# MINNESOTA JUST CAN'T QUIT TWOMBLY: WHY THE COURT'S RECENT DECISION IN WALSH LIKELY DOES NOT SIGNAL A RETURN TO "PURE" NOTICE PLEADING

BY RYAN P. MYERS, LIND JENSEN, SULLIVAN, & PETERSON, P.A.

Given the Minnesota Supreme Court's recent decision in *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, (Minn. 2014), which rejected "plausibility" pleading as articulated by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), it is tempting to conclude that the effect of *Walsh* is to turn the clock back almost 65 years to the "traditional" notice pleading standard first articulated in *First National Bank of Hanning v. Olson*, 74 N.W.2d 123 (Minn. 1955). Under *Olson*, courts traditionally asked *whether any possible set of facts might be introduced* consistent with the pleadings that would entitle a plaintiff to relief. *See Olson*, 74 N.W.2d at 129. Literally applied, this standard requires courts to speculate about the possible evidence that could be unearthed in discovery that might support a plaintiff's claim for relief.

However, the return to *Olson* notice pleading in Minnesota is not a foregone conclusion. It is true that *Walsh* eliminated continued appeal to the "plausibility" language in the second prong of the *Twombly* test. But the *Walsh* decision notably left intact Minnesota's prior decisions adopting the requirement, also articulated in *Twombly*, that a pleading state more than "mere labels and conclusions." And for at least 15 years, Minnesota's application of the *Olson* pleading standard has not at all resembled the literal language of the rule. Instead, while paying lip service to the "traditional" notice pleading standard, Minnesota courts have routinely, and appropriately, reviewed the sufficiency of the facts *alleged* in the complaint when deciding motions to dismiss for failure to state a claim on which relief can be granted. *Walsh* did not address this body of law. As a result, the defense bar still has room to argue that the *substantive* effects of the *Twombly* pleading standard remain alive and well in Minnesota, even if the Minnesota Supreme Court refused to adopt its literal language.

**MINNESOTA'S RULE 8 PLEADING STANDARD ARTICULATED UNDER *OLSON***

Since Minnesota's adoption of its Rules of Civil Procedure in 1951, Rule 8 has required that every claim for relief must "contain a short and plain statement of the claim showing that the pleader is entitled to relief." Minn. R. Civ. P. 8.01. The Minnesota Supreme Court first interpreted the pleading requirements of Rule 8 in *Olson*, holding that "there is no justification for dismissing a complaint for insufficiency . . . unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim." 74 N.W.2d at 129. Several years later, in *Northern States Power Co. v. Franklin*, the court elaborated on its holding in *Olson*, and explained that Rule 8 "permit[ted] the pleading of events by way of a broad general statement which may express conclusions rather than . . . by a statement of facts sufficient to constitute a cause of action." 122 N.W.2d 26, 29 (Minn. 1963). The court stated that pleadings functioned

> simply to give fair notice to the adverse party of the incident giving rise to the suit with sufficient clarity to disclose the pleader's theory upon which his claim for relief is based, to permit the application of the doctrine of res judicata, and to determine whether the case must be tried by the jury or the court. No longer is a pleader required to allege facts and every element of a cause of action.

*Id.*

**THE FEDERAL COURT'S APPLICATION OF RULE 8: FROM *CONLEY TO TWOMBLY.***

Rule 8 of the Federal Rules of Civil Procedure is identical to the Minnesota rule. *Compare* Fed. R. Civ. P. 8(a)(2), *with*

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*Mr. Myers is a litigator at Lind, Jensen, Sullivan & Peterson, P.A., where he maintains a practice focused on the defense of employers in employment matters, attorneys and other professionals in malpractice cases, and businesses and their owners in general commercial litigation.*

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Minn. R. Civ. P. 8.01. And for the 50 years that followed Minnesota's adoption of its Rules of Civil Procedure, the pleading standard articulated by the federal and Minnesota state courts were nearly identical as well. *Compare Franklin*, 122 N.W.2d at 29 (holding "[a] claim is sufficient against a motion to dismiss based on Rule [12.02(e)] if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded."), with *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) ("the accepted rule [is] 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"). Then, in 2007, the Supreme Court decided *Bell Atlantic Corp. v. Twombly*, which abrogated the "no set of facts" language first stated in *Conley* and replaced it with the following:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all allegations in the complaint are true (even if doubtful in fact).

