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*

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INTRODUCTION

In *Cullen v. Auto-Owners Insurance Co.*,[1] the Arizona Supreme Court granted review in part to determine whether it should reinterpret Rule 8 of the Arizona Rules of Civil Procedure to abandon notice pleading in favor of the stricter standard articulated by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*[2] requiring "plausible" fact-specific pleading.[3] In reaffirming Arizona's allegiance to notice pleading, however, the court ultimately did not address whether the *Twombly* standard ought to be adopted.[4] Rather, the Arizona Supreme Court simply held that because a rule may be modified by one of two methods only—a Rule 28 petition or judicial interpretation, the authority of which constitutionally vests exclusively in the supreme court—the court of appeals had no authority to reinterpret Rule 8.[5] In doing so, the court reasserted the long-standing principle that Arizona is a notice-pleading state,[6] but declined to clarify the ambiguity that continues to plague the Rule 8 standard.

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1. 189 P.3d 344 (2008).
2. 127 S. Ct. 1955 (2007).
3. *Cullen*, 189 P.3d at 346. The court limited its review to two specific issues: "(1) Does this Court have exclusive authority to change the notice pleading standard under Rule 8?; and (2) Should Rule 8 be re-interpreted to modify the notice pleading standard established by this Court in favor of a more fact-specific pleading standard?" *Id.*
4. *See id.* at 347 (stating that the court "has not" revised Rule 8 in light of *Twombly*, but not addressing whether the court *should* do so).
5. *Id.* The Arizona Supreme Court upheld the decision of the court of appeals on the grounds that the court of appeals had used the proper standard and all discussion of *Twombly* was dicta. *Id.*
6. *Id.*

I. FACTS AND PROCEDURAL HISTORY

In February 2004, Michael Cullen was injured while riding as a passenger in a car owned and operated by his cousin, Kyle Coughanour.[7] Coughanor's insurance company later issued benefits to Cullen, up to the policy's liability limits.[8] Because Cullen's injuries allegedly exceeded the liability limits on Coughanor's insurance policy, Cullen filed a claim for underinsured motorist (UIM) benefits with Auto-Owners Insurance Company under a different vehicle: a Dodge Caravan owned and insured by Sierrita Mining and Ranch Company.[9] Sierrita is a "self-contained community of persons who all refer to themselves as family members, practice one faith together, and conduct themselves as belonging to one family unit."[10] While Cullen did not have an individual insurance policy with Auto-Owners, Sierrita provided the Dodge Caravan to Cullen's mother, Jana Coronado, for exclusive use by Coronado and her family.[11] The Auto-Owners insurance policy on the Caravan listed only Sierrita as the insured, and in no way referenced Coronado or Cullen.[12] Auto-Owners denied Cullen's claim for UIM benefits.[13]

Following the denial of Cullen's claim, Cullen sued Auto-Owners for breach of contract and bad faith denial of insurance.[14] Auto-Owners moved to dismiss Cullen's complaint for failure to state a claim upon which relief can be granted, pursuant to Arizona Rule of Civil Procedure 12(b)(6).[15] The trial court granted the motion to dismiss, holding that "[t]he facts presented by Plaintiff do not lend themselves to a finding of coverage under the Sierrita Mining insurance contract with Auto Owners."[16]

On appeal to the Arizona Court of Appeals, Cullen submitted that the trial court improperly granted Auto-Owners' motion to dismiss under Arizona's standard for Rule 8 notice pleading.[17] Citing *Phelps Dodge Corp. v. El Paso Corp.*,[18] Cullen asserted that Rule 8 requires a court to deny a motion to dismiss unless there are "*no possible* facts" to support a plaintiff's claim, regardless of whether those facts were pled in the plaintiff's complaint.[19] In *Phelps Dodge*, the Arizona Court of Appeals, quoting the Arizona Supreme Court, had stated that Rule 8 permits dismissal only if a plaintiff "could not be entitled to relief under

