BY BRIAN J. POLLOCK

# SENSIBLE PLEADING REQUIREMENTS

## Arizona Courts Should Adopt *Twombly*

In *Bell Atlantic Corp. v. Twombly*,[1] the U.S. Supreme Court clarified the pleading standards under Federal Rules of Civil Procedure 8(a) and 12(b)(6), announcing the sensible rule that one must allege enough facts to plausibly suggest the existence of the claim asserted. Arizona courts should follow the Supreme Court's lead and do the same.

In interpreting an Arizona Rule of Civil Procedure, Arizona courts give great weight to federal court interpretations of the corresponding Federal Rule.[2] Arizona courts follow U.S. Supreme Court decisions on such procedural issues "absent serious disagreement with that Court's reasoning," the rationale being that "procedural uniformity is a desirable and important objective."[3] Without such uniformity, litigants would be encouraged to shop for the more procedurally friendly forum.

Arizona's courts should follow this principle of procedural uniformity and adopt the *Twombly* pleading standard. The Federal and Arizona versions of Rule 8 are identical, with both requiring that a complaint contain "[a] short and plain statement of the claim showing that the pleader is entitled to relief."[4] The Arizona Supreme Court recently followed federal court precedent in interpreting this precise provision of Rule 8.[5] And Arizona's courts have in the past shown agreement with the pleading principles of *Twombly*.

### Arizona Courts Previously in Agreement With *Twombly*

Like federal courts leading up to *Twombly*, Arizona courts have been inconsistent in expressing the pleading requirements to get beyond a motion to dismiss—for example, in one case holding insufficient an allegation that a defamatory statement had been made because the allegation was conclusory, whereas in another holding sufficient an allegation that the plaintiffs were "qualified electors" because one could infer from that conclusory allegation a claim that all the statutory requirements for being a qualified elector had been met.[6] Although not always consistent, Arizona courts have voiced many of the same principles as *Twombly*. For example:

- The Court in *Twombly* said a pleading cannot survive a motion to dismiss merely because it leaves "open the possibility that a plaintiff might later establish some 'set of [undisclosed facts]' to support recovery."[7] The Arizona Court of Appeals has similarly stated, "In determining whether a complaint states facts upon which relief may be granted, the court considers only the facts alleged."[8]
- The U.S. Supreme Court held mere legal "conclusions" and "labels," or a "formulaic recitation of the elements of a cause of action," insufficient to withstand a motion to dismiss.[9] Likewise, the Arizona Court of Appeals has held that while "the well-pleaded facts alleged in the complaint [are accepted] as true" for purposes of weighing dismissal at the pleading stage, courts "do not accept as true allegations consisting of conclusions of law, inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts."[10]
- The U.S. Supreme Court held that Rule 8(a)(2) does not dispense with the need to plead facts.[11] Arizona courts have held that a complaint must "set[] forth facts showing plaintiff is entitled to relief."[12]
- Most significant, the Court in *Twombly* ruled that a complaint's allegations must plausibly suggest, not merely be consistent with, the necessary elements of the claim asserted.[13] Although Arizona courts have never adopted this precise requirement, their oft-repeated standard for weighing motions to dismiss is whether the plaintiff would be entitled to relief under any state of facts "susceptible of proof" under the claim stated.[14] It is difficult to see much, if any, distinction between requiring susceptibility of proof of the claim asserted and requiring plausible suggestion of the claim, especially given the rule in Arizona that a plaintiff is only given the benefit of inferences that the complaint can "reasonably support."[15]

Given these existing pleading principles in Arizona, there is no compelling reason for Arizona courts to reject *Twombly*. Like the U.S. Supreme Court, Arizona courts should settle on a more consistent standard for analyzing cases at the pleading stage.

