

THE MYTH OF NOTICE PLEADING

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I. INTRODUCTION

Pleading is the gateway to the federal courts. By design, this threshold is easy to pass. Under the Federal Rules, “notice pleading” applies. This merely requires a plaintiff to provide a short and plain statement of a claim sufficient to put the defendant on notice.¹ While there are exceptions under the Rules requiring pleading with greater factual detail, these heightened pleading situations are narrow.² If any rule in federal civil procedure deserves the label “blackletter,” it is notice pleading. Indeed, thrice the Supreme Court has explicitly stated: notice pleading controls.³

Notwithstanding its foundation in the Federal Rules and repeated Supreme Court imprimatur, notice pleading is a myth. From antitrust to environmental litigation, conspiracy to copyright, substance specific areas of law are riddled with requirements of particularized fact-based pleading. To be sure, federal courts recite the mantra of notice pleading with amazing regularity.⁴ However, their rhetoric does not match the reality of federal pleading practice. Sometimes subtle, other times overt, federal courts in every circuit impose non-Rule-based heightened pleading in direct contravention of notice pleading doctrine.

Despite the regularity with which courts require it, little scholarship exists exploring the divergent requirements contained in the concept—heightened pleading.⁵ Outside of the civil rights⁶ and securities fraud contexts,⁷ the literature

1. FED. R. CIV. P. 8(a).

2. See FED. R. CIV. P. 9(b) (requiring the circumstances constituting fraud and mistake be stated with particularity).

3. See *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 514 (2002).

4. As of May 27, 2003, a Westlaw query of “notice pleading” in the Allfeds database yielded 5312 cases invoking the phrase. The phrase was used in 60 cases in the decade of the 1960s, 290 cases in the 1970s, 984 cases in the 1980s, and 2621 cases in the 1990s. So far this decade, “notice pleading” has been recited by the federal courts in 1278 cases.

5. Professor Richard Marcus is the exception having twice surveyed pleading practice and commented on the return to fact-based pleading. See generally Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986) [hereinafter *Revival*]; Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998) [hereinafter *Puzzling*].

6. Scholarly attention to heightened pleading in the civil rights context is more robust and universally critical. See generally Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002); Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935 (1990); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 299 (1989); C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back*, 49 MO. L. REV. 677 (1984).

7. This Article focuses solely on judicially-imposed heightened pleading requirements. Congress has also recently seized upon heightened pleading and imposed it with the Private Securities Litigation Reform Act of 1995 (PSLRA) and the Y2K Act. See

largely ignores what courts and litigants must grapple to answer: what does heightened pleading require? By analyzing pleading practice across diverse substantive areas, this Article uncovers a rich continuum of heightened pleading requirements. Some are narrowly targeted requiring only a single element of a substantive claim to be pleaded with specificity. Others are more broad-based mirroring the Federal Rules' particularity standard for fraud. Still others impose a form of "hyperpleading"—mandating virtually every element of a claim be pleaded with factual detail. This varied landscape of heightened pleading cuts across both substantive areas and jurisdictions.⁸

When the pleading practices in these micro substantive areas are combined, a macro vision of pleading emerges. Contrary to the myth, current practice is not a simple binary choice: fact-based pleading for fraud; notice pleading for everything else. Rather, there is a wide range of factual detail required in federal complaints. The spectrum begins with the factless and universally rejected "conclusory allegation." Simplified notice pleading follows. The varieties of heightened pleading are next with their increasing particularity requirements. Ultimately, a pleading may reach the point of prolixity and the same fate as its conclusory cousin. Hence, the macro-model can be visualized as a pleading circle where substantial variety in factual particularity both exists and is required.⁹ This reality is a far cry from notice pleading.

Part II of the Article briefly explores the origins of the notice pleading myth from the drafters' vision through the Court's pronouncements. Part III presents the macro-pleading model forged from the reality of pleading practice in the micro areas. The specific pleading practices of the micro substantive areas are detailed in Part IV. Part V then explores possible explanations for this disconnect between notice pleading rhetoric and reality. One overriding conclusion emerges—notice pleading as a universal standard is a myth.

PSLRA, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.); 15 U.S.C. §§ 6601–6617 (2001) (Y2K Act). Statutory heightened pleading under the PSLRA has generated considerable scholarly interest. See generally Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627 (2002); Marilyn F. Johnson et al., In re Silicon Graphics Inc.: *Shareholder Wealth Effects Resulting From the Interpretation of the Private Securities Litigation Reform Act's Pleading Standard*, 73 S. CAL. L. REV. 773 (2000); Ann M. Olazabal, *The Search for "Middle Ground": Towards a Harmonized Interpretation of the Private Securities Litigation Reform Act's New Pleading Standard*, 6 STAN. J.L. BUS. & FIN. 153 (2001); Hillary A. Sale, *Heightened Pleading and Discovery Stays: An Analysis of the Effect of the PSLRA's Internal-Information Standard on '33 and '34 Act Claims*, 76 WASH. U. L.Q. 537 (1998); Elliott J. Weiss, *Complex Litigation at the Millennium: Pleading Securities Fraud*, 64 LAW & CONTEMP. PROBS. 5 (2001); Elliott J. Weiss & Janet E. Moser, *Enter Yossarian: How to Resolve the Procedural Catch-22 that the Private Securities Litigation Reform Act Creates*, 76 WASH. U. L.Q. 457 (1998). For a complete discussion and comparison of heightened pleading in the civil rights context with the PSLRA and Y2K Act, see generally Fairman, *supra* note 6.

8. See *infra* subparts III.B(3)–(5).

9. See *infra* subpart III.A (describing the pleading spectrum as a circle).

II. ORIGINS OF THE MYTH

A. Foundation of the Federal Rules

A procedural system with notice pleading at its core is no accident. The drafters of the Federal Rules, chiefly Charles E. Clark,¹⁰ wanted a sharp break from the former common law and code pleading regimes.¹¹ Both were widely criticized for overemphasizing form over substance. Common law pleading, with its preoccupation with specialized allegations, degenerated into an expensive and inefficient practice.¹² The cure—code pleading—proved to be as bad as the disease with its obsession for hypertechnical distinctions.¹³ Clark had a new vision.¹⁴

Adopted in 1938, the Federal Rules are essentially a reform effort designed to ensure litigants have their day in court.¹⁵ With merits determination as the goal, the Federal Rules create a new procedural system that massively de-emphasizes the role of pleadings.¹⁶ Under the Federal Rules, a complaint would serve the single function of providing notice of the claim asserted.¹⁷ Rule 8's

10. Clark was dean of the Yale Law School and reporter for the drafting committee of the Federal Rules. He is widely considered the Federal Rules' principal architect. *Revival*, *supra* note 5, at 433. For a list of the entire drafting committee see Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 534–35 n.30 (2001).

11. See Richard L. Marcus, *2002 Institute For Law and Economic Policy Litigation Conference: Litigation in a Free Society: Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901, 901–02 (2002) (explaining how the drafters changed the procedural landscape by implementing law reform); *Revival*, *supra* note 5, at 439 (describing the drafters' desire to devise a system that would install a "liberal ethos").

12. See Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 458–60 (1943) (chronicling the cumbersome system of common-law pleading); CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 471 (6th ed. 2002) (calling common-law pleading "wonderfully slow, expensive, and unworkable").

13. See David M. Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390, 395–96 (1980) (describing "hypertechnical artifices" of code pleading and its social costs); Clark, *supra* note 12, at 460 (characterizing code pleading as "at best wasteful, inefficient, and time-consuming").

14. The starting point for exploring Clark's vision is his article, *The Handmaid of Justice*, written just prior to the effective date of the new rules. Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297 (1938). For a legal-historical view of Clark's role as professor, dean, drafter and jurist see generally Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914 (1976).

15. See Clark, *supra* note 14, at 318–19 (describing the new rules and procedures to reach merits determination); see also *Revival*, *supra* note 5, at 439 (stating the drafters set out to devise a system that preferred disposition on the merits); Smith, *supra* note 14, at 916 (finding one of Clark's "cardinal virtues" was merits determination of cases).

16. See *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 514 (2002) (stating Rule 8 was adopted as part of a simplified pleading system adopted to focus litigation on the merits).

17. Pleadings at common law and under the codes served multiple functions including notice, factual development, winnowing issues, and disposing of sham claims. Instead of serving all these multiple functions, pleading under the Federal Rules was designed to provide notice alone. See 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER,

command, simple and direct, requires only a “short and plain statement of the claim showing that the pleader is entitled to relief.”¹⁸ For the drafters, this meant notice “of the general nature of the case and the circumstances or events upon which it is based.”¹⁹ The Federal Forms model the simplicity required.²⁰

The drafters did include isolated exceptions where more than mere notice is required. Rule 9(b) requires “the circumstances constituting fraud or mistake shall be stated with particularity.”²¹ While the true reason for inclusion of this heightened pleading requirement is probably historical accident,²² the best proffered rationale is that it still serves a notice function.²³ The inherent vagueness of an allegation of fraud requires greater articulation of the surrounding

FEDERAL PRACTICE AND PROCEDURE § 1202, at 68 (2d ed. 1990) [hereinafter WRIGHT & MILLER] (comparing pleading function under the Federal Rules with previous systems).