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7. Appellants' Opening Brief at 3, Cullen v. Koty–Leavitt Ins. Agency, Inc., 168 P.3d 917 (Ariz. Ct. App. 2007) (No. 2 CA-CV 2007-0020), 2007 WL 2817594 at *3.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. Cullen v. Koty–Leavitt Ins. Agency, Inc., 168 P.3d 917, 920 (Ariz. Ct. App. 2007).
15. *Id.* at 512.
16. Appellants' Opening Brief at 3, Cullen v. Koty–Leavitt Ins. Agency, Inc., 168 P.3d 917 (Ariz. Ct. App. 2007) (No. 2 CA-CV 2007-0020), 2007 WL 2817594 at *3.
17. *Koty–Leavitt*, 168 P.3d at 922.
18. 142 P.3d 708 (Ariz. Ct. App. 2006).
19. *Koty–Leavitt*, 168 P.3d at 922.

any facts susceptible of proof under the claims stated."[20] According to Cullen, this "any facts" language required a court to entertain hypothetical facts not pleaded.[21]

The court of appeals rejected Cullen's assertion.[22] In doing so, the court noted that while a number of Arizona cases had used the "*any* facts" language, which might suggest that considerations of hypothetical facts are permissible, recent Arizona Supreme Court cases suggested otherwise.[23] Those cases clarified that notice pleading in Arizona requires a court to consider only the facts that are well-pled in the plaintiff's complaint.[24] Thus, contrary to Cullen's formulation, Rule 8 does not permit a court to entertain hypothetical facts.[25] Rather, Rule 8 only permits a court to entertain facts actually pled and the reasonable inferences that may be drawn therefrom.[26]

In addition to extracting the most recent articulation of Rule 8's standard from recent Arizona Supreme Court cases, the court also discussed the U.S. Supreme Court's decision in *Bell Atlantic Co. v. Twombly*.[27] Noting that *Twombly* addressed a "similar question" to the one presented by Cullen, the court explained that federal courts had long used language similar to the "any facts" language utilized in *Phelps Dodge*, but that the *Twombly* Court rejected such an expansive reading of Rule 8 of the Federal Rules of Civil Procedure.[28]

Following the *Twombly* analysis, the court further noted that a reading of Arizona's Rule 8 that precludes a court from entertaining hypothetical facts is more consistent with the purpose of Rule 8.[29] Notably, Rule 8 serves to place one's opponent on fair notice of the nature and basis of the claims against him, but a complaint that fails to allege even basic facts cannot satisfy such notice.[30] Consequently, the court considered only those facts pled in Cullen's complaint to

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20. *Phelps Dodge*, 142 P.3d at 710 (emphasis added) (quoting Donnelly Const. Co. v. Oberg/Hunt/Gilleland, 677 P.2d 1292, 1294 (Ariz. 1984), *overruled on other grounds by* Gipson v. Kasey, 150 P.3d 228 (Ariz. 2007)).

21. *Koty–Leavitt*, 168 P.3d at 922.

22. *Id.*

23. *Id.*

24. *Id.* (citing Mohave Disposal, Inc. v. City of Kingman, 922 P.2d 308, 311 (Ariz. 1996) (stating that the Court would "uphold dismissal [for failure to state a claim] only if the plaintiffs would not be entitled to relief under any facts susceptible of proof *in the statement of the claim*" (emphasis added)); *see also* Dressler v. Morrison, 130 P.3d 978, 980 (Ariz. 2006) (quoting *Mohave Disposal*); Doe *ex rel.* Doe v. State, 24 P.3d 1269, 1270 (Ariz. 2001) ("In reviewing the trial court's decision to dismiss for failure to state a claim, we 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)).

25. *Koty–Leavitt*, 168 P.3d at 922.

26. *Id.*

27. *Id.* at 923.

28. *Id.*

29. *Id.* at 923–24.

30. *Id.*

determine whether Cullen had stated a claim upon which relief can be granted, and concluded that Cullen had not.[31]

Cullen petitioned the Arizona Supreme Court for review, arguing in part that the court of appeals reinterpreted notice pleading under Arizona's Rule 8 as indicated by the court of appeals' discussion of *Twombly*.[32] The Arizona Supreme Court accepted Cullen's petition for review, and ultimately affirmed the court of appeals' opinion, but vacated that portion of the opinion citing *Twombly*.[33]

II. BACKGROUND: *CONLEY*, *TWOMBLY*, AND *CULLEN*

Arizona's Rule 8, adopted in 1956,[34] provides in relevant part that a pleading shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[35] This language was adopted from Rule 8 of the Federal Rules of Civil Procedure and in fact precisely mirrors its federal counterpart.[36] The mirroring language, however, has not historically yielded mirroring interpretations.

