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Should the Florida Courts Adopt the Federal *Twombly* Standard For Motions to Dismiss?

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I. INTRODUCTION

For half a century, plaintiffs in federal court facing motions to dismiss dutifully cited the familiar *Conley v. Gibson* mantra that the motion must be denied unless it appears beyond doubt that the "plaintiff can prove no set of facts in support of [the] claim."[2] The Supreme Court's 2007 *Twombly*[3] decision and its 2009 companion case, *Iqbal*,[4] changed that, adopting for federal courts a "plausibility" standard for evaluating the sufficiency of complaints on motions to dismiss.

Although Florida Rule of Civil Procedure 1.110 is based on and contains very similar language to Federal Rule of Civil Procedure 8, Florida courts, at least formally, still adhere to the *Conley* standard.[5] But just as the Florida Supreme Court has abandoned the *Frye*[6] test for determining whether expert evidence is admissible in favor of the federal *Daubert*[7] standard,[8] and is considering adopting the federal *Celotex* standard for determining whether summary judgment is appropriate,[9] perhaps now is the time for the Florida courts to also adopt the *Twombly* standard

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[2] Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

[3] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

[4] Ashcroft v. Iqbal, 556 U.S. 662, 670 (2009).

[5] *See, e.g.*, MYD Marine Distributor, Inc. v. Int'l Paint Ltd, 76 So. 3d 42, 47 (Fla. Dist. Ct. App. 2011) (refusing to expressly adopt the *Twombly* plausibility analysis while nonetheless applying a similar test).

[6] Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923).

[7] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

[8] *See* In re: Amendments to the Florida Evidence Code, 278 So. 3d 551, 551–52 (Fla. 2019) (adopting *Daubert* as the standard for reviewing expert testimony under Fla. Evid. Code §§ 90.702 and 90.704); Kemp v. State, 280 So. 3d 81, 84 (Fla. Dist. Ct. App. 2019) (applying *Daubert* to exclude expert opinion testimony regarding whether driver in fatal accident applied the brakes before the crash).

[9] Wilsonart, LLC v. Lopez, No. SC19-1336, 2019 WL 5188546, at *1 (Fla. Oct. 15, 2019) (citing that the federal standard was articulated in three cases, Celotex Corp. v. Catrett, 477 U.S. 317 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)).

for motions to dismiss. As this article will explain, the Florida courts should formally recognize *Twombly*'s plausibility test as the motion to dismiss standard because the text of rule 1.110 requires it and many Florida courts are applying the functional equivalent of it.

II. CONLEY*'S "NO SET OF FACTS" STANDARD*

The Supreme Court adopted the Federal Rules of Civil Procedure for the federal judicial system in 1937.[10] In 1952, Professor Robert Millar observed that Rule 8 speaks "in terms of 'claims' rather than of 'causes of action.'"[11] He noted that two schools of interpretation had developed among the federal courts.[12] One school believed that "a plaintiff must state the facts sufficient to show a cause of action" and that a pleading would not be entitled to relief "if it omitted an essential element of what we have been accustomed to speak of as the cause of action, even though not necessary to conveying adequate notice of the claim, because in the absence of that element there could be no recovery."[13] This school carried into the Federal Rules the notion from code pleading that the complaint must contain a "statement of the facts constituting the cause of action."[14] The other school, however, believed that "the function of the complaint is to afford fair notice to the adversary of the nature and basis of the claim asserted and [to provide] a general indication of the type of litigation involved."[15] Under this school, "conclusions either of fact or of law have been deemed sufficient if they meet the test of fair notice."[16] As to which school would prevail, Professor Millar simply stated that "unanimity is lacking."[17]

In 1957, the Supreme Court decided between these two schools of thought in *Conley*.[18] The court reversed the grant of a motion to dismiss a Railway Labor Act case brought by African American employees alleging collective bargaining discrimination.[19] In so doing, the Court followed what it called the "accepted rule" from several circuit cases 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."[20] Even though the complaint apparently failed to set forth specific facts supporting the general allegations of

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[10] *Federal Rules of Civil Procedure*, U.S. COURTS, https://www.uscourts.gov/rules-policies/current-rules-practice-procedure/federal-rules-civil-procedure (last visited Mar. 20, 2021).
[11] ROBERT MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 192 (1952).
[12] *Id.*
[13] *Id.*
[14] *Id.* at 190 (quoting N.Y. CODE CIV. P. § 120 (1848)).
[15] *Id.* at 192. (quoting Continental Collieries, Inc. v. Shober, Jr., 130 F. 2d 631, 635 (3d Cir. 1942)).
[16] *Id.* at 193.
[17] *Id.*
[18] Conley v. Gibson, 355 U.S. 41, 45 (1957).
[19] *Id.* at 46–48.
[20] *Id.* at 45–46.

discrimination, the Court declared that the Federal Rules "do not require a claimant to set out in detail the facts upon which he bases his claim."[21] Under Rule 8, only a "short and plain statement" that provides "fair notice" of the basis of the claim is required.[22] Under the *Conley* standard, lower federal courts now understood that there was no requirement that a complaint state facts sufficient to constitute a cause of action.[23]