18. FED. R. CIV. P. 8(a)(2).

19. Clark, *supra* note 12, at 460.

20. Clark himself thought the forms were the best indicator of the specificity required. Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958). He described in detail the car accident example that is the basis of the negligence complaint in Form 9, App. of Forms, FED. R. CIV. P., and how it comports with the notice function of the rules. *See id.* at 182–83; Clark, *supra* note 12, at 461–62. The four-sentence model is “short and plain” indeed. *See* Form 9, App. of Forms, FED. R. CIV. P. However, the form is “sufficient under the rules” and is intended to “indicate the simplicity and brevity . . . the rules contemplate.” FED. R. CIV. P. 84.

21. FED. R. CIV. P. 9(b).

22. *See* William M. Richman et al., *The Pleading of Fraud: Rhymes Without Reason*, 60 S. CAL. L. REV. 959, 965–68 (1987) (tracing the scant legislative history of Rule 9(b) and linking the rule to the “remote history of fraud”); Fairman, *supra* note 6, at 563 (describing cryptic history surrounding Rule 9(b)’s inclusion). In this sense, courts that state “this bite of Rule 9(b) was part of the pleading revolution of 1938” have little support. *See* Williams v. WMX Techs., Inc., 112 F.3d 175, 178 (5th Cir. 1997).

23. *See, e.g.,* Abels v. Farmers Commodities Corp., 259 F.3d 910, 920 (8th Cir. 2001) (“The special nature of fraud does not necessitate anything other than notice of the claim; it simply necessitates a higher degree of notice”); Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass’n, 176 F.3d 315, 322 (6th Cir. 1999) (“The purpose of Rule 9(b) is to provide fair notice to the defendant so as to allow him to prepare an informed pleading responsive to the specific allegations of fraud.”). Other purposes of Rule 9(b) include protection of reputation, deterrence of frivolous suits, and resistance to reopening completed transaction. These rationales have been widely criticized. *See* Richman, *supra* note 22, at 961–65; 5 WRIGHT & MILLER, *supra* note 17, § 1296, at 581–82; Note, *Pleading Securities Fraud Claims with Particularity Under Rule 9(b)*, 97 HARV. L. REV. 1432, 1439–48 (1984). Still, courts persist in restating these disfavored rationales. *See, e.g.,* Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999) (listing in addition to notice, protection from frivolous suits, eliminating actions where facts are learned post-discovery, and protecting reputations); New England Data Servs., Inc. v. Becher, 829 F.2d 286, 289 (1st Cir. 1987) (identifying notice, strike suits, and protection of defendant as the “three purposes behind Rule 9(b)’s particularity requirement” but notice is the “major purpose”); Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd., 85 F. Supp. 2d 282, 293 (S.D.N.Y. 2000) (stating allegations of fraud must be pleaded with sufficient particularity to provide not only notice, but also prevent harm to reputation by unfounded allegations, and reduce strike suits).

circumstances so the defendant has sufficient notice to respond.²⁴ Significantly, Rule 9(b) also recognizes the difficulty in pleading states of mind: “Malice, intent, knowledge, and other condition of mind of a person may be averred generally.”²⁵

To preserve liberal pleading, Clark would have eliminated pleading motions all together.²⁶ While this view did not prevail, the Federal Rules “erect a powerful presumption against rejecting pleadings for failure to state a claim.”²⁷ Consequently, a motion to dismiss for failure to state a claim under Rule 12(b)(6) does not provide an avenue for defendants to challenge the underlying merits of a case.²⁸ Rather, Rule 12(b)(6) is designed to raise legal challenges to a claim, typically based on the inclusion within a complaint of allegations that cause the claim to self-destruct.²⁹ In ruling on a 12(b)(6) motion, a court must accept the plaintiff’s allegations as true and construe the complaint liberally granting the plaintiff the benefit of all inferences that can be derived from the facts.³⁰ In other words, “it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.”³¹

The Rules also include a motion for a more definite statement.³² In the rare case where a complaint is too vague to provide a defendant notice to prepare a

24. See Richman, *supra* note 22, at 969–71 (contending 9(b) and Rule 8(a) should be harmonized and greater particularity required as needed for notice).

25. FED. R. CIV. P. 9(b).

26. Smith, *supra* note 14, at 927. Even after the Rules were adopted, Clark continued to advocate “a system of procedure which will substantially eliminate motion practice dealing with pleading forms and force adjudication upon the merits, either by way of summary judgment or trial.” Clark, *supra* note 12, at 467.

27. Robbins v. Wilkie, 300 F.3d 1208, 1210 (10th Cir. 2002); Brever v. Rockwell Int’l Corp., 40 F.3d 1119, 1125 (10th Cir. 1994) (accord).

28. See Browning v. Clinton, 292 F.3d 235, 242 (D.C. Cir. 2002) (“At the Rule 12(b)(6) stage, we do not assess the truth of what is asserted or determine whether a plaintiff has any evidence to back up what is in the complaint.”); see also Fed. Freeport Transit, Inc. v. McNulty, 239 F. Supp. 2d 102, 108 (D. Me. 2002).

29. See Bender v. Suburban Hosp., Inc. 159 F.3d 186, 192 (4th Cir. 1998) (explaining that if a plaintiff chooses to plead particulars, he is bound by them and a case can be dismissed if the facts show no claim); Bennett v. Schmidt, 153 F.3d 516, 519 (7th Cir. 1998) (“Litigants may plead themselves out of court by alleging facts that establish defendant’s entitlement to prevail.”); *Freeport*, 239 F. Supp. 2d at 108 (stating 12(b)(6) motion is valid when complaint includes allegations that damn the claim); 5A WRIGHT & MILLER, *supra* note 17, § 1357, at 347–48 (explaining 12(b)(6) dismissal as appropriate where the plaintiff’s allegations contradict the claim asserted—i.e., where the allegations of negligence showed that plaintiff’s own negligence was the sole proximate cause of the injury).

30. *Browning*, 292 F.3d at 242.

31. Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 515 (2002) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

32. FED. R. CIV. P. 12(e). Clark was originally opposed to the rule and wanted it left out because its potential for mischief outweighed its value. Clark, *supra* note 20, at 185–86. After the Rules were enacted, even though federal courts were “chary of granting these motions,” Clark still advocated amending to eliminate Rule 12(e). Clark, *supra* note 12, at 467.

responsive pleading, Rule 12(e) provides the tool for clarity.³³ However, Rule 12(e) is not intended for routine use or a return to particularization.³⁴ If more detail is merely desirable (as opposed to necessary for notice purposes), discovery is the answer.³⁵

The modern discovery tools enable every party to obtain disclosure of all relevant, unprivileged information in the possession of another.³⁶ Grounded in equity, the drafters thought it fairer and more productive of truth to require disclosure at an early stage in litigation,³⁷ thus avoiding trials “carried on in the dark.”³⁸ The broad and flexible provisions of Rules 26 through 37 are probably the most significant innovation of the new rules.³⁹ As Professors Wright and Kane colorfully put it: “Discovery was the Cinderella of the changes in procedure made by the Civil Rules.”⁴⁰ While the discovery rules have been extensively amended to both fine tune their effectiveness and curb abuse,⁴¹ they continue to serve the vital function of factual development that once overburdened pleading practice.⁴²

Following discovery, summary judgment deals with claims lacking merit. Rule 56 provides that any party can move for summary judgment on any claim or defense or part thereof if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.⁴³ On a summary judgment motion, the court cannot try issues of fact; it only determines if there are issues to be tried. Now described as “salutary and efficient,”⁴⁴ the federal courts once had differing

33. Clark, *supra* note 12, at 466–67; *Swierkiewicz*, 534 U.S. at 514; see *Stamm v. Sullivan Foods Corp.*, No. 02 C 50257, 2002 WL 31487814, at *2 (N.D. Ill. Nov. 6, 2002) (stating a defendant who needs more information can seek a more definite statement under Rule 12(e)).

34. See Clark, *supra* note 20, at 185–86 (commenting that the motion to make more definite is seldom used or seldom granted); Clark, *supra* note 12, at 466–67 (noting the unfortunate use of the rule by some seeking particularization).

35. Clark, *supra* note 12, at 467; Charles E. Clark, *Special Pleading in the “Big Case,”* 21 F.R.D. 45, 52 (1957) (stating that lack of detail is corrected by discovery).

36. Clark, *supra* note 14, at 318; WRIGHT & KANE, *supra* note 12, at 580–81.

37. Clark, *supra* note 14, at 318.

38. *Hickman v. Taylor*, 329 U.S. 495, 500 (1947).

39. WRIGHT & KANE, *supra* note 12, at 580. In their current incarnation, Rule 26 includes general discovery provisions including required disclosures. Rules 27–32 relate to depositions, both oral and written. Interrogatories are described in Rule 33. Production of documents is handled by Rule 34. The availability of physical and mental examinations is explained in Rule 35. Requests for admissions are provided for in Rule 36. Rule 37 then provides for penalties and sanctions for failure to comply with the preceding discovery rules. See FED. R. CIV. P. 26–37.

40. WRIGHT & KANE, *supra* note 12, at 580. As the authors note, critics of discovery might dispute on which side of midnight we currently are.

