust law, the

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“plausible” standard announced might fairly be read as limited in its application to the antitrust context. Caution was urged; a wait-and-see approach was adopted.

Then, in October 2007, Division Two of the Arizona Court of Appeals issued its decision in *Cullen I*, a case in no manner involving antitrust claims.<sup>12</sup> The plaintiff, Cullen, argued that the trial court erred in granting a motion to dismiss his claims for breach of (insurance) contract and bad faith denial of claim predicated upon the policy’s failure, on its face, to extend coverage to Cullen.<sup>13</sup> Citing to *Phelps Dodge Corp. v. El Paso Corp.*,<sup>14</sup> a Court of Appeals opinion, Cullen asserted that dismissal could only be affirmed “if there are no possible facts that would allow” his claim, even if not pled.<sup>15</sup> The Court of Appeals corrected him, noting that *Phelps* actually quoted the relevant standard as requiring dismissal to be sustained “only if the plaintiffs ‘could not be entitled to relief under any facts susceptible of proof under the claims stated.’”<sup>16</sup> Affirming dismissal, the court stated that “recent standards articulated” by the Arizona Supreme Court prohibited a trial court from specu-

lating about “hypothetical facts that might entitle the plaintiff to relief.”<sup>17</sup>

But the Court of Appeals went further. Observing the persuasive weight accorded to federal court interpretations of the federal analogues to the Arizona Rules of Civil Procedure, the court devoted three paragraphs of its decision to a discussion of *Twombly*<sup>18</sup>; remarked upon the United States Supreme Court’s rejection of the *Conley* “no set of facts” formulation and holding that a complaint’s factual allegations “must be enough to raise a right to relief above the speculative level”<sup>19</sup>; and arguably measured the sufficiency of Cullen’s complaint by reference to *Twombly*.<sup>20</sup>

More questions were raised than answered. Was *Twombly* now the law in Arizona? Did the Arizona Court of Appeals intend to signal a departure from the accepted Arizona pleading standard by citing to, discussing and perhaps relying on *Twombly* in *Cullen I*? How different was the new *Twombly* “plausibility” standard from the standard previously announced by the Arizona courts?

Uncertainty was the order of the day.

## The Arizona Supreme Court Rules

On July 25, 2008, the Arizona Supreme Court issued its decision in *Cullen II*. The Court approved of the standard employed by the Court of Appeals in *Cullen I* for evaluating motions to dismiss, namely that “dismissal is appropriate only if a plaintiff is not entitled to relief, as a matter of law, on any interpretation of the facts alleged in the plaintiff’s complaint.”<sup>21</sup> The Supreme Court went on to catalog various principles governing application of this standard and disposition of Rule 12(b)(6) motions to dismiss for failure to state a claim.

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First, the Court stated that the Court of Appeals had correctly observed its admonition against speculation about “hypothetical facts that might entitle the plaintiff to relief” by lower courts.<sup>22</sup> Second, a court faced with a motion to dismiss must limit its consideration to the pleading and its well-pled factual allegations.<sup>23</sup> Third, the court must “assume the truth of all well-pled factual allegations and indulge all reasonable inferences therefrom.”<sup>24</sup>

The standard recited by the Supreme Court in *Cullen II* closely resembles the *Mackey* formulation, as well as those quoted by the Court of Appeals in *Cullen I*, including that dismissal under Rule 12(b)(6) will be upheld “only if the plaintiffs would not be entitled to relief under any facts susceptible of proof in the statement of the claim”<sup>25</sup> and affirmed “only if, as a matter of law, the plaintiff would not be entitled to relief on any interpretation of those facts” alleged in the complaint and assumed to be true for Rule 12(b)(6) analysis purposes.<sup>26</sup>

The Arizona Supreme Court noted that this standard (and, implicitly, the principles governing application of the controlling formulation) reflected a divergence between Arizona and federal procedural law, with federal litigants governed by one “broader” than that employed in the Arizona courts.<sup>27</sup> Thus, although Arizona courts are limited to consideration of the well-pled facts contained in a pleading and the reasonable inferences that might be drawn from such facts, prior to *Twombly* federal courts were seemingly at liberty to consider facts not pled by the claimant, but that otherwise might be proven in support of a claim.<sup>28</sup>