The same year in which Arizona adopted Rule 8, the Arizona Supreme Court in *Mackey v. Spangler*[37] interpreted the standard embodied by the rule. The court determined that the sufficiency of a complaint to withstand a motion to dismiss turns on whether "enough is stated [in the complaint that], if true, would entitle [the plaintiff] to some kind of relief on some theory."[38] Only if it appeared 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" would dismissal of the plaintiff's complaint be proper.[39] By interpreting Rule 8 broadly, the *Mackey* court adopted a notice-pleading standard.[40] Detailed pleading of facts was not required.[41]

In 1957, the year following *Mackey*'s articulation of Arizona's Rule 8 notice-pleading standard, the U.S. Supreme Court in *Conley v. Gibson*[42]

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31. *Id.* at 924, 927.

32. Cullen v. Auto-Owners Ins. Co., 189 P.3d 344, 346 (Ariz. 2008). The case name at the Arizona Supreme Court differed from that at the court of appeals because Cullen and Coronado's original suit included a claim against Koty–Leavitt Insurance Agency for negligence, but the parties agreed to stay claims against Koty–Leavitt pending the outcome of Cullen's appeal. *Id.* at 345 n.1.

33. *Id.* at 348.

34. *See* Mackey v. Spangler, 301 P.2d 1026, 1027 (Ariz. 1956).

35. ARIZ. R. CIV. P. 8(a)(2). If a complaint fails to comply with Rule 8, the opposing party may move to dismiss for "failure to state a claim upon which relief can be granted." *Id.* 12(b)(6).

36. *Compare* ARIZ. R. CIV. P. 8(a)(2), *with* FED. R. CIV. P. 8(a)(2) ("A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.").

37. 301 P.2d 1026 (Ariz. 1956).

38. *Id.* at 1029.

39. *Id.*

40. *Id.* at 1027–28 ("The purpose of [Rule 8] is to avoid technicalities and give the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved.").

41. *Id.*

42. 355 U.S. 41 (1957).

interpreted Rule 8 of the federal rules similarly. There, the Supreme Court held that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."[43] The Court further determined that when testing the sufficiency of a complaint under Rule 8 of the federal rules, the 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."[44]

Four years after *Conley*, in 1961, the Arizona Supreme Court in *Long v. Arizona Portland Cement Co.* explicitly determined that the tests under Arizona Rule 8 and the Federal Rule 8 were the same.[45] There, the court stated:

> [t]his Court and the United States Supreme Court have recently held that the 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, and the court should not grant a motion to dismiss unless it appears certain that plaintiff would be entitled to no relief under any state of facts which is susceptible of proof under the claim as stated.[46]

The court further emphasized that, in accordance with the principle that "a case should be tried on the proof rather than the pleadings," defendants who deem a complaint to provide insufficient notice of the plaintiff's claim ought to utilize the "discovery and issue-sharpening procedures" that are intended for that purpose.[47] Thus, the court did not intend Rule 8 as a procedural device to weed out frivolous claims. Rather, discovery devices[48] and Rule 11 sanctions[49] were

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43. *Id.* at 47. The U.S. Supreme Court reasoned that the notice-pleading standard embodied by Rule 8 of the federal rules "is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Id.* at 47–48.

44. *Id.* at 45–46 (emphasis added)

45. 362 P.2d 741, 742 (Ariz. 1961).

46. *Id.*

47. *Id.* at 743. Contrary to the clear language of *Long*, the Arizona Supreme Court in *Cullen* interpreted the U.S. Supreme Court's articulation of the standard under Federal Rule 8 in *Conley* to be somewhat broader than the Arizona Supreme Court's articulation of the standard under Arizona's Rule 8 in *Mackey*. *Cullen v. Auto-Owners Ins. Co.*, 189 P.3d 344, 346 (Ariz. 2008). In *Cullen*, the Court explained that "[i]n *Conley v. Gibson*, the U.S. Supreme Court established a pleading standard broader than that adopted by Arizona." *Id.* It is relevant to note here that the Court used the past tense to emphasize that Arizona's articulation of Rule 8 has always been stated differently than *Conley*'s articulation of Federal Rule 8. *Id.* There is thus a discrepancy between the actual history of Rule 8 and the Court's description of that history in *Cullen*. However, one could interpret the *Cullen* court's brief summary as meaning simply that the *Conley* standard is different from the Arizona standard as it has evolved today, rather than how it has been articulated in the past.