41. See WRIGHT & KANE, *supra* note 12, at 581–84 (describing amendment process).

42. See WRIGHT & MILLER, *supra* note 17, § 1202, at 68–69 (describing how factual development once performed by pleadings is reassigned in the Federal Rules to discovery).

43. FED. R. CIV. P. 56.

44. WRIGHT & KANE, *supra* note 12, at 709.

views on the usefulness of Rule 56.⁴⁵ In a series of cases in 1986,⁴⁶ the Supreme Court sent a clear signal to the lower courts that summary judgment could be relied upon to “weed out frivolous lawsuits and avoid wasteful trials.”⁴⁷ As a result, summary judgment provides an efficient end to meritless litigation, lifting this final burden from the shoulders of the pleadings.⁴⁸

Whether visualized as the “keystone”⁴⁹ or the “crown jewel,”⁵⁰ Rule 8 plays a vital role in the Federal Rules. Its command of simplified pleading broke from the inefficiencies and inequities of past practice. Despite its individual importance, Rule 8 is part of a procedural system structured to foster the determination of cases on the merits. In other words, the complaint is “just the starting point.”⁵¹ Thus, the reform effort of the Federal Rules also de-emphasizes pleading motions, such as those under Rule 12(b)(6), and encourages discovery, summary judgment and trial. The Supreme Court repeatedly backs this foundation.

B. Supreme Court Support

In a trilogy of cases, the Supreme Court reinforces the simplified pleading in Rule 8 and the goal of merits determination of the Federal Rules as a whole. The Court’s first look at pleading practice came in 1957 with *Conley v. Gibson*.⁵² This class action lawsuit involved allegations of discrimination by African-American members against their union in violation of its duty of fair representation.⁵³ The union’s motion to dismiss for failure to set forth specific facts in support of the

45. Judge Clark himself described his split with fellow Judges Learned Hand and Jerome Frank over the usefulness of summary judgment and lamented: “In summary judgment we perhaps have a rule so broad that it is not properly understood.” Clark, *supra* note 20, at 196; see WRIGHT & KANE, *supra* note 12, at 714–15 (describing the divergence of federal judges on the utility and application of summary judgment especially within the Second Circuit). Clark set out to make summary judgment more useful with the help of his “brilliant young associate in working on the rules, Professor Charles Alan Wright of Texas.” Clark, *supra* note 20, at 196. Clark wanted to strengthen summary judgment by requiring the party opposing the motion to offer specific proof, rather than general allegations. He tried unsuccessfully with the 1955 amendments. In 1963, the proposal was finally enacted. See Smith, *supra* note 14, at 928 (describing amendment efforts).

46. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

47. WRIGHT & KANE, *supra* note 12, at 715.

48. See Clark, *supra* note 14, at 318–19 (describing role of summary judgment in disposing of cases where the opponent has no defense on the facts); 5 WRIGHT & MILLER, *supra* note 17, § 1202, at 69 (explaining how partial summary judgment narrows issues for trial and summary judgment disposes of meritless claims, both functions once served by pleadings).

49. WRIGHT & KANE, *supra* note 12, at 470.

50. See Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1917 (1998).

51. *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998).

52. 355 U.S. 41 (1957).

53. *Id.* at 42–43.

discrimination allegations was granted by the district court and affirmed on appeal.⁵⁴ The high court found otherwise. In so doing, the Court explained the proper relationship between Rule 12(b)(6) and Rule 8(a). First, a Rule 12(b)(6) motion should not be granted “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.”⁵⁵ While this standard is high, Rule 8’s is not. The Rules “do not require a claimant to set out in detail the facts upon which he bases his claim.”⁵⁶ Instead, all that is required is a “‘short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”⁵⁷ Significantly, the Court pointed to the liberal discovery and pretrial procedures of the Rules that permit “simplified notice pleading.”⁵⁸

Given *Conley*’s clear endorsement of notice pleading, it is surprising that the Court was forced to return to the question. However, unwarranted judicial concern over the rise in frivolous civil rights litigation led the federal courts to require heightened pleading.⁵⁹ In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,⁶⁰ the Court struck down the Fifth Circuit’s requirement that § 1983 suits against municipalities⁶¹ must be pleaded with factual specificity. According to the Supreme Court, the heightened pleading standard ran afoul of the express language of Rule 8 and *Conley*.⁶² Moreover, Rule 9(b) lists the only exceptions.⁶³ After speculating that if the rules were being rewritten today the drafters might include § 1983 cases, the Court stated that such a change must come through the rulemaking process, not judicial fiat.⁶⁴ “In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.”⁶⁵

54. *Id.* at 41, 43–44.

55. *Id.* at 45–46.

56. *Id.* at 47.

57. *Id.*

58. *Id.* at 47–48.

59. See Fairman, *supra* note 6, at 574–82 (describing the genesis and proliferation of heightened pleading in civil rights litigation). The Court itself probably encouraged the adoption of heightened pleading. See *Siegert v. Gilley*, 500 U.S. 226 (1991). After initially granting certiorari to address heightened pleading in a *Bivens* action, the Court resolved the case at “an analytically earlier stage.” *Id.* at 227. However, Justice Kennedy’s concurrence endorsed heightened pleading as an accommodation between subjective intent and objective qualified-immunity analysis, despite the fact that it would be a deviation from Rules 8 and 9(b). *Id.* at 235–36.

60. 507 U.S. 163 (1993).

61. This variant of § 1983 litigation is known as a *Monell* action, after *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978).

62. *Leatherman*, 507 U.S. at 168.

63. See FED R. CIV. P. 9(b) (stating “the circumstances constituting fraud or mistake shall be stated with particularity”); *supra* notes 21–25 and accompanying text describing Rule 9(b). The Court invoked *expressio unius* and found *Monell* actions were absent from Rule 9. *Leatherman*, 507 U.S. at 168.

64. *Leatherman*, 507 U.S. at 168; see Marcus, *supra* note 11, at 923 (describing the Court’s limitation on judicially-imposed heightened pleading).

65. *Leatherman*, 507 U.S. at 168.

Thus, the Court squarely endorsed the pleading rubric presented by the plain language of the Federal Rules and informed by the drafters' intent: heightened pleading for fraud and mistake and notice pleading for everything else.⁶⁶

In spite of the Court's clarity, heightened pleading in civil rights cases continued in many circuits.⁶⁷ This compelled the Court to address the issue again last year in *Swierkiewicz v. Sorema, N.A.*⁶⁸ At issue was an employment discrimination case dismissed for failure to meet the Second Circuit's heightened pleading requirement.⁶⁹ The Supreme Court unanimously held that an employment discrimination complaint need not contain specific facts establishing a prima facie case of discrimination; it must only meet Rule 8's notice standard.⁷⁰ The reason heightened pleading does not apply is straight from *Leatherman*: "Just as Rule 9(b) makes no mention of municipal liability, neither does it refer to employment discrimination."⁷¹ Instead, the complaint "must satisfy only the simple requirements of Rule 8(a)."⁷² The simplified notice pleading standard is possible because of our procedural system. The Court reminded that if the complaint fails to

66. For more complete treatment of the background of *Leatherman*, see Fairman, *supra* note 6, at 567–72.

67. See *infra* subpart IV.C. (discussing civil rights pleading post-*Leatherman*). After *Leatherman*, the Supreme Court also struck down the D.C. Circuit's heightened burden of proof for constitutional torts involving improper motive in *Crawford-El v. Britton*, 523 U.S. 574 (1998). Although sometimes labeled as heightened pleading, this was a misnomer for a clear and convincing proof standard required at summary judgment and trial. *Crawford-El v. Britton*, 93 F.3d 813, 823 (D.C. Cir. 1996), *rev'd*, 523 U.S. 574 (1998). The Supreme Court found this standard incompatible with the Federal Rules. *Crawford-El*, 523 U.S. at 594. However, the Court recognized the problem of qualified immunity and suggested acceptable procedural alternatives in dicta, such as a Rule 7 reply or Rule 12(e) motion for a more definite statement. *Id.* at 597–98. In so doing, the Court added to the confusion over the viability of heightened pleading by stating: "Thus, the court may insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment." *Id.* at 598 (quoting Justice Kennedy's concurrence in *Siegert v. Gilley*, 500 U.S. 236 (1991), endorsing the use of heightened pleading). This statement is fodder for both courts imposing and rejecting heightened pleading. See *infra* note 264.

68. 534 U.S. 506 (2002).

69. The Second Circuit articulated its post-*Leatherman* heightened pleading standard: "It is well settled in this Circuit that a complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts, fails to state a claim under Rule 12(b)(6)." *Swierkiewicz v. Sorema, N.A.*, 5 Fed. Appx. 63, 64 (2d Cir. 2001).

70. *Swierkiewicz*, 534 U.S. at 514–15. To prove a prima facie case of discrimination under Title VII, a plaintiff must be a member of a protected group, qualified for the job in question, and affected by an adverse employment action under circumstances giving rise to an inference of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

71. *Swierkiewicz*, 534 U.S. at 513.