III. CONLEY*'S IMPACT*

Conley established the standard for evaluating motions to dismiss in federal court for 50 years.[24] As Justice Stevens observed in dissent in *Twombly*, it was cited as authority in a dozen majority opinions of the Supreme Court.[25] It also was adopted by 26 states and the District of Columbia.[26] Justice Stevens noted that Florida was one of those states, which this article will discuss later in Part V.[27]

IV. THE TWOMBLY/IQBAL *"PLAUSIBILITY" STANDARD*

In 2007, the United States Supreme Court abrogated *Conley* for the federal courts in *Bell Atlantic Corp. v. Twombly*.[28] *Twombly* involved an antitrust conspiracy case involving telecommunications providers.[29] The plaintiffs alleged that the defendants, regional telephone companies formed after the 1984 break-up of AT&T, engaged in parallel conduct unfavorable to competition, including: overcharging customers, entering into unfair access contracts, providing inferior connections to their networks, and generally refusing to compete with one another.[30] When the defendants filed a motion to dismiss, plaintiffs argued that the allegations of parallel activity were sufficient to allege an antitrust conspiracy.[31] The Supreme Court, however, ruled as a matter of antitrust law that without more, such allegations were insufficient.[32] Moreover, Justice Souter, writing for the majority, took the opportunity

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[21] *Id.* at 47.
[22] *Id.* (quoting FED R. CIV. P. 8(a)(2) (2020)).
[23] *See, e.g.*, Bolack v. Sohio Petroleum Co., 475 F.2d 259, 262 (10th Cir. 1973); Gould v. Continental Coffee Co., 304 F. Supp. 1, 2 (S.D.N.Y. 1969).
[24] Conley v. Gibson, 355 U.S. 41, 45–46 (1957).
[25] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 577 (2007) (Stevens, J., dissenting, with Ginsburg, J., joining in part).
[26] *Id.* at 578.
[27] *Id.* at 578 n.5 (citing Hillman Constr. Corp. v. Wainer, 636 So. 2d 576, 578 (Fla. Dist. Ct. App. 1994)).
[28] *Id.* at 560–61 (majority opinion).
[29] *Id.* at 553.
[30] *Id.* at 556–57.
[31] *Id.*
[32] *Id.* at 564–65.

to comment on what a plaintiff must plead to state a claim under Rule 8.[33] The majority agreed with *Conley* that the complaint "does not need detailed factual allegations," although it was quick to note, citing existing precedent, that mere "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[34] Thus, although the facts alleged need not be detailed, they "must be enough to raise a right to relief above the speculative level."[35] In the context of an antitrust conspiracy claim, this meant that the factual matter in the complaint must provide "plausible grounds to infer an agreement."[36]

Twombly might have been an interesting antitrust decision, and little more, if it were not for the plaintiffs' insistence that this "plausibility" requirement conflicted with *Conley*'s construction of Rule 8. In response, the majority stated that *Conley*'s "no set of facts' language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings."[37] Indeed, it observed that many courts had engaged in such a "focused and literal reading," while others had "balked at taking the literal terms of the *Conley* passage as a pleading standard."[38] It decided that *Conley*'s "no set of facts" language had been questioned, criticized, and explained away long enough and "this famous observation has earned its retirement."[39] The phrase, the Court explained, was "best forgotten as an incomplete, negative gloss on an accepted pleading standard."[40]

The Court added that its introduction of the term "plausibility" did not signify a "heightened" pleading standard.[41] It stated: "we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."[42] In the case before it, because plaintiffs failed to nudge their claims across the line from "conceivable" to "plausible," the complaint was required to be dismissed.[43]

Only two justices dissented. Justice Stevens, joined by Justice Ginsburg, favored the lenient reading of *Conley*.[44] Under his understanding, *Conley* permitted "outright dismissal only when proceeding to discovery or beyond would be futile."[45] Indeed, he believed that the pleading standard adopted by Rule 8 did "not require, or

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[33] *Id.* at 555–56.
[34] *Id.* at 556.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 561.
[38] *Id.* at 561, 562.
[39] *Id.* at 563.
[40] *Id.*
[41] *Id.* at 569 n.14.
[42] *Id.* at 570.
[43] *Id.*
[44] *Id.* (Stevens, J., dissenting, with Ginsburg, J., joining in part).
[45] *Id.* at 577.

even invite, the pleading of facts" to begin with.[46] He noted that early decisions adopting what ultimately became the *Conley* standard "disquieted the defense bar and gave rise to [an unsuccessful attempt] to revise Rule 8 to require a plaintiff to plead a 'cause of action'" rather than a claim.[47] He opined that he "would not rewrite the Nation's civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so."[48]

Following the decision, an initial question was whether *Twombly* was limited to antitrust cases. The Supreme Court put that question to rest in *Iqbal*.[49] In *Iqbal*, a Pakistani Muslim who was arrested and detained on terrorism charges filed a complaint against several government officials, alleging "he was deprived of various constitutional protections while in federal custody."[50] The district court denied the motion to dismiss, applying the *Conley* standard.[51] The Second Circuit applied *Twombly*, which had been decided in the interim, but upheld the complaint.[52] The Supreme Court granted certiorari to address whether the complaint pled factual matter that, if taken as true, stated a claim that the defendants deprived him of constitutional rights.[53] The majority opinion, authored by Justice Kennedy, held that it did not.[54]