48. *See, e.g.*, ARIZ. R. CIV. P. 26–33.

49. Rule 11 provides that "[t]he signature of an attorney or party constitutes a certificate by the signer that . . . to the best of the signer's knowledge, information, and belief formed after reasonable inquiry [the pleading] is well grounded in fact . . . ." *Id.*

intended for that purpose. Following *Long*'s extensive reference to *Conley*, the Arizona Court of Appeals' decisions cited *Conley*'s "no set of facts" language as indicative of Arizona's Rule 8 pleading standard.[50]

In 2007, the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly* markedly reinterpreted the pleading standard under Rule 8 of the federal rules, at least in the antitrust context.[51] There, the Court explicitly rejected *Conley*'s "no set of facts language," reasoning that such language, when read literally or in isolation, would permit a wholly conclusory statement revealing the theory of the claim to survive a motion to dismiss unless the statement itself was a factual impossibility.[52] Consequently, if there remained any possibility that undisclosed conjectural facts supporting the plaintiff's claim might later be unearthed, *Conley*'s formulation of Rule 8 precluded dismissal.[53] In relegating *Conley*'s formulation to a "phrase best forgotten as an incomplete, negative gloss on an accepted pleading standard," the Court in *Twombly* held that a complaint must reveal sufficient facts to "plausibly suggest" the claims alleged.[54] The Court clarified that under this "plausibility standard," the plaintiff need not engage in heightened fact pleading of specifics, but it is necessary to plead enough facts such that the plaintiffs claim for relief "is plausible on its face."[55]

11(a). A violation of Rule 11 permits a court to impose "reasonable sanctions" on the signor of the pleading, the party to whom the pleading is attributed, or both. *Id.*

50. *See, e.g.*, Mintz v. Bell Atl. Sys. Leasing Int'l, Inc., 905 P.2d 559, 565 (Ariz. Ct. App. 1995) (Lankford, J., dissenting in part); Newman v. Maricopa County, 808 P.2d 1253, 1255 (Ariz. Ct. App. 1991).

51. 127 S. Ct. 1955 (2007). Notably, the Court phrased the scope of its review as addressing "the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct." *Id.* at 1963. Yet, a recent empirical study has revealed that "courts have applied the decision in every substantive area of law governed by Rule 8" and that antitrust cases account for only 3.7% of all cases citing *Twombly* in the study. Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1814–15 (2008).

52. *Twombly*, 127 S. Ct. at 1968–69.

53. *Id.*

54. *Id.* at 1965–66. The Court's analysis of Federal Rule 8 seemed to be tailored to the antitrust context. The Court noted, for example, that judicial supervision cannot adequately ferret out discovery abuse, and the cost of discovery in an antitrust action can be unusually high. *Id.* at 1966–67. The Court's criticism of *Conley*, however, was not limited to its application in an antitrust action. *See id.* at 1968–69 (observing that "a good number of judges and commenters have balked at taking the literal terms of the *Conley* passage as a pleading standard" and citing cases arising out of many different causes of action). Consequently, whether *Twombly*'s "plausibility" standard has application outside of the antitrust context, or whether *Conley* is authoritative in other causes of action, remains unclear. As a practical matter, however, federal courts are applying *Twombly* outside of the antitrust context. *See supra* note 51 and accompanying text.

55. *Twombly*, 127 S. Ct. at 1974. Consequently, Rule 8 of the federal rules has been transformed into a tool for weeding out frivolous claims. Notably, Rule 11 of the federal rules previously served this purpose. Rule 11 permits a court to impose sanctions on an attorney, law firm, or party who submits a signed pleading with factual contentions that lack evidentiary support or are unlikely to have evidentiary support after a reasonable opportunity for further investigation or discovery. FED. R. CIV. P. 11(b)–(c). Reading

Although the court of appeals in *Cullen v. Koty–Leavitt Insurance Agency, Inc.* was not the first Arizona court to cite *Twombly*,[56] it was the first to discuss and analyze *Twombly* at length.[57] Cullen's request for review to the Arizona Supreme Court, therefore, created a unique opportunity for the court to evaluate Arizona's notice-pleading standing in light of the federal pleading standard in *Twombly*. Initially, the court seemed to seize the opportunity, granting review on two separate questions: "(1) Does this Court have exclusive authority to change the notice pleading standard under Rule 8?; and (2) Should Rule 8 be re-interpreted to modify the notice pleading standard established by this Court in favor of a more fact-specific pleading standard?"[58] Ultimately, however, the court answered the former but failed to address the latter.