72. *Id.* As Professor Chemerinsky succinctly puts it: "I don't think that the Court could have been clearer." Erwin Chemerinsky, *Supreme Court Review*, 51 KAN. L. REV. 269, 288 (2003).

provide sufficient notice, a motion for more definite statement under Rule 12(e) is available.⁷³ Likewise, liberal discovery rules work to define disputed facts and issues.⁷⁴ If the claim truly lacks merit, summary judgment is the proper procedural vehicle.⁷⁵ A Rule 12(b)(6) motion to dismiss is not. A dismissal for failure to state a claim is proper “only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.”⁷⁶ This procedural system is designed “to focus litigation on the merits of a claim.”⁷⁷ As in *Leatherman*, the Supreme Court repeated that if greater factual specificity for certain claims was desirable at the pleading stage, it “must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.”⁷⁸

The Court’s rigid defense of notice pleading and Rule 8 is not always so clear. There is certainly dicta,⁷⁹ as well as separate opinions,⁸⁰ showing support for greater fact-based pleading.⁸¹ However, when called upon to address pleading issues square on, the Court continually—and unanimously—embraces simplified notice pleading. While this trilogy of cases springs from civil rights litigation, the Court’s analysis plainly applies outside of that niche. Rule 8 applies to all claims save fraud and mistake. Both the plain language of the Federal Rules and the equitable goal of merits determination compel this result. If heightened pleading is wanted, the lower courts cannot do so by fiat; the rulemaking process requires amendment. Given this analysis, it is unsurprising that the rhetoric used by the federal courts is notice pleading. However, the reality of federal court practice—using all manner of fact-based particularity requirements—is shocking.

73. *Swierkiewicz*, 534 U.S. at 514; see *supra* notes 32–35 and accompanying text (discussing Rule 12(e) motion for more definite statement).

74. *Swierkiewicz*, 534 U.S. at 512–13; see *supra* notes 36–42 and accompanying text (discussing liberal discovery rules).

75. See *Swierkiewicz*, 534 U.S. at 512–13; see *supra* notes 43–48 and accompanying text (discussing summary judgment and Rule 56).

76. *Swierkiewicz*, 534 U.S. at 514 (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

77. *Id.*

78. *Id.* at 515 (quoting *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)). For more complete treatment of the background of *Swierkiewicz* see Fairman, *supra* note 6, at 572–74.

79. *Leatherman* itself contains dicta hinting at the vitality of heightened pleading in non-*Monell* civil rights cases. See *Leatherman*, 507 U.S. at 166–67 (“We thus have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials.”). Dicta in *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983), also contributes to fact-based pleading in the antitrust area. See *infra* notes 173–78 and accompanying text (discussing pleading patterns in antitrust litigation).

80. See *Siegert v. Gilley*, 500 U.S. 226, 235–36 (1991) (Kennedy, J., concurring) (endorsing the use of heightened pleading in the context of official immunity and calling the tool a workable solution to avoid disruptive discovery).

81. This language provides ammunition for those courts seeking to justify heightened pleading and undoubtedly contributes to its resilience. See *infra* subpart V.C (discussing the Supreme Court’s role in the perpetuation of heightened pleading).

III. PLEADING REALITIES: A MACRO-MODEL OF MODERN PLEADING

A. Overview

Charles Clark once said: “Notice pleading is a beautiful nebulous thing.”⁸² However correct his characterization was, the imprecise boundaries of what is called “notice pleading” are quite apparent today. When actual pleading practice and judicial action are explored in substance specific areas, a very different picture emerges. This image is not one of merely putting a party on notice of asserted claims. Rather a continuum, best visualized as a circle, exists. Consider Figure 1.

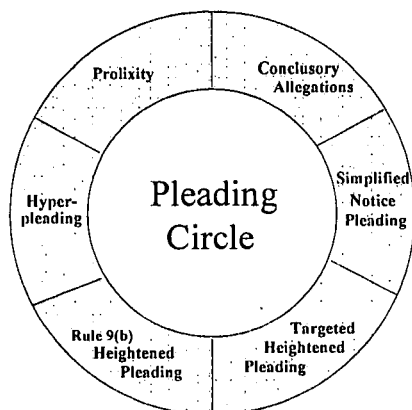


Figure 1: Pleading Circle

The pleading circle begins with broad, conclusory allegations—an unacceptable form of pleading consistent with notice pleading rhetoric. A simplified notice pleading standard follows—true to the Federal Rules and the Supreme Court’s guidance. Next, a prevalent form of “targeted” heightened pleading emerges. Unlike Rule 9(b), this more limited version of heightened pleading attaches only to specific elements of a claim or subsets of a broader category of a claim. Rule 9(b)-type particularity is next—although it appears in vastly more substantive areas than merely fraud or mistake. This is followed by an even more aggressive form of heightened pleading—“hyperpleading”—requiring particularity as to each element of a claim. Eventually, the pleading circle turns to a point of prolixity, simply too much detail to be consistent with federal practice. Hence, a pleading may be condemned at either extreme: for being too conclusory or too detailed. While the impropriety of pleading at these extremes is not new, recognition of the wide spectrum of fact-based pleading required in federal practice is new.

82. Clark, *supra* note 20, at 181.

B. Elements Explored

1. Conclusory Allegations

The macro-model of pleading begins with conclusory allegations. Broad statements of legal conclusion do not meet the pleading requirements under the Federal Rules.⁸³ While courts use different phraseology to describe this impermissible form of pleading, the end result is the same.⁸⁴ A pleading that merely states a legal conclusion as a claim is subject to dismissal.⁸⁵

The reason is simple. Legal conclusions do not comport with a notice standard. The drafters envisioned that the complaint would provide sufficient notice to allow the defendant to prepare an answer and facilitate claim preclusion.⁸⁶ If a complaint stated a broad, conclusory allegation such as, "I want you to answer in tort," the defendant would not have enough information to form a response. Similarly, a court would be ill-prepared to sketch the preclusive effect of such an allegation.⁸⁷

There are contemporary instances of the drafters' hypothetical. For example, a complaint that alleges that defendant's actions "embodied violations of the Act" or "violated the Act in other ways" is a conclusory allegation failing to

83. See, e.g., *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) ("That said, we accept neither inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint, nor legal conclusions cast in the form of factual allegations."); *Doug Grant, Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173, 184 (3d Cir. 2000) (stating the court does not accept as true "unsupported conclusions and unwarranted inferences"); *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993) ("However, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.").

84. See 5A *WRIGHT & MILLER*, *supra* note 17, § 1357 ("They also have said that they do not accept 'legal conclusions,' 'unsupported conclusions,' 'unwarranted inferences,' 'unwarranted deductions,' 'footless conclusions of law,' or 'sweeping legal conclusions cast in the form of factual allegations.'").

85. See, e.g., *Bender v. Suburban Hosp., Inc.*, 159 F.3d 186, 192 (4th Cir. 1998) (dismissing Title VII suit that stated legal conclusion of "employment relationship" where plaintiff pleaded that she was self-employed in private practice); *Fernandez-Montes*, 987 F.2d at 284 (stating legal conclusions will not prevent a motion to dismiss); *Kozel v. City of Chicago*, No. 02 C 4300, 2003 WL 145422, at *1 (N.D. Ill. Jan. 21, 2003) ("A complaint will not avoid dismissal if it contains 'bare legal conclusions' absent facts outlining the basis of the claims."); *David v. Assumption Parish Police Jury*, No. Civ. A. 02-765, 2003 WL 57039, at *2 (E.D. La. Jan. 6, 2003) ("However, 'conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.'"); *Riser v. WSYX-TV ABC-6*, No. C2-02-091, 2002 WL 31409427, at *2 (S.D. Ohio July 17, 2002) (stating "bare assertions of legal conclusions are insufficient" to withstand a motion to dismiss).

86. Clark, *supra* note 12, at 460-61.

87. Clark discussed why we would not want to go to this "other extreme." See Clark, *supra* note 20, at 183.

provide notice of violation of a consumer protection statute.⁸⁸ Other judicial declarations adhering to this principle are widespread through the substantive areas.⁸⁹ However, the rhetoric of “conclusory allegations” is also used by courts masking their use of heightened pleading requirements.⁹⁰ Circuits continuing to impose variations of fact-based pleading in civil rights cases frequently use this language.⁹¹ Consequently, care must be taken in the categorization of specific judicial practices.

2. Simplified Notice Pleading

To be sure, pleading practice continues to rely on simplified notice pleading.⁹² For purposes of this model, simplified notice pleading refers to short and plain statements of a claim that embody the simplicity of both Rule 8 and the Federal Forms.⁹³ This is best illustrated by examples. In a negligence case stemming from a car wreck, all the complaint must state is that the “defendant negligently drove a motor vehicle against plaintiff.”⁹⁴ In an employment discrimination case, all a complaint must state is “I was turned down for a job

88. See *Nix v. Welch & White, P.A.*, 55 Fed. Appx. 71, 73 (3d Cir. 2003) (dismissing conclusory allegations of violation of the Fair Debt Collection Practices Act post-*Swierkiewicz*).

89. See, e.g., *Doug Grant, Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173, 187 (3d Cir. 2000) (rejecting unsupported conclusions in RICO case); *Bender*, 159 F.3d at 192 (dismissing complaint based on legal conclusion in Title VII case); *De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir. 1996) (stating conclusory allegations in RICO case fails liberal standards of the Federal Rules); *Pravda v. City of Albany*, 956 F. Supp. 174, 180–81 (N.D.N.Y. 1997) (stating “conclusory allegations” of conspiracy cannot support civil rights claims).