The Court rejected the notion that *Twombly* was limited to antitrust disputes, declaring that "the decision was based on our interpretation and application of Rule 8."[55] It also rejected the suggestion that the *Twombly* standard should be "tempered" or relaxed if the trial court committed to controlling discovery.[56] If a complaint is deficient, a plaintiff "is not entitled to discovery, cabined or otherwise."[57]

The majority explained that two "working principles" undergirded *Twombly*.[58] First, the tenet that a court must accept all the allegations in the complaint as true did not apply to legal conclusions.[59] This principle applies equally to "legal conclusion[s] couched as [ ] factual allegation[s]."[60] Thus, Rule 8, which requires only a "short and plain statement of the claim showing that the pleader is entitled to relief," marks a "notable and generous departure from the hypertechnical, code-

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[46] *Id.* at 580.
[47] *Id.* at 582.
[48] *Id.* at 579.
[49] Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009).
[50] *Id.* at 666.
[51] Iqbal v. Hasty, 490 F.3d 143, 155 (2d. Cir. 2007).
[52] *Iqbal*, 556 U.S. at 669–70.
[53] *Id.*
[54] *Id.*
[55] *Id.* at 684.
[56] *Id.*
[57] *Id.* at 686.
[58] *Id.* at 678.
[59] *Id.*
[60] *Id.*

pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."[61] Second, only a complaint that "states a plausible claim for relief" will survive a motion to dismiss.[62] To be sure, this inquiry is "context-specific" and even allows the trial court to "draw on its [judicial] experience and common sense."[63] "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint" fails to show, as Rule 8 requires, "that the pleader is entitled to relief."[64]

The majority thus outlined a two-step process for determining whether a complaint states a claim for which relief can be granted.[65] In step one, the trial court identifies the legal conclusions that are not entitled to the assumption of truth.[66] In step two, the court examines the well-pleaded factual allegations, assumes their veracity, and then determines whether they plausibly give rise to an entitlement to relief.[67]

Applying this two-step analysis, the court focused on the legal principles implicated by the complaint. The plaintiff had to plead enough factual matter to show that the defendants adopted and implemented the challenged detention policies, not for a neutral, investigative reason, but for the purpose of discriminating on account of race, religion, or national origin.[68] The complaint failed this standard.[69] Applying the first step, the majority ruled that the allegations that the government officials "'knew of, condoned, and willfully and maliciously agreed to subject [the plaintiff] to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin'" were nothing more than formulaic and conclusory recitations of the elements of the claim.[70] In other words, they were legal conclusions, not entitled to be assumed as true.[71] Applying the second step, the majority determined that the remaining factual allegations that the government officials approved a policy to detain Arab, Muslim men after September 11, 2001, did not plausibly establish a purpose of detaining them because of their race, religion, or national origin.[72] More plausibly, the men were detained because of their potential connection to those who committed terrorist acts.[73] Regardless, the complaint

[61] *Id.* at 677–79.
[62] *Id.* at 679.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.* at 679–80.
[67] *Id.*
[68] *Id.* at 677.
[69] *Id.* at 682–83.
[70] *Id.* at 681–83.
[71] *Id.*
[72] *Id.*
[73] *Id.*

contained no factual allegations actually showing that the defendants detained the plaintiff because of his race, religion, or national origin.[74]

Justice Souter, the author of *Twombly*, dissented, essentially taking issue with the majority's application of the plausibility standard to characterize the complaint's allegations as conclusory and entitled to no deference.[75] Justice Breyer also dissented on the ground that preventing unwarranted litigation against government officials provided no justification for the majority's interpretation of *Twombly*.[76] But neither Justice sought a return to the discredited *Conley* standard.

V. THE FLORIDA STANDARD FOR DISMISSAL

As noted above, Justice Stevens, in his *Twombly* dissent, characterized Florida as a state that had adopted the old *Conley* rule.[77] In 1965, Florida's Second District Court of Appeal adopted the *Conley* test in *Martin v. Highway Equip. Supply Co.*[78] Interestingly, this was two years before Florida adopted the current Florida Rules of Civil Procedure in 1967.[79] The Florida Supreme Court quoted the *Martin* court's invocation of the *Conley* standard with approval in two cases, the *Ellison* decision issued in 1965, before the advent of the Florida rules, and *Hawkins*, issued in 1967, after the adoption of the rules, although the court applied the prior standard.[80]

Arguably, these cases are all superseded by the Florida Supreme Court's adoption of the Florida Rules of Civil Procedure. The author's note to the 1967 adoption of the Florida rules states that these rules "supersede all prior rules and are more closely akin to the Federal Rules." It even suggests that a treatise construing the Federal Rules should be consulted "because of the persuasive influence of the federal interpretations in terms of Florida practice."[81]

After the adoption of the Florida rules, apart from one dissent, no subsequent court has cited the Florida Supreme Court's citation of the *Conley* standard from *Martin* in *Ellison*.[82] The Third and Fourth Districts, however, have adopted the

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[74] *Id.*
[75] *Id.* at 697–699 (Souter, J., dissenting).
[76] *Id.* at 699–700 (Breyer, J., dissenting).
[77] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 578 n.5 (2007) (Stevens, J., dissenting, with Ginsburg, J., joining in part).
[78] *See* Martin v. Highway Equip. Supply Co., Inc., 172 So. 2d 246, 248 (Fla. Dist. Ct. App. 1965).
[79] *See* In re Fla. Rules of Civil Procedure 1967 Revision, 187 So. 2d 598 (Fla. 1966).
[80] *See* Hawkins v. Williams, 200 So. 2d 800 (Fla. 1967) (noting the adoption of the Florida rules effective January 1, 1967); Ellison v. City of Fort Lauderdale, 175 So. 2d 198, 200 (Fla. 1965).
[81] FLA. R. CIV. P. 1.010 cmt. 1.
[82] Judge Magar of the Fourth District cited the *Conley* rule from *Ellison* in dissent in Coral Ridge Golf Course, Inc. v. City of Fort Lauderdale, 253 So. 2d 485, 489 (Fla. Dist. Ct. App. 1971).