With regard to its first issue for review, the *Cullen* court held that reinterpretation of Arizona's notice pleading standard can be accomplished through one of two discreet methods: (1) a Rule 28 proceeding; or (2) judicial interpretation.[59] Reinterpretation via judicial interpretation, however, can be exercised only by the Arizona Supreme Court itself, and not by the court of appeals.[60] The court further noted that it had not, prior to *Cullen*, reinterpreted Arizona's Rule 8 notice-pleading standard.[61] Thus, the court found that "Arizona has not revised the language or interpretation of Rule 8 in light of *Twombly*."[62]

While the court failed to address its second issue for review—whether Arizona's Rule 8 should be reinterpreted in light of *Twombly*—as it initially suggested it would, it did address whether the *Twombly* discussion by the court of appeals was proper.[63] In this regard, the majority of the court held that in discussing *Twombly*, the court of appeals did not purport to reinterpret Rule 8.[64] Rather, the court of appeals' *Twombly* analysis was simply dicta that merely buttressed the court's holding that Arizona's Rule 8 does not permit a court to

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Twombly's plausibility-pleading requirement in conjunction with Rule 11 supports the contention that a court is now permitted to impose sanctions if a complaint fails to comport with *Twombly*.

56. *See* Dube v. Likins, 167 P.3d 93, 111 (Ariz. Ct. App. 2007).

57. Cullen v. Koty–Leavitt Ins. Agency, Inc., 168 P.3d 917, 923 (Ariz. 2007).

58. Cullen v. Auto-Owners Ins. Co., 189 P.3d 344, 346 (Ariz. 2008).

59. *Id.* at 347. Rule 28 permits "[a]ny person, association or public agency interested in the adoption, amendment, or repeal of a court rule [to] file a petition to adopt, amend, or repeal a rule." ARIZ. R. SUP. CT. 28(a)(1).

60. *Cullen*, 189 P.3d at 347. The court noted that Arizona Constitution grants the court the exclusive authority to *make* rules relative to all procedural matters, and thereby grants the court the exclusive authority to interpret those rules. *Id.* Thus, the court emphasized that "[b]ecause this Court has the final say in the interpretation of procedural rules, only this Court can revise or reconsider its prior interpretation of the rules, even if a lower court believes that subsequent events may call into question a prior interpretation." *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* Justice Hurwitz dissented from this portion of the majority's opinion. *See infra* notes 68–71 and accompanying text.

entertain hypothetic facts not pleaded.[65] Importantly, the court of appeals reached its holding by relying on Arizona Supreme Court cases.[66] Thus, "while the court of appeals [properly] applied [Arizona's Rule 8] notice pleading standard," the court vacated that portion of the court of appeals' opinion citing to *Twombly* "[t]o eliminate any confusion."[67]

Notably, Justice Hurwitz dissented from the portion of the opinion regarding the propriety of the *Twombly* discussion engaged in by the court of appeals.[68] He considered the court of appeals' discussion—four entire paragraphs—as too in-depth to merely be dicta.[69] Thus, even if the court of appeals did not purport to reinterpret Arizona's Rule 8 notice-pleading requirement, Justice Hurwitz remained unconvinced that the court of appeals did not apply *Twombly* nonetheless.[70] Consequently, Justice Hurwitz would have remanded the case, rather than partially vacate the opinion, to ensure that "at least one appellate court [evaluates the plaintiffs'] complaint under the appropriate legal standard . . . ."[71]

The *Cullen* court, therefore, unanimously held that *Twombly* does not provide the pleading standard under Arizona's Rule 8.[72] The court was not unanimous, however, regarding the propriety of the court of appeals' *Twombly* discussion, and the proper disposition of the case.[73]

III. IMPLICATIONS

A number of unresolved issues arise from the *Cullen* opinion: the judicial application of notice pleading under Rule 8 and the specificity thereby required; the relationship between Arizona and federal pleading requirements for cases removed to the federal courts; the propriety of lower courts citing to federal rule interpretations as persuasive authority; and the possible future reinterpretation of Rule 8.