90. For a good example of this practice, see the discussion of *Barnes Landfill, Inc. v. Town of Highland*, 802 F. Supp. 1087 (S.D.N.Y. 1992), *infra* note 255 and accompanying text. In this CERCLA case, the district court first dismissed the complaint pre-*Leatherman* for being conclusory when it actually did not meet the court’s heightened standard. Post-*Leatherman*, the court recharacterized its earlier opinion as based on Rule 8.

91. See *Goad v. Mitchell*, 297 F.3d 497, 504 (6th Cir. 2002) (permitting district courts “to require plaintiffs to produce specific, nonconclusory factual allegations of improper motive before discovery in cases in which the plaintiff must prove wrongful motive”); *Judge v. City of Lowell*, 160 F.3d 67, 72 (1st Cir. 1998) (“[A] bare conclusory allegation of the critical element of illegal intent, including of an intent to discriminate, is insufficient.”).

92. As Judge Clark pointed out, none of the drafters used the phrase “notice pleading.” Clark, *supra* note 20, at 181. The Supreme Court used the expression in *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957). Professors Wright and Miller favor “simplified” pleading over “notice” pleading. 5 WRIGHT & MILLER, *supra* note 17, § 1202, at 72–73. Most recently, the Supreme Court repeatedly used variations of “simplified” to describe the appropriate standard. See *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 513–14 (2002).

93. See *supra* notes 15–20 and accompanying text (describing notice pleading).

94. Form 9, App. of Forms, FED. R. CIV. P. Of course, including the date and location are also probably necessary to distinguish this accident from others the reckless defendant might have engaged in. See *id.*

because of my race.”⁹⁵ In a § 1983 police brutality case, all a complaint must state is “she was the victim of the use of excessive force by the police.”⁹⁶ In a conspiracy case, all the complaint must do is “indicate the parties, general purpose, and approximate date, so that the defendant has notice of what he is charged with.”⁹⁷ As these examples illustrate, all a plaintiff must do is plead the bare minimum of facts necessary to put the defendant on notice so that the defendant can file an answer.⁹⁸ A complaint does not have to identify a correct legal theory.⁹⁹ Similarly, a complaint does not have to plead all the elements of a cause of action.¹⁰⁰ At the pleading stage, all benefit of the doubt goes to the plaintiff.¹⁰¹

Of course, not all federal cases are as simple as Judge Clark’s car wreck in Boston.¹⁰² To provide notice, some complaints certainly go beyond the skeletal illustrations offered above. What simplified notice pleading calls for is a general description of the case.¹⁰³ To do so, more or less description may be inherent. However, regardless of the complexity, the guiding standard is always: does the defendant have enough information to answer the complaint? If so, the complaint is sufficient under simplified notice pleading. Examples abound in the substance specific areas.¹⁰⁴

95. *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998).

96. *Kain v. Nesbitt*, 156 F.3d 669, 672 (6th Cir. 1998).

97. *Walker v. Thompson*, 288 F.3d 1005, 1007 (7th Cir. 2002).

98. *Conley v. Gibson*, 355 U.S. 41, 47 (1957); *Jennings v. Univ. of N.C. at Chapel Hill*, No. 1:99-CV-400, 2002 WL 31941457, at *6 (M.D.N.C. Nov. 13, 2002); *Paxson v. County of Cook*, No. 02 C 2028, 2002 WL 1968561, at *1 (N.D. Ill. Aug. 23, 2002).

99. *See Bennett*, 153 F.3d at 518 (“Complaints need not plead law or match facts to every element of a legal theory . . .”); 5 WRIGHT & MILLER, *supra* note 17, § 1218, at 188–95 (discussing the Federal Rules’ abolition of the “theory of the pleadings” doctrine).

100. *See Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 515 (2002) (holding plaintiff need not plead prima facie case of Title VII action); *Strong v. David*, 297 F.3d 646, 649 (7th Cir. 2002) (stating under notice pleading “nature of the claim need only be sketched” and “a pleader need not match facts against the elements of a legal theory”); *Bennett*, 153 F.3d at 518; *Thomson Multimedia, Inc. v. Vassel*, Cause No. IP 02-0191-C H/K, 2002 WL 31741467, at *2 (S.D. Ind. Nov. 1, 2002) (“The Federal Rules of Civil Procedure do not require that the specific elements of a claim be pled.”); *see also* 5 WRIGHT & MILLER, *supra* note 17, § 1216, at 154–56 (“[P]leadings need not state with precision all elements that give rise to a legal basis for recovery as long as fair notice of the nature of the action is provided.”).

101. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999) (stating complaints are construed favorably to their drafters); *Jennings*, 2002 WL 31941457, at *6 (same); *see also* FED. R. CIV. P. 8(f) (providing “all pleadings shall be so construed as to do substantial justice”).

102. *See supra* note 20.

103. *Clark, supra* note 20, at 181.

104. *See, e.g., infra* note 200 (antitrust notice pleading cases); note 245 (CERCLA notice pleading cases); note 262 (civil rights notice pleading cases); note 291 (conspiracy notice pleading cases); note 314 (copyright notice pleading cases); note 355 (defamation notice pleading cases).

While cases invoking notice pleading flourish, care must be taken to pierce through the rhetoric. Frequently, courts use the language of Rule 8 and notice pleading, yet still impose higher pleading requirements. For example, in defamation cases, some courts state the Rule 8 standard, but require pleading the exact defamatory words.¹⁰⁵ Similarly, with RICO conspiracy claims, courts state the notice rule while requiring “facts constituting the conspiracy, its objects and accomplishments.”¹⁰⁶ This type of blending between Rule 8 rhetoric and heightened standards is most common with targeted heightened pleading.

3. Targeted Heightened Pleading

One of the most interesting discoveries of the micro-analysis of pleading practice is an amazingly prevalent requirement—targeted heightened pleading. Instead of subjecting the allegations of the entire claim to particularized pleading, courts require certain elements of a claim or subsets of a broader category of a claim to be pleaded with greater factual detail. All these variations place tougher burdens on plaintiffs. However, the effect on plaintiffs varies widely, depending on what precisely is targeted for the heightened burden.

This extreme variation in effect on the plaintiff arises when certain elements of a claim are required to meet a heightened standard. For example, an element of recovery in a CERCLA case is that a response cost is incurred. Under simplified notice pleading, the statement “plaintiff incurred response costs” is sufficient. Some courts, however, require a “cognizable response cost” to be pleaded, such as clean-up costs or a remedial action plan.¹⁰⁷ This form of targeted heightened pleading, however, should be easy to meet since the information on the response cost would be with the plaintiff.¹⁰⁸ A similar situation presents itself in defamation where some courts still require the specific defaming words to be pleaded.¹⁰⁹ Again, in most cases the plaintiff would know how he was defamed; therefore, meeting this targeted burden is slight.

105. See *infra* note 358 and accompanying text (collecting cases of notice standard, but *in haec verba* required). Similarly, some courts still require CERCLA complaints to plead “cognizable response costs” while implying the elevated standard is required for notice. See *Soo Line R.R. Co. v. Tang Indus., Inc.*, 998 F. Supp. 889, 895 (N.D. Ill. 1998) (reciting *Ascon* that “plaintiff must only allege one type of cognizable response costs under CERCLA” in the context of notice pleading).

106. See, e.g., *A-Valey Eng’rs, Inc. v. Bd. of Chosen Freeholders*, 106 F. Supp. 2d 711, 718 (D.N.J. 2000) (quoting *Black & Yates, Inc. v. Mahogany Ass’n, Inc.*, 129 F.2d 227, 232 (3d Cir. 1941)).

107. See *infra* notes 231–34 and accompanying text (describing response costs and heightened pleading).

108. See *infra* notes 251–53 and accompanying text (discussing effect of heightened response cost pleading).

109. See *infra* notes 357–58 and accompanying text (collecting cases requiring *in haec verba* post-*Leatherman*). Significantly, many of the courts continuing to require specific defamatory words to be pleaded do so under Rule 8 further illustrating the need to cut through the pleading rhetoric currently used. See *id.*

Not all targeted heightened pleading is as easy to satisfy. When conspiracy or fraud is an element of another independent claim, the conspiracy or fraud elements are typically subjected to heightened pleading. For example, in antitrust cases some jurisdictions require the conspiracy element of a section 1 violation of the Sherman Antitrust Act to be pleaded with particularity.¹¹⁰ To meet the pleading burden, a plaintiff must essentially meet the heightened elements of conspiracy by pleading facts detailing the conspiracy, its object, and accomplishments.¹¹¹ Such a burden is significantly greater than pleading CERCLA response costs because information regarding the nature of the conspiracy is often solely in the hands of the conspirators.¹¹² Similarly, a RICO violation with fraud as the predicate act or RICO conspiracy typically must have the fraud or conspiracy element pleaded with the same type of particularity required in Rule 9(b).¹¹³

However, the most onerous variant of targeted heightened pleading is aimed at the state of mind of the defendant as in some civil rights and RICO cases. While their number dwindled post-*Swierkiewicz*, some jurisdictions still require specific evidence of unlawful intent to be pleaded when subjective intent is an element of a civil rights claim.¹¹⁴ Similarly, some jurisdictions require RICO claims based on mail or wire fraud to plead scienter with facts giving rise to strong inference of intent.¹¹⁵ This requires a plaintiff to plead—pre-discovery—specific facts concerning the defendant’s state of mind irrespective of Rule 9(b), which

110. See *infra* notes 182–86 and accompanying text (describing application in section 1 cases).

111. Use of this form of heightened pleading continues post-*Leatherman*. See, e.g., *Granite Partners, L.P. v. Bear Stearns & Co.*, 58 F. Supp. 2d 228, 238 (S.D.N.Y. 1999) (requiring Sherman Act conspiracy claim to include factual basis including relevant product market, co-conspirators, and nature and effects of conspiracy); *In re Lease Oil Antitrust Litig.*, No. Civ. A. C-98-048, 1998 WL 690947, at *6 (S.D. Tex. May 7, 1998) (describing specificity required in conspiracy context as facts constituting the conspiracy, objects and accomplishments).