Conley standard from *Martin* in multiple cases.[83] Interestingly, no Florida court has cited *Martin* after *Twombly*.

In other states, some courts adopted *Twombly* and others rejected it.[84] The Florida courts, however, have not addressed whether they should adopt its plausibility standard.[85] But I believe they should consider it and adopt it. Indeed, as explained below, the Florida courts should recognize that what has emerged as the *Twombly* standard for evaluating the sufficiency of a complaint in the federal courts is effectively already the standard being applied in this state given the precise language chosen in the text of Florida rules 1.110 and 1.140, albeit using different terminology.

VI. THE SIMILARITIES AND DIFFERENCES BETWEEN FEDERAL RULE 8(B) AND FLORIDA RULE 1.110(B)

Fla. R. Civ. P. 110(b) states:

> "A pleading which sets forth a claim for relief . . . must state a cause of action and shall contain . . . (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief."[86]

Fla. R. of Civ. P. 1.140(b)(6) provides for a defense of "failure to state a cause of action."[87] The 1967 author's comment states that rule 1.110(b) is "in part an adaption of Federal Rule 8(a)" and that "[p]leadings under the Florida Rules are now

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[83] *See* Goldstein v. Abco Const. Co., Inc., 334 So. 2d 281, 282 n.1 (Fla. Dist. Ct. App. 1976); Almarante v. Art Inst. of Fort Lauderdale, Inc., 921 So. 2d 703, 705 (Fla. Dist. Ct. App. 2006); Merkle v. Health Options, Inc., 940 So. 2d 1190, 1199 (Fla. Dist. Ct. App. 2006); Ingalsbe v. Stewart Agency, Inc., 869 So. 2d 30, 35 (Fla. Dist. Ct. App. 2004), *rev. dismissed*, 889 So. 2d 779 (Fla. 2004); Morris v. Fla. Power & Light Co., 753 So. 2d 153, 154 (Fla. Dist. Ct. App. 2000); Greenfield v. Manor Care Inc., 705 So. 3d 926 (Fla. Dist. Ct. App. 1997), *overruled on other grounds by* Beverly Enters.-Fla., Inc. v. Knowles, 766 So. 2d 335, 336 (Fla. Dist. Ct. App. 2000); Wasau Ins. Co. v. Haynes, 683 So. 2d 1123, 1124 (Fla. Dist. Ct. App. 1996); Hillman Constr. Corp. v. Wainer, 636 So. 2d 576, 578 (Fla. Dist. Ct. App. 1994); Orlovsky v. Solid Surf, Inc., 405 So. 2d 1363, 1364 (Fla. Dist. Ct. App. 1981).); *see also* Warner v. Fla. Jai Alai, Inc., 235 So. 2d 294, 298 (Fla. 1970) (Adkins, J., dissenting) (citing Martin v. Highway Equip. Supply Co., 172 So. 2d 246 (Fla. Dist. Ct. App. 1965)).

[84] For a list of states in each category, see ARTHUR R. MILLER, MARY KAY KANE & A. BENJAMIN SPENCER, FEDERAL PRACTICE & PROCEDURE § 1216 nn.186–187 (3d ed. 2020).

[85] Several Florida courts have cited other propositions from *Twombly* and *Iqbal* with approval. *See* Davis v. Bay Cty. County Jail, 155 So. 3d 1173, 1177 (Dist. Ct. App. 2014) (Makar, J., dissenting) (citing other propositions from *Twombly* and *Iqbal*); Gallego v. Wells Fargo Bank, N.A., 276 So. 3d 989, 990 (Fla. Dist. Ct. App. 2019) (per curiam) (quoting Judge Makar's citations of *Twombly* and *Iqbal*). In *Davis*, Judge Makar expressly stated that his opinion that a state section 1983 complaint should be dismissed was "not based on the even more demanding 'plausibility' standard in federal law." 155 So. 3d at 1179.

[86] FLA. R. CIV. P. 1.110(b).