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65. *Cullen*, 189 P.3d at 347 ("[A]lthough the court cited *Twombly* for additional support, the discussion of *Twombly* was wholly unnecessary to the court's conclusion."). Notably, the court of appeals analyzed *Twombly*, but in doing so, not once did the court mention that *Twombly* adopted a "plausibility" pleading standard. *Id.* at 348. The Arizona Supreme Court majority seemingly found this to be a persuasive indicator that the court of appeals did not consider *Twombly*'s plausibility standard when determining Arizona's pleading standard and evaluating the sufficiency of Cullen's complaint. *See id.* at 347–48. Justice Hurwitz, however, did not find the lack of the term "plausible" in the court of appeals' opinion to be particularly noteworthy, and he dissented from that portion of the majority's opinion. *Id.* at 348 (Hurwitz, J., concurring in part and dissenting in part); *see also infra* notes 68–71 and accompanying text.

66. *Cullen.* 189 P.3d at 347–48.

67. *Id.* at 348.

68. *Id.* (Hurwitz, J., concurring in part and dissenting in part).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 346, 348.

73. *See supra* notes 64–71 and accompanying text. While the majority did not find the court of appeals' *Twombly* discussion to be per se impermissible, and only vacated that portion of the court of appeals' opinion to "eliminate any confusion," the opinion effectively signals lower courts to refrain from citing *Twombly*.

A. Requisites to Arizona's Rule 8 Notice Pleading

Under *Cullen*, it is now clear that notice pleading in Arizona and the "plausibility" standard articulated in *Twombly* are not the same.[74] Rather than considering plausibility, an Arizona court must "look only to the pleading itself and consider the well-pleaded factual allegations contained therein" and "indulge all reasonable inferences therefrom."[75] Clearly then, the *Cullen* court does not equate a "reasonable inference" with a "plausible inference." Yet, the *Cullen* court affirmed the court of appeals' citation to prior Arizona Supreme Court cases that articulated the standard as whether the plaintiff would be entitled to relief "under any facts *susceptible of proof* in the statement of the claim."[76] Where permissible "reasonable inferences" and "facts susceptible of proof" stand in relation to impermissible "plausibility" is unclear.[77] In fact, it remains unclear whether Arizona's notice-pleading standard requires more or less than *Twombly*'s plausibility-pleading standard.[78]

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74. *Cullen*, 189 P.3d at 347; *see also id.* at 348 ("The Court correctly decides today that *Bell Atlantic Corp. v. Twombly*, does not provide the standard for determining under Arizona Rule of Civil Procedure 12(b)(6) whether a complaint states a claim upon which relief can be granted.") (Hurwitz, J., concurring in part and dissenting in part).

75. *Id.* at 346 (citations omitted). For a brief enumeration of Arizona Supreme Court cases prior to *Cullen* that clarified Arizona's notice pleading standard as requiring a court to consider only the facts that are well-pled in the plaintiff's complaint see *supra* note 24.

76. Cullen v. Koty–Leavitt Ins. Agency, Inc., 168 P.3d 917, 923 (Ariz. Ct. App. 2007) (emphasis added). The Arizona Supreme Court in *Cullen* did not reference the "susceptible of proof" language that it had used in prior cases and that the court of appeals in *Koty–Leavitt* relied on. *Cullen*, 189 P.3d at 346. However, it affirmed the court of appeals' citation to those cases that espoused the "susceptible of proof" standard. *Id.* at 347.

77. It would have been helpful for the court to give more guidance and clarify whether a "reasonable" inference is the same as a "likely" inference, a "possible" inference, a "conceivable" inference, or falls under an entirely different standard. The lack of guidance invites significant judicial discretion in evaluating the sufficiency of complaints under Rule 8.

78. *Cullen*, 189 P.3d at 346–47. It is clear that notice pleading in Arizona is less permissive than the former *Conley* formulation. *Id.* It is also clear that *Twombly*'s plausibility pleading requires more fact-specific pleading than *Conley*. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1968–69 (2007). Thus, if an imaginary pleading scale were constructed with *Conley* as the most permissive standard, and heightened-fact pleading as the least permissive standard, it seems that both Arizona's notice pleading and *Twombly*'s plausibility pleading would fall somewhere in between. Where they would fall in relation to each other, however, cannot be easily discerned. One might assume that Arizona's notice-pleading standard is more permissive than *Twombly*'s plausibility-pleading standard because of the manner in which the *Cullen* court frames the notice-pleading standard in the context of *Conley*. The *Cullen* court described the *Conley* formulation as "broader" than Arizona's standard. *Cullen*, 189 P.3d at 346. Yet, it is clear that *Twombly* was an emphatic rejection of *Conley*, particularly in light of the federal courts' aggressive use of the new *Twombly* standard. *See* Hannon *supra* note 51, at 1814–15. Therefore, it is reasonable to conclude that Arizona's notice pleading is likely more permissive than *Twombly*'s plausibility pleading, even though the *Cullen* court did not directly address the issue.