112. Targeted heightened pleading is also applied in antitrust actions when fraudulent concealment is raised to challenge limitations defenses and when the so-called “sham exception” to the *Noerr-Pennington* doctrine is raised. See *infra* notes 187–97, 205–06 and accompanying text for a complete discussion of these targeted uses.

113. RICO predicate acts based on fraud universally must meet a heightened Rule 9(b) standard. See *infra* notes 412–18 and accompanying text. Heightened pleading with RICO conspiracies is less widespread, but still survives *Leatherman*. See *infra* notes 431–33 and accompanying text.

114. See *Goad v. Mitchell*, 297 F.3d 497, 504 (6th Cir. 2002) (permitting district courts “to require plaintiffs to produce specific, nonconclusory factual allegations of improper motive before discovery in cases in which the plaintiff must prove wrongful motive”); *Judge v. City of Lowell*, 160 F.3d 67, 74 (1st Cir. 1998) (requiring improper motive in an Equal Protection Clause case to be “pleaded not just conclusorily but by *specific, nonconclusory factual* allegations giving rise to a reasonable inference of racially discriminatory intent”) (emphasis in original).

115. See *infra* notes 417 and accompanying text (discussing RICO scienter heightened pleading).

allows state of mind to be alleged generally.¹¹⁶ Even though the heightened burden applies to only one part of the claim, it essentially eviscerates the entire claim. Thus, a court determined to disfavor a claim can wield targeted heightened pleading just as effectively as the broader versions of fact-based pleading requirements.

4. Rule 9(b) Heightened Pleading

As Rule 8 requires simplified notice pleading, Rule 9(b) mandates the circumstances constituting fraud or mistake to be stated with particularity—heightened pleading.¹¹⁷ Despite the Supreme Court’s direct statements proclaiming that Rule 9(b) particularity is limited to that rule’s very short list, heightened pleading modeled after the fraud standard persists in many other areas. While deciphering what courts mean when they apply Rule 9(b) “does not lend itself to refinement,”¹¹⁸ its application to fraud is a reasonable starting point.

Typically, courts applying Rule 9(b) to fraud actions require the “circumstances constituting the fraud” to be pleaded with particularity, not the elements of fraud.¹¹⁹ This means that such things as time, place, contents of the false representation, the person making it, and what was obtained from it must be stated with specificity.¹²⁰ Another way of looking at this requirement is pleading

116. FED. R. CIV. P. 9(b) (“Malice, intent, knowledge, and other condition of mind of a person may be averred generally.”).

117. FED. R. CIV. P. 9(b).

118. *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 178 (5th Cir. 1997); see 5 WRIGHT & MILLER, *supra* note 17, § 1297, at 590.

119. The elements of fraud include: a false representation of material fact, defendant’s knowledge of the falsity, intent to induce reliance, justifiable reliance, and damages. W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 105, at 728 (5th ed. 1984). By requiring the “circumstances constituting the fraud” as opposed to the elements to be plead with particularity, Rule 9(b)’s burden is significantly lessened. If each of the elements of a fraud claim were required to be pleaded with particularity, it would be an example of hyperpleading.

120. *Williams*, 112 F.3d at 177; see *Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1236 (10th Cir. 2000) (requiring a complaint alleging fraud to “set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof” (quoting *In re Edmonds*, 924 F.2d 176, 180 (10th Cir. 1991))); *Specialty Moving Sys., Inc. v. Safeguard Computer Servs., Inc.*, No. 01 C 5816, 2002 WL 31178089, at *3 (N.D. Ill. Sept. 30, 2002) (stating Rule 9(b) requires the pleading of who, what, when, and where); *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 293 (S.D.N.Y. 2000) (stating Rule 9(b) requires the specific statement or omission, what makes it false, when it was made, who was responsible); see also 5 WRIGHT & MILLER, *supra* note 17, § 1297, at 590. *But see* *McHale v. NuEnergy Group*, No. CIV. A. 01-4111, 2002 WL 321797, at *3 (E.D. Pa. Feb. 27, 2002) (“Allegations of ‘date, place, or time’ fulfill these functions, but nothing in the rule requires them. A plaintiff is free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud.” (quoting *Seville Indus. Mach. Corp v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984))).

the newspaper questions of who, what, when, where, and how.¹²¹ The rigidity with which this standard applies varies in practice.¹²² Nonetheless, pleading the newspaper questions provides a concise view of what most courts should do with Rule 9(b) and fraud. Significantly, complaints dismissed under Rule 9 are almost always dismissed with leave to amend.¹²³

Despite the clarity of Rule 9(b)'s limited applicability, heightened pleading akin to fraud is required in other substantive areas. In fact, courts actually turn to fraud particularity to justify the extension of heightened pleading; if the claim is "fraud-like," specificity is required.¹²⁴ Undoubtedly the most famous area of extension is civil rights cases.¹²⁵ *Leatherman* and *Swierkiewicz* should be the one-two punch necessary to lay this use of heightened pleading to rest. However, there are still jurisdictions that require Rule 9(b)-type heightened pleading in civil rights cases.¹²⁶

121. See *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990) (making the newspaper analogy).

122. For example, in *Odyssey* the court stated that under Rule 9(b) the plaintiff must allege facts that give rise to a "strong inference of fraudulent intent" in a common law fraud claim. 85 F. Supp. 2d at 295. This is obviously wrong given the explicit language in Rule 9(b) that intent can be averred generally. In contrast, *Specialty Moving* found a fraud complaint sufficient under Rule 9(b) that pleaded the who, what, and when and averred intent generally. See 2002 WL 31178089, at *3-4. On a broader scale, Professor Louis's survey of fraud cases leads him to conclude that there are two types of judicial approach to handling fraud cases—one lenient and one strict. See Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1023, 1038-41 (1989).

123. See *Nix v. Welch & White, P.A.*, 55 Fed. Appx. 71, 73 (3d Cir. 2003) (noting the court has consistently held that a complaint dismissed for lack of factual specificity should be given leave to amend); *Wight v. BankAmerica Corp.*, 219 F.3d 79, 91 (2d Cir. 2000).

124. Prior to *Leatherman*, this was widespread. See *infra* notes 235-41 and accompanying text (describing the extension of heightened pleading in CERCLA cases based on supposed similarities to fraud).

125. See *supra* note 6 (listing authorities in this area). For discussion of the similarities between fraud and civil rights cases see Fairman, *supra* note 6, at 576 n.201 (noting the common justifications of deterrence of frivolous claims and defendant protection in both types of cases). The judicial application of Rule 9(b) to securities fraud is probably the second most popular area. Because heightened pleading is now required by the PSLRA, it is outside the scope of this Article. For a discussion of these securities fraud topics, see Fairman, *supra* note 6, at 597-612.

126. Sometimes heightened pleading is triggered by § 1983 cases where qualified immunity of the defendant is at issue. See *GJR Invs., Inc. v. County of Escambia*, 132 F.3d 1359, 1367 (11th Cir. 1998) (using circuit's tightened pleading requirement in qualified immunity cases); *Schultea v. Wood*, 47 F.3d 1427, 1432-34 (5th Cir. 1995) (en banc) (requiring heightened pleading in a Rule 7 reply brief in qualified immunity cases); *White v. Downs*, No. 95-2177, 1997 WL 210858, at *3 (4th Cir. Apr. 30, 1997) (applying heightened pleading). Because the qualified immunity issue will almost always be present in § 1983 cases, this barely limits the scope.

The same form of broad heightened pleading survives with conspiracy claims. Once widely applied, the recent court authority has caused some retreat in this area.¹²⁷ However, some jurisdictions still demand heightened pleading in conspiracy claims—typically facts constituting the conspiracy, its object and accomplishment.¹²⁸ Most troubling in trying to distinguish between notice and heightened pleading is that this same standard (facts constituting the conspiracy, its object and accomplishment) is used by some courts as an explanation of the Rule 8 notice standard.¹²⁹ This illustrates both the resilience of heightened pleading and the need to look beneath the court applied labels to decipher current pleading practice.