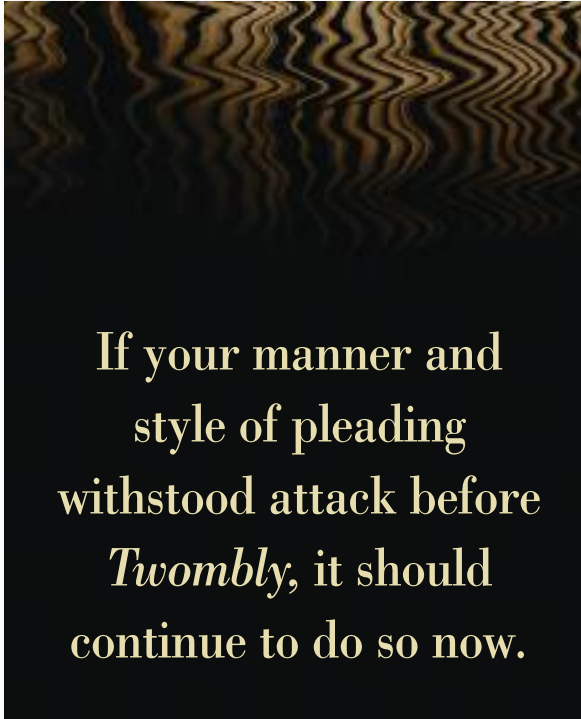
Moreover, the Arizona Supreme Court observed that its prior interpretation of an Arizona Rule of Civil Procedure may be modified only in two ways: through subsequent interpretation by that Court or successful rule petition.<sup>29</sup> As Rule 8 had been

the subject of neither in light of *Twombly*’s announcement of the “plausibility” standard and rejection of *Conley*, the Court held that the pre-*Twombly* Arizona pleading standard quoted above continues to control in our state courts.<sup>30</sup> In disposition of the case before it, the Court concluded that the Arizona Court of Appeals neither modified nor abandoned Arizona’s Rule 8 notice pleading standard by its citation to *Twombly*, and affirmed *Cullen I*.<sup>31</sup> So as to eliminate the confusion caused by *Cullen I*, however, the Arizona Supreme Court further vacated the Arizona Court of Appeals’ discussion of *Twombly*.<sup>32</sup>

standard.<sup>34</sup> The *Mackey* Court itself cited, in part, to Moore’s Federal Practice in support of the standard it announced.<sup>35</sup> Indeed, in its 1961 decision in *Long v. Arizona Portland Cement Co.*,<sup>36</sup> another case relied on by the *Cullen II* Court,<sup>37</sup> the Arizona Supreme Court cited directly to *Conley* in support of this formulation.<sup>38</sup> Given this facial resemblance, those (apparently rogue) Arizona Court of Appeals decisions that expressly applied the *Conley* test in evaluating trial court treatment of motions to dismiss,<sup>39</sup> and the persuasive authority in Arizona of federal decisions interpreting federal counterparts to our Rules,<sup>40</sup> it is hardly surprising that the Arizona Court of Appeals treated and (arguably) applied the *Twombly* standard in *Cullen I*.<sup>41</sup>

Second, apart from the Arizona Supreme Court’s observation in *Cullen II* that the pleading standard in Arizona is more restrictive than that set forth in *Conley*, is there any precedential, practical manner in which to measure or describe the difference? Perhaps.

The *Conley* standard refers to a pleader being able to “prove no set of facts in support of his claim that would entitle him to relief.”<sup>42</sup> By contrast, the Arizona standard speaks in terms of certainty that the “plaintiff would be entitled to no relief under any set of facts susceptible of proof under the claim as stated.”<sup>43</sup> Those last two words, “as stated,” would seem to support the distinction drawn by the Arizona Supreme Court in *Cullen II* between the Arizona standard, which restricts a court to consideration of the well-pled



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### Questions Remain

Several questions should be asked in the wake of *Cullen II*.

First, how did so much confusion come about? After all, in *Cullen II*, the Arizona Supreme Court simply told us that the standard applicable in Arizona prior to *Twombly* continues to control.

To begin with, the language used in *Mackey* and those decisions quoted in *Cullen I*<sup>33</sup> is very similar to the now-rejected *Conley*

facts and reasonable inferences drawn therefrom, and the pre-*Twombly* federal standard, which seemingly permitted a court to speculate about facts that might be proven in support of a claim, whether pled or not.