B. Removal to Federal Court

The uncertainty regarding the state of Arizona's notice pleading in relation to *Twombly*'s plausibility pleading has significant implications for cases that are removable to federal court. A defendant who is foreign to the state in which the plaintiff brought suit may remove the case against him from state court to federal court.[79] If *Twombly*'s plausibility pleading has application outside the antitrust context, then a permissible statement of a claim under Rule 8 in an Arizona court might be an insufficient statement under Federal Rule 8 in district court. Specifically, if Arizona's notice-pleading standard is more permissive than *Twombly*'s plausibility-pleading standard,[80] a sufficient complaint in state court would be insufficient when removed to federal court.[81]

C. Continued Application of Edwards v. Young

For over thirty years, Arizona courts, including the courts of appeals, have cited to *Edwards v. Young*[82] for the proposition that federal rule interpretations are persuasive in Arizona.[83] In *Edwards*, the court explained that "because Arizona has substantially adopted the Federal Rules of Civil Procedure, we give great weight to the federal interpretations of the rules."[84] Yet, in *Cullen*, the Arizona Supreme Court held that it alone has the authority to reinterpret the rules of procedure, and consequently vacated the portion of the court of appeals' opinion that referenced federal case law.[85]

If the Arizona Supreme Court were to consider federal rule interpretations as persuasive authority for Arizona rules, this would be a permissible exercise of

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79. 28 U.S.C. § 1441(b) (2006). Any civil action over which the district court has original jurisdiction, if brought in state court, *must* be removed to federal court. *Id.* at 1441(a). However, where a district court does not retain original jurisdiction over an action, a defendant, in his discretion, may remove the case to federal court if there is diversity of citizenship and neither the removing defendant nor any other defendant is a citizen of the state wherein the action is brought. *Id.*

80. It seems likely that Arizona's Rule 8 notice-pleading standard is in fact more permissive than *Twombly*. *See supra* note 78 and accompanying text.

81. A practitioner would most likely be granted leave to amend his complaint to comport with federal standards, even if the amendment falls outside of the statute of limitations. Pursuant to Rule 15 of the Federal Rules of Civil Procedure, an amendment that falls outside of the statute of limitations may be amended "only with the opposing party's written consent or the court's leave." FED. R. CIV. P. 15(a)(3). Courts are instructed to "freely give leave when justice so requires." *Id.* Only in extraordinary circumstances would a court refuse to grant a party leave to amend his complaint to comport with the federal pleading requirements. Prudent practitioners, however, might plead cases with greater factual specificity in state court where removal to federal court remains a possibility.

82. 486 P.2d 181 (Ariz. 1971).

83. *See, e.g.*, Mohave Elec. Co-op., Inc. v. Byers, 942 P.2d 451, 460 n.3 (Ariz. Ct. App. 1997); Est. of Page v. Litzenburg, 865 P.2d 128, 137 (Ariz. Ct. App. 1993); Wright v. Hills, 780 P.2d 416, 421 (Ariz. Ct. App. 1989); Ott v. Samaritan Health Serv., 622 P.2d 44, 48 (Ariz. Ct. App. 1980).

84. *Edwards*, 486 P.2d at 182.

85. Cullen v. Auto-Owners Ins. Co., 189 P.3d 344, 347 (Ariz. 2008) (citing ARIZ. CONST. art. 6, § 5, cl. 5).

its exclusive authority to interpret the rules.[86] The *Cullen* decision implies, however, that if a lower court were to seek guidance in federal rule interpretations, the lower court would violate that exclusive authority. This would be especially true in the context of an unambiguous Arizona rule, in which case federal authority would be irrelevant. Yet, in the context of an ambiguous Arizona rule—precisely the context in which a court would most likely explore federal case law for guidance—such federal rule analysis might similarly be improper.[87]