[87] *Id.* R. 1.140(b)(6).

similar to the Federal Rules."[88] The comment further states that the rule's requirement that a complaint state a cause of action and set forth a plain statement of the ultimate facts on which the pleader relies (among other things) are "the same as the Federal Rule."[89] It adds, however, that under the Florida rule, "vague and loose pleading will not be permitted," and the "complaint must show a legal liability by stating the elements of a cause of action" and "plead factual matter sufficient to apprise the adversary of what he is called upon to answer so that the court may determine the legal effect of the complaint."[90]

Despite the comment that the Florida rule is substantially similar to Federal Rule 8, some differences between the actual words used are readily apparent. The Florida rule references a "cause of action" as well as a "claim" (whereas Rule 8 only requires a "claim"), and in Florida, the "plain statement" must be of "ultimate facts" (whereas Rule 8 only requires a "short and plain statement of the claim showing that the pleader is entitled to relief").[91]

Are the Florida rules' references to a "cause of action" rather than a "claim" a distinction without a difference? In several older cases, Florida appellate courts have thought so.[92] Judge May of the Fourth District more recently noted that "the terms 'claim for relief,' 'claim,' and 'cause of action' have been used so interchangeably over the years in both case law and rules of procedure [that] it is difficult to tell them apart."[93] But they are not the same, at least under some definitions.

Black's Law Dictionary defines a "claim" variously as (1) "a statement that something yet to be proved is true" (i.e., "claim of torture"), (2) the assertion of an existing right, including a right to payment or a right to an equitable remedy (i.e., claim to lottery winnings), and (3) "a demand for money, property, or a legal remedy to which one asserts a right" (i.e., claim for relief in a complaint).[94] The third definition, the definition applicable to lawsuits, is the operative one for the present discussion. Black's Law Dictionary defines a "cause of action" as (1) a "group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person," (2) a "legal

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[88] *Id.* R. 1.110(b) (1967) (specially refer to the authors' comment).
[89] *Id.*
[90] *Id.*
[91] FED. R. CIV. P. 8; FLA. R. CIV. P. 1.110(b).
[92] *See* Ellison v. City of Fort Lauderdale, 175 So. 2d 198, 200 (Fla. 1965) (comparing former Florida rule 1.11(b)(6) with Federal Rule 12(b)(6)); Martin v. Highway Equip. Supply Co., Inc., 172 So. 2d 246, 247 (Fla. Dist. Ct. App. 1965) (same); Jackson Grain Co. v. Kemp, 177 So. 2d 513, 515 (Fla. Dist. Ct. App. 1965) (same); Steinhardt v. Banks, 511 So. 2d 336 (Fla. Dist. Ct. App. 1987); Vantage View, Inc. v. Bali East Dev. Corp., 421 So. 2d 728, 729 (Fla. Dist. Ct. App. 1982), *overruled on other grounds by* Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114 (Fla. 1984).
[93] Tyson v. Viacom, Inc., 890 So. 2d 1205, 1223 (Fla. Dist. Ct App. 2005) (May, J., dissenting).
[94] *Claim*, BLACK'S LAW DICTIONARY (11th ed. 2019) [hereinafter *Claim*, BLACK'S LAW DICTIONARY].

theory of a lawsuit," or (3) a ground (or literal cause) of action.[95] Of course, all three of these definitions apply to lawsuits. Moreover, given the broad semantic range of possible meanings, it is not surprising that Edwin Bryant commented as far back as 1899 that jurists "have found it difficult to give a proper definition."[96] Nonetheless, he defined a cause of action, not in terms of bare legal theory, but as "a situation or state of facts that entitles a party to maintain an action in a judicial tribunal."[97]

In 1956, the Florida Supreme Court adopted the third definition of "cause of action" in *Shearn v. Orlando Funeral Home, Inc.,*[98] a case involving the prohibition of splitting causes of action, calling it the "right which a party has to institute a judicial proceeding." Looking back in 2005, Judge Gross of the Fourth District in *Tyson* suggested that this definition is "more akin" to the definition of "claim" or "theory of relief."[99]

Irrespective of its viability in the claim splitting context, as a historical matter, this equating of the terms makes little sense in the context of rule 1.110(b). Given the range of meanings for "cause of action," the *Federal Practice and Procedure* treatise authors commented that the Federal Rules drafters intentionally used "claim" rather than "cause of action" because they wanted to depart from the "unfortunate rigidity and confusion" that had developed surrounding the phrase "cause of action" under former pleading codes.[100] Justice Stevens likewise seemed to see a difference between the terms, noting in his *Twombly* dissent that the defense bar after *Conley* sought to amend Rule 8 and Rule 12 to refer to "causes of action" rather than "claims," ostensibly because that would dictate a tighter pleading standard.[101]

Indeed, as a matter of rule construction, to equate the terms "cause of action" and "claim" as used in rule 1.110(b) would violate the principle against redundancy.[102] The Florida rule drafters used both terms, stating in rule 1.110(b) that a "pleading which sets forth a ***claim*** for relief . . . must state a ***cause of action*** and shall contain . . . a short and plain statement of the ***ultimate facts*** showing that the pleader is entitled to relief . . . ." It is implausible that the drafters meant for the words "claim"

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[95] *Cause of Action*, BLACK'S LAW DICTIONARY (11th ed. 2019) [hereinafter *Cause of Action*, BLACK'S LAW DICTIONARY].

[96] EDWIN E. BRYANT, THE LAW OF PLEADING UNDER THE CODES OF CIVIL PROCEDURE 168 (2d ed. 1899) (quoted in *Claim*, BLACK'S LAW DICTIONARY, *supra* note 94).

[97] *Id.*

[98] 88 So. 2d 591, 593 (Fla. 1956)*; see also* Bacardi v. Lindzon, 845 So. 2d 33, 36 (Fla. 2002). In *Tyson*, 890 So. 2d at 1220 n.6, the court stated that the Florida Supreme Court has never adopted the broader test from *Black's Law Dictionary*.