550 U.S. at 555-56 (2007). The Court explained that stating a claim requires pleading enough factual matter, taken as true, to provide plausible grounds to infer each element of a cause of action. *Id.* at 556.

In 2009, the Supreme Court decided *Ashcroft v. Iqbal*, which reaffirmed the holding in *Twombly* and expanded its scope to "govern[] the pleading standard in all civil actions and proceedings in the United States district courts." 556 U.S. 662, 684 (2009) (internal quotation omitted).

## MINNESOTA CARRIED ON A SEVEN-YEAR COURTSHIP WITH THE *TWOMBLY* PLEADING STANDARD

Since the Supreme Court's discussion of the Rule 8 pleading standards in *Twombly*, a handful of state courts chose to adopt the standards articulated in *Twombly*. *See, e.g., Data Key Partners v. Permira Advisers, LLC*, 849 N.W.2d 693 (Wis. 2014) (applying the *Twombly / Iqbal* standard to pleadings filed in state court) ; *Doe v. Bd. of Regents of Univ. of Neb.*, 788 N.W.2d 264 (Neb. 2010) (same); *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879 (Mass. 2008) (same); *Sisney v. Best Inc.*, 754 N.W.2d 804 (S.D. 2008) (same).

In addition, a handful of states have refused to adopt any portion of the standard. *See, e.g., Hawkeye Foodservice Dist., Inc. v. Iowa Ed. Corp.*, 812 N.W.2d 600 (Iowa 2012) (refusing to apply any portion of the *Twombly / Iqbal* standard to pleadings filed in state court); *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422 (Tenn. 2011) (same); *McCurry v. Chevy Chase Bank, FSB*, 233 P.2d 861 (Wash. 2010) (same).

The only jurisdiction to have flirted with *Twombly*, without committing entirely, is Minnesota. Beginning with *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226 (Minn. 2008), the Minnesota Supreme Court began a courtship with *Twombly* that lasted for seven years. In *Hebert*, the court eschewed recitation of the "traditional" notice pleading language set out in *Olson* and *Franklin*, and instead stated: "We are to consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party." *Id.* at 229. (citing *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997) and *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003)). It then adopted the first prong of *Twombly*, and acknowledged for the first time that Minnesota courts "are not bound by legal conclusions stated in a complaint when determining whether the complaint survives a motion to dismiss for failure to state a claim." *Id.* at 235 (citing *Anspach v. City of Philadelphia*, 503 F.3d 256, 260 (3d Cir. 2007); *Twombly*, 550 U.S. at 553-54).

Consistent with *Twombly* – but out of step with *Olson* and *Franklin* – the *Hebert* court proceeded to evaluate the factual allegations in the complaint to determine the legal sufficiency of the pleadings. *See Id. Hebert* appeared to mark the beginning of a departure from Minnesota's "traditional" notice pleading standard, which had explicitly permitted "the pleading of events by way of a broad general statement which may express conclusions rather than . . . by a statement of facts sufficient to constitute a cause of action." *Franklin*, 122 N.W.2d at 29.

Two years later, in 2010, the court decided *Bahr v. Capella University*, 788 N.W.2d 76 (Minn. 2010), which presented a clear invitation to adopt *Twombly*. The court of appeals in *Bahr v. Capella Univ.*, 765 N.W.2d 428 (Minn. Ct. App. 2009), held that *Twombly* had:

> recently corrected [the *Franklin* "no set of facts" pleading standard] insofar as it suggests that the future introduction of evidence can substitute for an adequate statement of facts in the complaint; the statement of entitlement to relief must go beyond "mere labels and conclusions" or the "speculative" presentation of a claim. The court demands that the complaint state "enough factual matter" or "factual enhancement" to suggest, short of "probability," "plausible grounds" for a claim — a pleading with "enough heft" to show entitlement.

*Id.* at 436-37.