Copyright and defamation claims are also subject to Rule 9(b)-type particularity by some courts.¹³⁰ Copyright provides some of the most surreptitious application. Some jurisdictions remain defiant that *Leatherman* does not apply and copyright pleading is an exception requiring greater specificity.¹³¹ Others maintain Rule 8 controls. It makes little difference. Both use the same standard requiring pleading: (1) which specific original work is the subject of the copyright claim, (2) that the plaintiff owns the copyright, (3) that the work in question has been registered in compliance with the statute, and (4) by what acts and during what time the defendant infringed the copyright.¹³² This standard, however, requires

127. See *Walker v. Thompson*, 288 F.3d 1005, 1007 (7th Cir. 2002) (holding no requirement to plead facts or elements of a conspiracy claim post-*Swierkiewicz*); see also *infra* notes 291–94 and accompanying text.

128. See, e.g., *A-Valey Eng'rs, Inc. v. Bd. of Chosen Freeholders*, 106 F. Supp. 2d 711, 718 (D.N.J. 2000) (requiring in the conspiracy context allegations of “facts constituting the conspiracy, its object and accomplishment” (quoting *Black & Yates, Inc. v. Mahogany Ass'n, Inc.*, 129 F.2d 227, 232 (3d Cir. 1941))); *Bieros v. Nicola*, 860 F. Supp. 223, 225 (E.D. Pa. 1994) (holding plaintiffs must allege conspiracy with particularity post-*Leatherman*).

129. See *A-Valey*, 106 F. Supp. 2d at 718 (applying Rule 8 but defining it in the conspiracy context as alleging “facts constituting the conspiracy, its object and accomplishment” (quoting *Black & Yates*, 129 F.2d at 232)); *In re Milk Prods. Litig.*, 84 F. Supp. 2d 1016, 1020 (D. Minn. 1997) (stating Rule 8 applies but complaint still must include a statement of the facts constituting the conspiracy, its object and accomplishment).

130. See *Paragon Servs., Inc. v. Hicks*, 843 F. Supp. 1077, 1081 (E.D. Va. 1994) (applying heightened pleading in copyright case); see also *Jones v. Capital Cities/ABC Inc.*, 874 F. Supp. 626, 629 (S.D.N.Y. 1995) (“Moreover, to the extent that plaintiff has made a claim of defamation, she has completely failed to identify with specificity the alleged defamatory words as required by Fed. R. Civ. P. 9.”).

131. *Paragon*, 843 F. Supp. at 1081.

132. Compare *Paragon*, 843 F. Supp. at 1081 (applying four-part test as exception to notice pleading), with *Vapac Music Publ'g, Inc. v. Tuff 'N' Rumble Mgmt.*, 99 Civ. 10656 (JGK), 2000 U.S. Dist. LEXIS 10027, at *17–18 (S.D.N.Y. July 19, 2000) (stating that Rule 8 requires infringing acts to be set out with some specificity, noting the four-part standard, and concluding that the complaint failed to satisfy the requirements). See also *infra* note 334 and accompanying text (collecting additional cases of surreptitious use).

more than simplified notice. While proof of ownership, registration, acts, and time are necessary for recovery, they are not necessarily required for simple notice.¹³³

Rule 9(b) heightened pleading exists as a distinct part of the pleading spectrum. However, its space in the model is not restricted to fraud cases alone. Jurisdictions continue to require pleading comparable to the particularity of Rule 9(b) in other substantive areas. Sometimes, the pleading requirements even exceed those ever contemplated by the drafters for any type of claim.

5. Hyperpleading

Rule 8 was intended to bury the most controversial part of code pleading—facts demonstrating the existence of a cause of action.¹³⁴ The Rule 8(a) requirement of a short and plain statement of a “claim showing that the pleader is entitled to relief” was specifically designed to distinguish the former code pleading practice where the plaintiff had to set forth facts constituting a “cause of action.”¹³⁵ Despite the intended break with the past, code pleading lives: enter hyperpleading.

Hyperpleading is an intense variety of heightened pleading. Whereas Rule 9(b) heightened pleading requires only certain circumstances to be pleaded with particularity,¹³⁶ hyperpleading requires all the elements of a cause of action to be established with particularity. In this sense, hyperpleading ratchets up the standard beyond Rule 9(b) and arguably code pleading itself.¹³⁷

The Second Circuit’s practice in employment discrimination cases prior to *Swierkiewicz* provides a concise model of hyperpleading. In order to survive a motion to dismiss, a complaint alleging a Title VII discrimination claim had to plead specific facts establishing a prima facie case.¹³⁸ This type of hyperpleading goes well beyond Rule 9(b) and the newspaper questions by requiring all the

133. See *infra* notes 318–20 and accompanying text (discussing non-notice requirements and judicial confusion).

134. CHARLES E. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* 242 (2d ed. 1947) (“By omitting any reference to ‘facts’ the Federal Rules have avoided one of the most controversial points in code pleading.”); see 5 WRIGHT & MILLER, *supra* note 17, § 1218, at 178–79 (describing the problem of fact pleading under the codes).

135. See *Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994) (“Any need to plead facts that, if true, establish each element of a ‘cause of action’ was abolished by the Rules of Civil Procedure in 1938, which to signify the radical change from code pleading also replaced ‘cause of action’ with ‘claim for relief.’”); *Specialty Moving Sys., Inc. v. Safeguard Computer Servs., Inc.*, No. 01 C 5816, 2002 WL 31178089, at *2 (N.D. Ill. Sept. 30, 2002) (accord); see also 5 WRIGHT & MILLER, *supra* note 17, § 1216, at 148–49. The Federal Equity Rules of 1912 also required “a short and simple statement of the ultimate facts upon which the plaintiff asks relief.” *Id.* § 1218, at 179–80.

136. See *supra* notes 118–22 and accompanying text (describing Rule 9(b) particularity).

137. See *Strong v. David*, 297 F.3d 646, 649 (7th Cir. 2002) (describing the code pleading system under which the complaint must identify each element of a cause of action).

138. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 509 (2002).

elements of a prima facie case to be pleaded with particularity. Of course, the Court unanimously struck down this aberration.¹³⁹ Nonetheless, versions of this type of standard persist—even in civil rights cases. In a recent discrimination case, a district court—*without even mentioning Swierkiewicz*—described its pleading standard: “[I]f a complaint fails to sufficiently state facts to support each element of the claims asserted therein, dismissal for failure to state a claim is proper.”¹⁴⁰ The court went on to dismiss an ADA claim where the plaintiff alleged he is “disabled,” but did not “identify the claimed disability and provides no factual basis” to “satisfy the elements of his prima facie case.”¹⁴¹

Hyperpleading is not limited to the civil rights arena. Post-*Swierkiewicz*, simple negligence actions have been dismissed in some jurisdictions for “failure to state facts supporting each of the elements of a claim.”¹⁴² Similarly, a split panel of the Fourth Circuit recently affirmed the dismissal of a Sherman Antitrust Act violation for not meeting the “basic pleading requirement that a plaintiff set forth facts sufficient to allege each element of his claim.”¹⁴³ A vigorous dissent stressed the incompatibility of such a standard with *Swierkiewicz*.¹⁴⁴ While the double dose of Supreme Court guidance in *Leatherman* and *Swierkiewicz* curtails some hyperpleading,¹⁴⁵ it remains a discrete pleading requirement in some substantive areas and jurisdictions.¹⁴⁶

139. *Id.* at 515.

140. *Keene v. Thompson*, 232 F. Supp. 2d 574, 579 (M.D.N.C. 2002).

141. *Keene*, 232 F. Supp. 2d at 583. The court also dismissed hostile work environment and adverse employment action claims for failure to allege sufficient facts. *Id.* at 584. *See also* *Barbier v. The Durham County Bd. of Educ.*, 225 F. Supp. 2d 617, 624 (M.D.N.C. 2002) (“Nevertheless, if a complaint fails to sufficiently state facts to support each element of the claims asserted therein, dismissal for failure to state a claim is proper.”); *O’Diah v. New York City*, No. 02 CIV.274 (DLC), 2002 WL 1941179, at *8 (S.D.N.Y. Aug. 21, 2002) (“The court can dismiss the claim only if, assuming all facts alleged to be true, the plaintiff still fails to plead the basic elements of a cause of action.”).

142. *Iodice v. United States*, 289 F.3d 270, 281 (4th Cir. 2002).

143. *Dickson v. Microsoft Corp.*, 309 F.3d 193, 212–13 (4th Cir. 2002); *see also* *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 220–22 (4th Cir. 1994) (holding in section 1 case that plaintiff must plead sufficient facts to support each element of the antitrust violation); *Syncsort Inc. v. Sequential Software, Inc.*, 50 F. Supp. 2d 318, 328 (D.N.J. 1999) (requiring antitrust violations to plead with particularity).

144. *See Dickson*, 309 F.3d at 218–20 (Gregory, J. dissenting) (arguing the standard violated *Swierkiewicz*).

145. Hyperpleading in the CERCLA context appears to have expired. *See infra* notes 235–41, 245–46 (discussing hyperpleading in CERCLA cases and its decline).

146. Aside from civil rights, negligence, and antitrust, hyperpleading also may exist in some jurisdictions with conspiracy. *See Gubitosi v. Zegeye*, 946 F. Supp. 339, 346 (E.D. Pa. 1996) (requiring detail on “the time period in which the actions allegedly took place, the object of the conspiracy, the actions taken in furtherance of the scheme, facts evidencing an agreement among the conspirators, and facts showing that defendants knew their actions constituted racketeering”).