[99] *Tyson*, 890 So. 2d at 1219–20.

[100] MILLER, KANE, & SPENCER, *supra* note 84.

[101] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 582–83 (2007) (Stevens, J., dissenting with Ginsburg, J., joining in part).

[102] *See* Clines v. State, 912 So. 2d 550, 558 (Fla. 2005) (courts avoid a redundant interpretation unless the statute clearly demands it); Fla. Dep't of Revenue v. Fla. Mun. Power Agency, 789 So. 2d 320, 324 (Fla. 2001) (court's function is to interpret statutes as they are written and give effect to each word in the statute).

and "cause of action" to mean the same thing, making part of the rule language either nonsensical or superfluous, effectively calling for a "claim to state a claim" or "legal theory to state a legal theory." It is more likely that the rule drafters meant that the pleading, to set forth a claim for relief, must state a ground or cause for relief and also must set forth ultimate facts demonstrating the right to relief. It is less likely but still possible that the drafters intended the rule to mean that, to state a claim, a complaint must state a "a factual situation that entitles one person to obtain a remedy in court from another person" and also describe the specific ultimate facts demonstrating that a remedy is appropriate.[103] Either way, Florida rules commentator Henry Trawick has opined that Florida "does not have notice pleading," which he said "cannot exist when pleadings are required to state a cause of action."[104]

What are "ultimate facts"? Black's Law Dictionary helpfully defines an "ultimate fact" as "[a] fact essential to the claim or the defense."[105] The Fifth District has adopted this definition.[106] The Fourth District adds:

> The logical conclusions deduced from certain primary evidentiary facts . . . Those facts found in that vaguely defined field lying between evidential facts on the one side and the primary issue or conclusion of law on the other . . . The final resulting effect reached by processes of legal reasoning from the evidentiary facts.[107]

Judge Danahy has commented that this distinction between evidentiary facts, ultimate facts, and conclusions of law is "sometimes difficult to fathom."[108] Nonetheless, the distinction is longstanding. Even before the advent of the Florida Rules of Civil Procedure, the Florida courts regularly distinguished between ultimate facts and both legal conclusions and evidentiary facts.[109]

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[103] *Cause of Action*, BLACK'S LAW DICTIONARY, *supra* note 95.
[104] HENRY TRAWICK, FLA. PRAC. & PROC. § 8.6 (2019–20 ed.).
[105] *Ultimate Fact*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[106] Costin v. Florida A&M Univ. Bd. of Trs., 972 So. 2d 1084, 1086 (Fla. Dist. Ct. App. 2008).
[107] Vantage View, Inc. v. Bali East Dev. Corp., 421 So. 2d 728, 731 (Fla. Dist. Ct. App. 1982) (quoting Waterman Mem'l Hosp. Ass'n v. Rigdon, 32 Fla. Supp. 154 (Fla. Cir. Ct. 1969) (order by Circuit Judge W. Troy Hall, Jr.); Black v. Rouse, 587 So. 2d 1359, 1361 (Fla. Dist. Ct. App. 1981); Feldman v. Dept. of Trans., 389 So. 2d 692, 694 (Fla. Dist. Ct. App. 1980); *see also* Tedder v. Fla. Unemployment Appeals Comm'n, 697 So. 2d 900, 902 (Fla. Dist. Ct. App. 1997) (Danahy, J., concurring). The Eleventh edition of *Black's Law Dictionary* states that an evidential fact, also called an evidentiary fact or predicate fact, is a fact that leads to the determination of an ultimate fact. *Evidential Fact*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[108] *Tedder*, 697 So. 2d at 902 n.1 (Danahy, A.C.J., with Fulmer, J., concurring).
[109] *See* Reinert v. Carver, 41 So. 2d 449 (Fla. 1949) (sustaining complaint that pled "ultimate facts" that defendants installed a septic tank, failed to install it with reasonably safe materials, and because of a defective top, it collapsed as plaintiff was walking upon it, causing injury); State *ex rel.* Bocher v. Hammons, 184 So. 145, 149 (1938) (relator in mandamus required to plead ultimate facts,

VII. WHY THE FLORIDA COURTS SHOULD ADOPT TWOMBLY *IN RULING ON MOTIONS TO DISMISS*

What are we to make of all this for purposes of construing rule 1.110(b)?

First, whatever else the words might denote, it is apparent that in Florida, contrary to Justice Stevens' suggestion in dissent in *Twombly*, a factless complaint, no matter how prolix in describing a legal theory, must be dismissed. To the extent the older decisions of *Martin*, *Ellison*, and *Hawkins* are to the contrary, they have been superseded by the adoption of rule 1.110(b). In other words, Florida is a "fact-pleading jurisdiction."[110] The Fifth District Court of Appeal recognized this in *Continental Baking Co. v. Vincent*,[111] observing in the days before *Twombly* that the "pleading standard in federal court and the pleading standard in our state courts differ radically" in that the federal courts only require notice pleading, while Florida is a "fact-pleading jurisdiction." As Judge Makar observed, a complaint that "simply strings together a series of sentences and paragraphs containing legal conclusions and theories does not establish a claim for relief."[112]