In refusing to accept this invitation, the court articulated the pleading standard in contradictory and confusing language. It juxtaposed the "no set of facts" language from *Franklin* (which expressly permitted the pleading of conclusory allegations), with the first *Twombly* factor (which explicitly denied their utility in pleadings). *See Id.* at 80 (citing *Franklin*, 122 N.W.2d at 29; *Hebert*, 744 N.W.2d at 235). And, under the pleading standard articulated, it reviewed the sufficiency of the factual *allegations* set forth in the complaint, determining that the issue on appeal concerned whether the plaintiff's claim was "based on a legal theory and facts that are *plausible*?" *Id.* at 82 (emphasis added).

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Applying this framework, the Minnesota Supreme Court reversed the court of appeals, finding "no reasonable person could believe that [defendant]'s treatment of [an employee] was forbidden by the MHRA because [the employee] was not subjected to anything that could remotely be considered adverse employment action." *Id.* at 84-85. Again, without stating it explicitly and despite employing a confusing standard, the Minnesota Supreme Court appeared to have functionally adopted *Twombly*.

The court's subsequent decision in *Graphic Communications Local 1B Health & Welfare Fund "A" v. CVS Caremark Corp.*, 850 N.W.2d 682 (Minn. 2014), appeared to have cemented Minnesota's functional application of *Twombly*, but again failed to clarify its stance on the rule. The court did not even cite to *Twombly*, but instead cited to *Bahr* alone, and set out the standard in the same confusing and contradictory language as *Bahr*. Just as it did in *Bahr*, the court "examine[d] whether the [plaintiff] *adequately pleaded facts* showing that the [defendants] engaged in actionable conduct. . ." *Id.* at 694 (emphasis added).

## MINNESOTA SOURS ON *TWOMBLY*, BUT KEEPS THE RELATIONSHIP ALIVE

With this history in mind, the court's analysis in *Walsh* is confusing. In *Walsh*, the plaintiff defaulted on the mortgage on her residence in Minneapolis. 851 N.W.2d at 600. The mortgage holder, U.S. Bank, sought to foreclose on the property in a non-judicial proceeding. *Id.*

On November 16, 2011, a process server working on behalf of U.S. Bank attempted to serve an adult at the Walsh property. *Id.* According to the process server, the adult at Walsh's property was an "occupant" ("Jane Doe") of the property at the time of service. Jane Doe refused to provide her name or acquiesce to service. *Id.* The process server left the foreclosure-related documents at the door to the property. *Id.*

Following the foreclosure sale, Walsh sued U.S. Bank to vacate the sale alleging the bank failed to properly serve her with notice. *Id. at 601.* In her complaint, she alleged that the only persons residing at the property were Walsh and her male roommate. *Id.* She alleged that neither she nor her roommate were served, but failed to allege any facts to explain who Jane Doe was or why she might have been at Walsh's property when the process server attempted to serve the foreclosure notice. *Id.*

U.S. Bank moved to dismiss Walsh's complaint for failure to state a claim, arguing that *Twombly's* "plausibility" standard required Walsh to plead enough facts to "nudge[] her claim across the line from conceivable to plausible." *Id.* The district court agreed and dismissed Walsh's claim. *Id.* The Minnesota Court of Appeals reversed, holding Walsh's complaint met the "traditional" notice pleading requirements articulated in *Franklin*. *Id.*

In affirming the court of appeals, the Minnesota Supreme Court addressed "whether the plausibility standard, applied by the district court, or our traditional pleading standard, applied by the court of appeals, governs civil pleadings in Minnesota." *Id.* The court discussed at length the "traditional" notice pleading standard articulated in *Olson* and *Franklin*, emphasizing a plaintiff's ability to plead events "by way of a *broad general statement* which may express conclusions rather than . . . by statement of facts sufficient to constitute a cause of action." *Id. at 604* (quoting *Franklin*, 122 N.W.2d at 29) (emphasis in original). The court then quoted the "no set of facts" language set out in *Franklin* as the "traditional" pleading standard that governs in Minnesota. *Walsh*, 851 N.W.2d at 605 (quoting *Franklin*, 122 N.W.2d at 29).