The *Cullen II* Court declined to compare and contrast Arizona’s standard with that announced in *Twombly*,<sup>44</sup> instead indicating that the Arizona test is less broad than *Conley*’s and hasn’t been changed by *Twombly*.<sup>45</sup> Though the Supreme Court



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identified the two exclusive means by which its prior interpretation of our Rules can be revised, the relevant federal and Arizona rules are identical,<sup>46</sup> presumably leaving only the Court's future interpretation to guide us with respect to how Arizona's standard compares to *Twombly*'s.

It has been argued that review of a decision of the Court of Appeals affirming the dismissal of claims by the trial court and discussing *Twombly* at length "created a unique opportunity" for the Supreme Court to weigh in on this question,<sup>47</sup> and the Court has been criticized for "miss[ing] an opportunity" and "compound[ing] the confusion."<sup>48</sup> Given the lack of any indication that Arizona's standard does not function as intended, however, the Supreme Court may have purposefully determined not to replace it with *Twombly*'s (or even compare the two) at the present time so as to afford the Court a sufficient opportunity to observe and consider how the *Twombly* standard develops through subsequent federal court application and interpretation.

### Practical Implications

What specific guidance did the Arizona Supreme Court provide in *Cullen II* as to

how a complaint should be pled to withstand attack by motion to dismiss in the Arizona courts?


The Supreme Court expressly reaffirmed that lower courts cannot speculate about hypothetical facts that might give rise to entitlement to relief,<sup>49</sup> and that, while not invalidating a complaint, "mere conclusory statements are insufficient to state a claim."<sup>50</sup> Thus, ignoring distinctions between fact and notice pleading, the reasoned answer is that the drafting and substance of a complaint should be fact-intensive and element-driven. By this, I mean that each essential element to each claim should be supported by a well-grounded, non-conclusory factual allegation, if possible.

Though not a new or revolutionary idea, this can be problematic conceptually and in practice.

In his article on *Ashcroft v. Iqbal*, Andy Halaby explores the difficulty in attempting to distinguish between "mere conclusions" and "factual allegations." Furthermore, pleading factual substance is often hindered by the limited information a plaintiff possesses prior to discovery or the nebulous nature of necessary elements to certain

types of claims, each of which may give rise to a need to plead upon information and belief.

Consider, for example, trying to plead as a fact that an entity was undercapitalized for alter ego purposes or that a debtor made a fraudulent transfer with actual intent to hinder, delay and defraud a creditor under A.R.S. § 44-1004(A)(1). Although the Supreme Court didn't tackle this issue in *Cullen II*, the analysis it approved suggests that, when faced with these circumstances, a pleader should ensure that its allegations made upon information and belief are supported by such other non-conclusory factual matter as required to make them "reasonable inferences" in the view of the court. In other words, the element that defies being pled as a fact must be grounded to such related and supportive factual allegations as will render the former reasonably inferred from the latter.

The simple answer is that if your manner and style of pleading withstood attack by motion to dismiss before *Twombly* and *Cullen I*, it should continue to do so after *Cullen II*. Nothing has changed in Arizona ... at least for now. 