Second, a properly pleaded complaint in Florida must specifically identify each element of each cause of action. My colleague, Bruce Berman, in his treatise on Florida practice, may be right that the dictionary definition of "ultimate facts" is vague and injects conclusion into the inquiry.[113] He cites several examples of cases applying this "ultimate facts" standard, both sustaining and dismissing complaints. But he concludes (rightly, in my view) that "at the very least, a properly pleaded claim should identify each element of each cause of action asserted therein."[114]

To further illustrate the point, I recur to Professor Millar's 1952 remarks on the two schools of thought prior to *Conley*. He described the school later rejected in *Conley* but embraced in *Twombly* by referring to a dog bite case:

> The difference between the two things is readily apparent by reference

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not evidence, supporting his right to back salary); Williams v. Peninsular Grocery Co., 75 So. 517, 519 (Fla. 1917) ("A conclusion of law is objectionable in pleading, but the statement of an ultimate fact, which necessarily is a conclusion drawn from intermediate and evidentiary facts, is not."); Curtis v. Briscoe, 129 So. 2d 450, 451 (Fla. Dist. Ct. App. 1961) (distinguishing between ultimate facts that must be pled and evidentiary facts that need not be pled and mere legal conclusions, which will not suffice to state a cause of action); Housing Auth. of Melbourne v. Richardson, 196 So. 2d 489 (Fla. Dist. Ct. App. 1967) ("While it is not proper for plaintiffs to plead evidence, it is necessary that they plead with some specificity using ultimate facts to show the relationship of plaintiffs' property to Booker Heights and just how they will be adversely affected by the zoning ordinance.").

[110] Horowitz v. Laske, 855 So. 2d 169, 172 (Fla. Dist. Ct. App. 2003).

[111] 634 So. 2d 242, 244 (Fla. Dist. Ct. App. 1994).

[112] Davis v. Bay Cty. Jail, 155 So. 3d 1173, 1179 (Dist. Ct. App. 2014) (Makar, J., dissenting) (citations omitted).

[113] BRUCE J. BERMAN AND PETER D. WEBSTER, 4 FLA. PRAC., CIV. PRO. § 1:110:11 (2020).

[114] *Id.*

> to the classic common-law case of the biting dog. Here the elements of the cause of action are (1) the keeping of the animal by the defendant; (2) its propensity to bite mankind; (3) knowledge on the part of the defendant of the dog's vicious propensity; and (4) the injury to the plaintiff. To state a cause of action, therefore, would require a statement of each of the four elements. Yet, if the third element, that of scienter, is omitted, is not the defendant, nevertheless, reasonably informed of the nature of the claim?[115]

Third, and most importantly, a properly pleaded complaint in Florida must assert actual facts – not legal conclusions in disguise – supporting each element of each cause of action. The Fifth District got it partly right in *Continental Baking*, an interesting case involving whether a Florida trial judge is required to honor a federal district judge's motion to dismiss determination after remand: "Florida's pleading rule forces counsel to recognize the elements of their cause of action and determine whether they have or can develop the facts necessary to support it, which avoids a great deal of wasted expense to the litigants and unnecessary judicial effort."[116] I quibble with the language (unexplained in the opinion) that may allow a complaint to stand based on the hope that the plaintiff "can develop the facts necessary" to support a cause of action.[117] Nonetheless, as the *Continental Baking* court recognized, even its articulation was a departure from the pre-*Twombly* federal standard. Indeed, the Fifth District opined that the fact that a complaint survived a motion to dismiss in federal court, at least pre-*Twombly*, said "nothing" about whether it met the Florida pleading standard.[118]

More accurate is the statement of the Fourth District in *Barrett v. City of Margate*,[119] that the complaint "must set forth factual assertions that can be supported by evidence which gives rise to legal liability." Better still is the First District's opinion in *Maiden v. Carter*[120] that it is a "fundamental principle of pleading that the complaint, to be sufficient, must allege ultimate facts as distinguished from legal conclusions which, if proved, would establish a cause of action for which relief may be granted." The Third District punctuated the matter in *Clark v. Boeing Co.*,[121] when it emphasized that "[p]leadings must contain ultimate facts supporting each element of the cause of action."

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[115] MILLAR, *supra* note 11, at 190.
[116] *Continental Baking Co.*, 634 So. 2d at 244.
[117] *Id.*
[118] *Id.*
[119] 743 So. 2d 1160, 1162–63 (Fla. Dist. Ct. App. 1999).
[120] 234 So. 2d 168, 170 (Fla. Dist. Ct. App. 1970).
[121] 395 So. 2d 1226, 1229 (Fla. Dist. Ct. App. 1981); *see also* Okeelanta Power Ltd. P'ship v. Fla. Power & Light Co., 766 So. 2d 264, 267 (Fla. Dist. Ct. App. 2000).