### Arizona and U.S. Supreme Court Standards for Dispositive Motions

This is not the first time Arizona courts have been presented with a change in direction from the U.S. Supreme Court in

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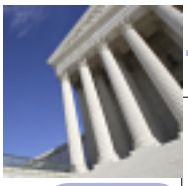



## THE FACT OF THE MATTER

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weighing dispositive motions. In a trilogy of decisions in 1986, the U.S. Supreme Court liberalized the standards for granting summary judgment motions.[16] Prior to the trilogy, the Court had sent mixed messages about the availability of summary judgment. Courts viewed the trilogy as signaling a call for a more favorable judicial attitude toward summary judgment.[17]

Four years later, in *Orme School v. Reeves*,[18] the Arizona Supreme Court reconsidered its summary judgment standards in light of the trilogy and adopted the U.S. Supreme Court's standards. Before *Orme School*, for example, Arizona courts applied the stringent test that summary judgment was inappropriate if even the "slightest doubt" existed as to the facts.[19] Following *Anderson v. Liberty Lobby*, the court rejected that standard and adopted the same standard used in weighing motions for directed verdicts, namely whether a reasonable trier of fact could rule for the non-moving party given the factual record.[20]

### Arizona No Haven for Speculative Lawsuits

As the Arizona Supreme Court did in *Orme School*, Arizona courts should follow the U.S. Supreme Court's lead. Aside from the logic behind requiring a plaintiff to allege enough facts to show a plausible chance of proving the claim asserted, if *Twombly* is not adopted, plaintiffs will be encouraged to file suit in Arizona[21] and to craft their cases so as to avoid federal court. Making matters worse, the plaintiffs most encouraged to so forum shop would be those whose claims are unsupported by known facts. Arizona's courts should not open themselves up as a sanctuary for such speculative lawsuits.[22] AZ AT

## endnotes

1. ___ U.S. ___, 127 S. Ct. 1955 (2007).
2. *See, e.g.*, *Edwards v. Young*, 486 P.2d 181, 182 (Ariz. 1971).
3. *U.S. West Communications, Inc. v. Arizona Dep't of Revenue*, 14 P.3d 292, 295 (Ariz. 2000).
4. FED. R. CIV. P. 8(a); ARIZ.R.CIV.P. 8(a)(2).
5. *Anserv Ins. Servs., Inc. v. Albrecht*, 960 P.2d 1159, 1160-61 (Ariz. 1998) (following federal court precedent in weighing whether a complaint violated the "short and plain statement" requirement).
6. *Cf. Aldabbagh v. Dep't of Liquor Licenses*, 783 P.2d 1207, 1213 (Ariz. Ct. App. 1989), *with Hancock v. Bisnar*, 132 P.3d 283, 287 (Ariz. 2006).
7. *Twombly*, 127 S. Ct. at 1968.
8. *Don Kelland Materials, Inc. v. Langel*, 560 P.2d 1281, 1282 (Ariz. Ct. App. 1977).
9. *Twombly*, 127 S. Ct. at 1964-65.
10. *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1259 (Ariz. Ct. App. 2005).
11. *Twombly*, 127 S. Ct. at 1965 n.3.
12. *Bates v. Bates*, 400 P.2d 593, 596 (Ariz. Ct. App. 1965).
13. *Twombly*, 127 S. Ct. at 1966.
14. *E.g.*, *State ex rel. Corbin v. Pickrell*, 667 P.2d 1304, 1309 (Ariz. 1983).
15. *Luchanski v. Congrove*, 971 P.2d 636, 639 (Ariz. Ct. App. 1998).
16. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).
17. 11 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE ¶ 56.03[1] (3d ed. 1999).
18. 802 P.2d 1000 (Ariz. 1990).
19. *Id.* at 1004 (citing cases).
20. *Id.* 1008.
21. *See Desimone v. Barrows*, ___ A.2d ____, 2007 WL 1670255 *14 (Del. Ch. June 7, 2007) (agreeing with plausible suggestion standard of *Twombly* under Delaware law).
22. *Cf. Orme School*, 802 P.2d at 1004 (noting the explosion of litigation, including many meritless cases, facing the state's trial judges).