Thus, in light of the *Cullen* court's firm decree that "only this Court can revise or reconsider its prior interpretation of the rules,"[88] a lower court faced with an ambiguous Arizona rule might be restricted to engaging in other forms of analysis, such as evaluating policy considerations, rather than evaluating federal interpretations for authority. Indeed, as Justice Hurwitz's dissent indicates, a lower court risks reversal merely by mentioning a federal case if it seems that the federal interpretation colored the lower court's thinking.[89]

D. Possible Future Reinterpretation of Rule 8

As noted above, the *Cullen* court did not address whether it ought to reinterpret Arizona's notice-pleading standard under Rule 8 in light of *Twombly*.[90] Consequently, reinterpretation remains an open possibility. Whether Rule 8 should be reinterpreted presents a contentious issue. On the one hand, access to justice for plaintiffs who are not likely to have the relevant facts is a stated policy of notice pleading in Arizona.[91] On the other hand, there is a concern for defendants who are forced to engage in costly discovery, defend meritless lawsuits, and sometimes to settle anemic suits because the cost of defense exceeds the cost of settlement.[92]

A sliding pleading scale based on the type of case at issue could harmonize these competing policies. On such a scale, the pleading requirements would be more permissive—reminiscent of the *Conley* standard—in those cases where the defendant has better access to relevant facts, such as employment discrimination or civil rights conspiracy suits. In contrast, the pleading requirements would be less permissive—closer to the *Twombly* standard—in those cases where the plaintiff should have access to a good portion of the relevant facts,

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86. *See id.*

87. Lower courts could, however, look to federal interpretations when the Arizona Supreme Court has not squarely addressed the question at hand.

88. *Cullen*, 189 P.3d at 347.

89. *See supra* notes 78–81 and accompanying text.

90. *See Cullen*, 189 P.3d at 347 (stating that the Court "has not" revised Rule 8 in light of *Twombly*, but not addressing whether the Court *should* do so).

91. Long v. Ariz. Portland Cement Co., 362 P.2d 741, 743 (Ariz. 1961) (internal quotations omitted) (stating that "a case should be tried on the proof rather than the pleadings"). For an analysis of why Arizona courts should not adopt *Twombly*, see Mark Samson, *Arizona Should Avoid* Twombly*'s Pernicious Effects*, ARIZ. ATT'Y, Sept. 2007, at 27.

92. Such were the concerns in *Twombly*. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1966–67 (2007). For an analysis of why Arizona courts should adopt *Twombly*, see Brian J. Pollock, *Sensible Pleading Requirements: Arizona Courts Should Adopt* Twombly, ARIZ. ATT'Y, Sept. 2007, at 26, 59.

such as personal injury suits. Inconsistent with these distinctions, however, *Twombly*'s plausibility-pleading requirement arose in the context of a claim such where one would expect the facts to be in the defendant's control.[93]

The possibility remains, therefore, that the Arizona Supreme Court might adopt *Twombly*'s pleading standard, reject *Twombly*'s pleading standard, or attempt to reconcile the competing policy concerns with a standard, such as the sliding pleading scale, which completely divorces the standards of Arizona's Rule 8 and its federal counterpart.

CONCLUSION

In *Cullen v. Auto-Owners Insurance Co.*,[94] the Arizona Supreme Court missed an opportunity to clarify the ambiguities surrounding notice pleading under Rule 8. Furthermore, the court could have interpreted and contextualized Arizona's notice-pleading standard under Rule 8 in light of the more fact-specific "plausibility" pleading articulated by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*[95] and widely adopted by federal courts. In spite of the court's stated goal to resolve confusion, it seized neither opportunity and thus compounded the confusion. While practitioners and courts are now certain that Arizona is a notice-pleading state, *Cullen* left them to resolve several important issues that impact everyday practice.

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93. Notably, *Twombly*'s plausibility-pleading requirement arose in the context of a claim such that one would expect the facts to be in the defendant's control. The plaintiff in *Twombly* made allegations of liability under section 1 of the Sherman Act, which prohibits companies from engaging in anticompetitive conduct and makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. . . ." *Twombly*, 127 S.Ct. at 1961; *see also* 15 U.S.C. § 1. Consequently, *Twombly* violates the sliding pleading scale in that the facts fall into the category of cases where it would be appropriate to impose a more permissible, rather than less permissible pleading standard.

94. 189 P.3d 344 (Ariz. 2008).

95. *Id.* at 346.