## endnotes

1. 550 U.S. 544 (2007).
2. 168 P.3d 917 (Ariz. Ct. App. 2007).
3. 189 P.3d 344 (Ariz. 2008).
4. The following analysis presupposes that the claim pled is not of a type that is subject to the heightened particularity requirements of Rule 9(b).
5. Rule 8(a), ARIZ.R.CIV.P.
6. 301 P.2d 1026, 1027 (Ariz. 1956).
7. *Id.* at 1027-28.
8. 355 U.S. 41, 45-46 (1957).
9. See Andy Halaby's companion piece in this issue of the ARIZONA ATTORNEY, as well as those cited by Andy in end-note 12 of his article.
10. *Twombly*, 550 U.S. at 563.
11. See *id.* at 555-56, 570.
12. See *Cullen I*, 168 P.3d at 920-21.
13. *Id.*
14. 142 P.3d 708 (Ariz. Ct. App. 2006).
15. *Cullen I*, 168 P.3d at 922.
16. *Id.* (citing *Phelps Dodge, quoting Donnelly Constr. Co. v. Oberg/Hunt/Gilleland*, 677 P.2d 1292, 1294 (Ariz. 1984)).
17. *Cullen I*, 168 P.3d at 923.
18. *Id.*
19. *Id.*
20. *Id.* at 923-24; see also Justice Andrew Hurwitz's dissent in *Cullen II*.
21. *Cullen II*, 189 P.3d at 346 (citing *Cullen I*, 168 P.3d at 923).
22. *Id.* at 345-46 (citing *Cullen I*, 168 P.3d at 923).
23. *Id.* at 346 (citing *Dressler v. Morrison*, 130 P.3d 978, 980 (Ariz. 2006), and *Long v. Ariz. Portland Cement Co.*, 362 P.2d 741, 721 (Ariz. 1961)).
24. *Id.* (citing *Doe ex rel. Doe v. State*, 24 P.3d 1269, 1270 (Ariz. 2001), and *Long*, 362 P.2d at 742).
25. *Cullen I*, 168 P.3d at 923 (citing *Mohave Disposal, Inc. v. City of Kingman*, 922 P.2d 308, 311 (Ariz. 1996)).
26. *Id.* (citing *Doe*, 24 P.3d at 1270).
27. *Cullen II*, 189 P.3d at 346.
28. See *id.* at 346-47.
29. *Id.* at 347.
30. *Id.*
31. *Id.* at 347-48.
32. *Id.* at 348.
33. See *Cullen I*, 168 P.3d at 923 (citing *Mohave Disposal*, 922 P.2d at 311, and *Doe*, 24 P.3d at 1270).
34. Cf. *Conley*, 355 U.S. at 45-46, with *Mackey*, 301 P.2d at 1027, *Mohave Disposal*, 922 P.2d at 311, and *Doe*, 24 P.3d at 1270.
35. See *Mackey*, 301 P.2d at 1027 (citing 2 MOORE'S FEDERAL PRACTICE, ¶ 8.13, and 6 MOORE'S FEDERAL PRACTICE, ¶ 54.60).
36. 362 P.2d 741 (Ariz. 1961).
37. *Cullen II*, 189 P.3d at 346 (citing *Long*, 362 P.2d 741).
38. *Long*, 362 P.2d at 742 (citing *Conley*, 355 U.S. 41).
39. E.g., *Newman v. Maricopa County*, 808 P.2d 1253, 1255 (Ariz. Ct. App. 1991).
40. See *Edwards v. Young*, 486 P.2d 181, 192 (Ariz. 1971).
41. Apparently, those confused by the proper controlling standard in Arizona included United States Supreme Court Justice John Paul Stevens who, in his dissent in *Twombly*, referred to Arizona as a jurisdiction adhering to the *Conley* "no set of facts" standard. See *Twombly*, 550 U.S. at 578 n.5 (Stevens, J., dissenting).
42. See *Conley*, 355 U.S. at 45-46 (emphasis added).
43. *Mackey*, 301 P.2d at 1027 (emphasis added). See also *Mohave Disposal*, 922 P.2d at 311 ("[U]nder any facts susceptible of proof in the statement of the claim.") (emphasis added); *Doe*, 24 P.3d at 1270 ("[W]e assume as true the facts alleged in the complaint and affirm the dismissal only if, as a matter of law, the plaintiff would not be entitled to relief on any interpretation of those facts.") (emphasis added).
44. See Brooke T. Mickelson, Case Note, *Cullen v. Auto-Owners Insurance Co.: Evaluating the Sufficiency of a Complaint Under Arizona's Rule 8 Notice-Pleading Standard in Light of Bell Atlantic Corp. v. Twombly*, 50 ARIZ. L. REV. 1215 (2008), an examination of *Cullen II* and some of its possible ramifications.
45. See *Cullen II*, 189 P.3d at 346-47.
46. Cf. Rule 8(a)(2), FED.R.CIV.P., with Rule 8(a)(2), ARIZ.R.CIV.P.
47. See Mickelson, *supra* note 44, at 1221.
48. *Id.* at 1226.
49. *Cullen II*, 189 P.3d at 345-46 (citing *Cullen I*, 168 P.3d at 923).
50. *Id.* at 346.