Acknowledging its several recent citations to *Twombly*, the court was careful to state it had never "*expressly* adopted or rejected the plausibility standard." *Walsh*, 851 N.W.2d at 603 (emphasis added). It acknowledged that it had adopted the first prong of the *Twombly* framework requiring a plaintiff to plead "more than labels and conclusions" in a complaint. *Id.* The court acknowledged it had previously cited *Twombly* substantively in *Hebert* "for its first working principle: the common-sense proposition that we are 'not bound by legal conclusions stated in a complaint when determining whether the complaint survives a motion to dismiss for failure to state a claim.'" *Id.* (quoting *Hebert*, 744 N.W.2d at 235). It also acknowledged it cited *Twombly* substantively in *Bahr* for the proposition that "[a] plaintiff must provide more than mere labels and conclusions" in a complaint. *Id.* at *4 (quoting *Bahr*, 788 N.W.2d at 80). It refused, however, to adopt *Twombly's* "plausibility" standard. *Walsh*, 851 N.W.2d at 603.

As it did in *Bahr*, the *Walsh* court analyzed the sufficiency of the factual *allegations* contained in the complaint and concluded that "[i]t contains two key factual assertions that, when accepted as true, adequately contest personal and substitute service." *Id.* at 607. As a result, the court held that Walsh's complaint "satisfie[d] the traditional pleading standard for civil actions in Minnesota." *Id.*

## FOR AT LEAST THE PAST 15 YEARS, MINNESOTA HAS APPLIED *TWOMBLY*-LITE

When viewed in the context of the court's focus on the sufficiency of the factual allegations in the *Hebert-Bahr-Graphic Communications* trilogy, the Minnesota Supreme Court's refusal to adopt the "plausibility" pleading standard in *Twombly* in *Walsh v. U.S. Bank* is confusing. This confusion is compounded by internal inconsistencies in *Walsh*, exemplified in the court's dual-affirmation of the "mere labels and conclusions" prong of the *Twombly* standard, and of *Franklin* which explicitly permitted pleading in such a manner. Further, *Walsh* did not even apply the "traditional" pleading standard it set out; nor did it overrule any of its previous decisions that applied something akin to the *Twombly* framework, even if the court never set out the pleading standards in those terms.

The decisions applying something more than the "traditional" pleading standard are also not limited to the *Hebert-Bahr-Graphic Communications* line of cases. For example, 15 years ago the Minnesota Supreme Court

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held in *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179 (Minn. 1999), that the plaintiff pled insufficient facts against an accounting firm to state a claim. The court briefly described the standard on a motion to dismiss as whether a pleading "set[s] forth a legally sufficient claim for relief; it is immaterial whether or not [plaintiff] can prove the facts alleged." *Id.* at 185. It did not mention *Franklin* or *Olson*, nor did it engage in the "traditional" notice pleading review. *See Id.* Instead, the court's analysis focused on whether the plaintiff had pled sufficient facts, together with permissible inferences, that supported each element of the plaintiff's causes of action. *Id.* In concluding the plaintiff had not, the court held that the complaint failed to state sufficient facts that, along with the permissible inferences that could be drawn from the facts alleged, entitled plaintiff to relief. *Id.* at 189.

A year later in *Martens v. Minnesota Mining and Manufacturing Co.*, 616 N.W.2d 732 (Minn. 2000), the Minnesota Supreme Court again engaged in a similar analysis. In *Martens*, the court reviewed the sufficiency of claims pled by several high level technical employees at 3M that they remained technical employees, and did not move into management positions, because 3M's "dual ladder" system promised technical employees that their compensation and benefits packages would be equivalent to those in management. The plaintiffs pled breaches of contract and promissory estoppel, among other causes of action. In granting 3M's motion to dismiss the plaintiffs' claim for unilateral contract, the Minnesota Supreme Court held "that the oral and written statements alleged by [plaintiffs] in their complaint" did not constitute a unilateral offer to contract. *Id.* at 745. Similarly, with regard to the plaintiffs' claim for promissory estoppel, the court focused on the factual content alleged in the complaint and concluded that the allegations regarding the plaintiffs' "opportunities for equivalent advancement" were too indefinite to state a claim for promissory estoppel. *Id.* at 745-46.