Maiden illustrates the point. There, the complaint alleged that the defendant received assets from an estate to which she had no lawful claim and to which she was not entitled.[122] This was deficient, however, because the complaint failed to allege the nature or value of the assets received, the time they were received, from whom they were received, or the circumstances surrounding their receipt.[123] Similarly, in *Horowitz*, a legal malpractice case, the complaint failed to allege ultimate facts showing privity of contract when it merely alleged that the plaintiff was "among the 'class'" of those intended to benefit from an attorney's advice.[124] The Fifth District rightly saw that allegation as merely a "legal conclusion devoid of ultimate facts supporting it."[125]

The Florida courts insist that ultimate facts be pled on all elements of the cause of action, even if the defendant is nonetheless reasonably informed of the nature of the claim. That too is the ultimate meaning of *Twombly*. Thus, quibbles aside about specific details of Florida pleading practice, the overwhelming point is that the Florida rules drafters decisively rejected the *Conley* "no set of facts" principle by the very language they used in the rules themselves. Conversely, the language of pleading a "cause of action" and "ultimate facts," as explicitly stated in the rules and explicated by the Florida courts, at bottom amount to no more than what *Twombly* and *Iqbal* require.

This can be seen by again looking at *Twombly*. The complaint contained only allegations of parallel conduct, but under substantive antitrust law, those allegations, even if supported by evidence, could not give rise to legal liability. Indeed, even if the facts supported the allegations of parallel conduct, the defendants still would be entitled to summary judgment.[126] Thus, the complaint failed to plead "ultimate facts" supporting an essential element of the claim, facts that would nudge the parallel conduct allegations from a conceivable conspiracy to a plausible one. Similarly, the complaint in *Iqbal* was deficient for the same reason that the complaints in *Maiden* and *Horowitz* were deficient. It failed to allege ultimate facts supporting a key element of the claim – that the detention policy was established in order to detain the plaintiff because of his race, religion, or national origin. But what is the difference between stating that the complaint fails to "plausibly establish" this element and stating that it fails to allege ultimate facts supporting it? I posit that, analytically speaking, there is none.

In other words, it seems to me that the Florida courts already are applying a *Twombly* plausibility analysis even if they won't expressly call it that. *MYD Marine*

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[122] *Maiden*, 234 So. 2d at 169.
[123] *Id.* at 170.
[124] Horowitz v. Laske, 855 So. 2d 169, 173 (Fla. Dist. Ct. App. 2003).
[125] *Id.*
[126] *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984) (explaining that independent action is not illegal under section 1 of the Sherman act).

Distributor, Inc. v. Int'l Paint Ltd[127] proves this point. There, a distributor of "yacht paint" filed a state law antitrust complaint against a paint manufacturer and competing distributors, alleging that its distributorship was terminated as a result of a conspiracy among the manufacturer and the distributors because it engaged in price discounting.[128] The complaint contained specific allegations about meetings where an explicit agreement was reached to coerce the plaintiff into raising its prices or terminate it.[129] Citing *Twombly*, the court agreed that the same standard applied to evaluating the sufficiency of the complaint as would be applied when considering a motion for directed verdict.[130] Although the court went to pains to note that it was not "bound by the United States Supreme Court's interpretation of the Federal Rules of Civil Procedure," it expressly stated that "Florida courts should look to *Twombly* in determining whether an agreement in violation of the Florida Antitrust Act can be reasonably inferred from the alleged facts."[131] Under this standard, a pleading that "merely asserts complaints to the manufacturer by competing dealers followed by termination of a discounter would be insufficient to create a 'reasonable inference' of a conspiracy."[132] The complaint in that case, however, pled "much more than" that, providing specific details of an express conspiracy.[133] Although the court did not use the term "plausible," what it effectively held is that, in the words of the *Twombly* court, the specific facts alleged regarding the conspiracy nudged the complaint from the merely conceivable to the plausible.[134] That fact that the Fourth District seemed to be uncomfortable with the word "plausible" to describe the allegations is, respectfully, a distinction without a difference.

VIII. CONCLUSION

Justice Stevens noted in his *Twombly* dissent that some of his colleagues had recently explained that "a strict interpretation of the literal text of statutory language is essential to avoid judicial decisions that are not faithful to the intent of Congress."[135] He argued that the majority's decision in *Twombly* violated a textual understanding of Rule 8. It is not the purpose of this article to speak to his understanding of Rule 8. But whatever the merits of that observation in the context of the federal rule, surely members of the Florida bench and bar can agree that both a textual and originalist understanding of the comparable Florida rules requires a

[127] 76 So. 3d 42, 47 (Fla. Dist. Ct. App. 2011).
[128] *Id.* at 44–45.
[129] *Id.* at 45.
[130] *Id.* at 46.
[131] *Id.* at 46 n.4.
[132] *Id.* at 46.
[133] *Id.* at 47.
[134] *Id.* at 49–50.
[135] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 595–96 (2007) (Stevens, J., dissenting with Ginsburg, J., joining in part).

complaint to provide enough "ultimate facts" on each element of each cause of action that would state a claim to relief that is plausible on its face. Analytically speaking, that is all *Twombly* requires.

There are a number of salutary effects to recognizing the *Twombly* standard in Florida. It would add clarity to and clear up existing judicial confusion as to what a plaintiff needs to plead to move a case into discovery. It again would align the Florida pleading standard with that existing under the comparable federal rule, as the Florida rules drafters desired. It also would allow Florida courts and litigants to draw upon the body of law interpreting Federal Rule 8 after 2007 as persuasive authority in evaluating complaints filed in the Florida courts. Most importantly, adopting or recognizing *Twombly* would make Florida case law more faithful to the actual text of rule 1.110(b). Accordingly, I believe the Florida courts should recede from *Martin* and its progeny and formally adopt the *Twombly* plausibility standard for Florida court motion to dismiss practice.