In dissent, Justice Gilbert took the majority to task for failing to apply the "traditional" pleading standard. He criticized the majority for engaging "in a factual analysis based on the pleadings" when dismissing the plaintiffs' claims. *Id.* at 753. He then correctly noted that, under the "traditional" notice pleading standard, "factual determinations are not the basis for dismissal on the pleadings. All of the facts have not been uncovered at this point. Discovery has not been completed." *Id.*

After *Martens*, the court continued to pay lip service to *Franklin* before assessing the factual sufficiency of the pleadings themselves, rather than ask whether facts could be uncovered in discovery that might support the plaintiff's claims. *See e.g., Noske v. Friedberg*, 670 N.W.2d 740, 742-43 (Minn. 2003) (requiring a plaintiff to allege sufficient facts to support each element of his or her cause of action, and stating that "[f]ailure to establish any one of these elements defeats the entire claim"); *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 558 (Minn. 2003) ("We hold that the court of appeals erred in reversing the dismissal of the complaint *because the facts, as alleged*, do not support the conclusion that there is 'publicity' to withstand a Rule 12.02(e) motion") (emphasis added). But *see, e.g., Wiegand v. Walser Auto. Gps., Inc.*, 683 N.W.2d 807 (Minn. 2004) (setting out the Rule 8 pleading standard articulated in *Franklin* and determining the plaintiff's complaint was sufficient because discovery might reveal facts consistent with the allegations in plaintiff's complaint that would entitle the pleader to relief). The court's subsequent appeal to *Twombly* in *Hebert*, *Bahr*, and *Graphic Communications*, merely reflected the change that had already taken place in Minnesota pleading jurisprudence.

## GIVEN MINNESOTA PRECEDENT, WHAT IS LEFT AFTER *WALSH*?

Without question, *Walsh* puts an end to the debate over whether the court will adopt the "plausibility" prong of the *Twombly* pleading standard. However, all is not lost. The defense bar retains powerful arguments that *Walsh* does not mandate a return to the "traditional" Rule 8 pleading standard articulated in *Olson* and *Franklin*.

First, *Walsh* is notable for what it does not do: overturn its previous jurisprudence adopting the first *Twombly* factor requiring plaintiffs to plead more than "mere labels and conclusions." And if pleading in a conclusory fashion is insufficient to state a claim, but pleading a "plausible" claim for relief sets too high of a bar for sufficiency, it begs the question: how much factual substance is required in a complaint so that it presents a legally sufficient claim upon which relief can be granted? The *Walsh* court did not resolve this question. And the "traditional" notice pleading standard set out in *Olson* and *Franklin* does not reflect the manner in which the court has analyzed complaints over the past 15 years.

One possible future articulation of the Rule 8 pleading standard might be found in *Hebert*, in which the court stated it "must consider only the facts alleged in the complaint . . . [and] construe all *reasonable* inferences in favor of the nonmoving party." 744 N.W.2d at 229. That pleading standard finds support in the *Walsh* decision, itself. Framing the standard in this fashion preserves the court's role as a gatekeeper to ensure that plaintiffs have pled enough facts to put a defendant on fair notice of the circumstances giving rise to the claim, permit the application of res judicata, and to determine whether the plaintiff is entitled to a jury trial. It acknowledges that Rule 8 does not require a plaintiff to plead facts supporting each element of their causes of action. But it provides a clear but flexible rule that permits a reviewing court to ask the question: do the facts alleged in the pleading, and the *reasonable* inferences drawn from those facts, support each element of the plaintiff's cause of action?

While not stated in terms of "plausibility," a test articulated in this manner — relying on the court's own statement that plaintiffs are entitled only to the *reasonable* inferences drawn from the facts alleged in their complaints — can more than approximate the analytical framework set out in *Twombly*. The defense bar still has wide latitude to pursue dismissal of pleadings that fail to state sufficient facts to support a cause of action. It can and should seek to settle the confusion that persists after *Walsh*.