6. Prolixity

Rule 8 requires a complaint to be both “short and plain.”¹⁴⁷ If it is not, this failure to comply with the rule can lead to dismissal for prolixity. This is heightened pleading gone mad—voluminous details presented by a plaintiff essentially obscuring the claim. The precise contours of prolixity are hard to define. Sometimes though it is a slam dunk as with the consolidated securities fraud complaint in *Gordon v. Green*.¹⁴⁸ “The various complaints, amendments, amended amendments, amendments to amended amendments, and other related papers are anything but short, totaling over 4,000 pages, occupying 18 volumes, and requiring a hand truck or cart to move.”¹⁴⁹ Labeling the complaint “gobbledygook”¹⁵⁰ and invoking the Old Testament,¹⁵¹ the Fifth Circuit had little difficulty disposing of the matter: “[W]e think that as a matter of law, verbose and scandalous pleadings of over 4,000 pages violate Rule 8.”¹⁵²

Not every prolix pleading is as easy to identify. There is no page threshold marking prolixity.¹⁵³ However, there are themes. First, and most important for the macro-model, is the relationship with heightened pleading. Prolix pleadings most often arise in cases, such as civil rights, where heightened pleading is imposed.¹⁵⁴ In fact, *plaintiffs* also invoke heightened pleading as a justification for this excessive detail.¹⁵⁵

147. FED. R. CIV. P. 8(a). Rule 8(e) reinforces this command: “Each averment of a pleading shall be simple, concise, and direct.” FED. R. CIV. P. 8(e)(1).

148. 602 F.2d 743 (5th Cir. 1979).

149. *Id.* at 744–45.

150. *Id.* at 744.

151. *See id.* (“Let Thy Speech Be Short, Comprehending Much in Few Words” Ecclesiasticus 32:8.”).

152. *Id.* at 745.

153. *See* *Tafoya v. Romer*, 208 F.3d 227, 2000 WL 231826, at *1 (10th Cir. Mar. 12, 2000) (unpublished) (affirming dismissal of 177 page complaint); *Ausherman v. Stump*, 643 F.2d 715, 716 (10th Cir. 1981) (describing a sixty-three page complaint as prolix violating Rule 8); *Agnew v. Moody*, 330 F.2d 868, 870 (9th Cir. 1964) (affirming dismissal under Rule 8(a) of a fifty-five page complaint); *Mutuelle Generale Francaise Vie v. Life Assurance Co. of Penn.*, 688 F. Supp. 386, 390–91 (N.D. Ill. 1988) (dismissing a 51 page, 205 paragraph complaint that reads “more like a novel” as prolix, but granting leave to amend); *Newman v. Massachusetts*, 115 F.R.D. 341, 342–43 (D. Mass. 1987) (dismissing a twenty-one page complaint as “argumentative, prolix, and verbose”); *cf.* *Bennett v. Schmidt*, 153 F.3d 516, 517–18 (7th Cir. 1998) (reversing dismissal of a twelve page complaint under Rule 8(a) despite being “repetitious, rambling, and disorganized” but noting that “[t]welve pages of gibberish is no better than 240, so it may be appropriate to dismiss a short complaint under Rule 8 because it is not ‘plain.’”); *Wee v. Rome Hosp.*, No. 93-CV-498, 1996 WL 191970, at *1 n.1 (N.D.N.Y. Apr. 15, 1996) (noting that the court could have dismissed the 212 page 518 paragraph complaint as inconsistent with Rule 8); 5 WRIGHT & MILLER, *supra* note 17, § 1217 (“However, what is the proper length and level of clarity for a pleading cannot be defined with any great precision and is largely a matter for the discretion of the trial court.”).

154. *See Tafoya*, 208 F.3d at 227 (affirming dismissal of civil rights complaint as “too rambling and incomprehensible to meet Rule 8”); *Bennett*, 153 F.3d at 517 (examining prolixity in employment discrimination complaint); *Agnew*, 330 F.2d at 870 (affirming

Judicial efficiency is the underlying rationale for the rule against prolixity. Prolix complaints impose unfair burdens not only on the defendants who must struggle to answer, but on the courts as well.¹⁵⁶ This leads to a waste of judicial resources.¹⁵⁷ Still, dismissal with prejudice is not the usual first remedy.¹⁵⁸ Prolix pleaders are typically given ample instruction and opportunity to replead.¹⁵⁹

dismissal of civil rights complaint); *Res. N.E. of Long Island v. Town of Babylon*, 28 F. Supp. 2d 786, 795 (E.D.N.Y. 1998) (dismissing prolix RICO complaint); *Karlinsky v. New York Racing Ass'n*, 310 F. Supp. 937, 939-40 (S.D.N.Y. 1970) (dismissing prolix antitrust complaint).

155. Consider the § 1983 complaint in *McHenry v. Renne*, 84 F.3d 1172 (9th Cir. 1996). What started at thirty-five pages grew to fifty-three pages by the third amended complaint and ended up reading “like a magazine story” of mostly “narrative ramblings” and “storytelling or political griping.” *Id.* at 1176. After comparing the complaint to the simplicity of Federal Form 9, the Ninth Circuit proclaimed, “[T]he complaint in the case at bar is argumentative, prolix, replete with redundancy, and largely irrelevant.” *Id.* at 1177. The plaintiff’s retort: heightened pleading made them do it. The court disagreed. “A heightened pleading standard is not an invitation to disregard[] Rule 8’s requirement of simplicity, directness, and clarity.” *Id.* at 1178; *see Agnew*, 330 F.2d at 870 (affirming dismissal of civil rights complaint despite “whatever additional verbiage appellant might be permitted in view of the many decisions emphasizing the need for specificity in pleadings under the Civil Rights Act”); *Newman v. Massachusetts*, 115 F.R.D. 341, 344 (D. Mass. 1987) (rejecting heightened pleading justification and dismissing civil rights complaint). Therefore, “[s]omething labeled a complaint but written more as a press release, prolix in evidentiary detail, yet without simplicity, conciseness and clarity as to whom plaintiffs are suing for what wrongs, fails to perform the essential functions of a complaint.” *McHenry*, 84 F.3d at 1180.

156. *McHenry*, 84 F.3d at 1179 (“[P]rolix, confusing complaints such as the ones plaintiffs filed in this case impose unfair burdens on litigants and judges.”); *Foster v. Pfizer*, No. 00-1287-JTM, 2000 WL 33170897, at *1 (D. Kan. Dec. 12, 2000) (stating prolixity places an undue burden on the court and defendant).

157. *McHenry*, 84 F.3d at 1179.

158. As Judge Easterbrook colorfully put it: “Prolixity is a bane of the legal profession but a poor ground for rejecting potentially meritorious claims.” *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998).

159. *See, e.g., Young v. Dept. of Justice*, 41 Fed. Appx. 988, 2002 WL 1759563, at *1 (9th Cir. July 29, 2002) (“The district court properly dismissed the Youngs’ action because the Youngs failed to amend their prolix, defective complaint despite receiving three extensions of time.”); *Rosa v. Goord*, 29 Fed. Appx. 735, 2002 WL 313189 (2d Cir. Feb. 27, 2002) (affirming dismissal of § 1983 case where plaintiff’s amended complaint remained prolix); *Res. N.E. of Long Island v. Town of Babylon*, 80 F. Supp. 2d 52, 57 (E.D.N.Y. 2000) (denying motion to dismiss where previously dismissed original 97-page, 442-paragraph complaint was amended to 49 pages and 215 paragraphs despite finding it “still needlessly prolix”); *Witherspoon v. Philip Morris Inc.*, 964 F. Supp. 455, 468 (D.D.C. 1997) (holding complaint failed to meet Rule 8 where it was unnecessarily voluminous containing unnecessary evidentiary information, but granting leave to amend); *Mutuelle Generale Francaise Vie v. Life Assurance Co. of Penn.*, 688 F. Supp. 386, 390-91 (N.D. Ill. 1988) (dismissing 51 page, 205 paragraph complaint, but granting leave to amend); *see also* 5 WRIGHT & MILLER, *supra* note 17, § 1217 (“Permission to file an amended complaint complying with Rule 8(a)(2) usually is freely given because the federal rules contemplate a decision on the merits rather than a final resolution of the disputes on the basis of technicalities.”).

Dismissal is saved for those complaints that are so unintelligible that their substance is disguised.¹⁶⁰ Also, a Rule 12(f) motion to strike¹⁶¹ can be used by district courts to shed unnecessary prolixity.¹⁶²

Thus, the varied requirements of pleading practice come full circle. A complaint filled with voluminous factual details is subject to dismissal—the same fate as a complaint that is void of facts and states only broad, conclusory allegations. In between these extremes is an amazing spectrum of pleading requirements ranging from simplified notice pleading to hyperpleading. This macro-model, generated from pleading practice in various substantive areas, is a far cry from Judge Clark's reform vision of de-emphasized pleadings.

IV. MICRO-ANALYSIS OF PLEADING PRACTICE

The macro-model emerges from micro-analysis of specific substantive areas. By examining not only what courts say about pleading requirements but also how they act, a richer vision of pleading requirements is possible. Consider the following areas: antitrust, CERCLA, civil rights, conspiracy, copyright, defamation, negligence, and RICO.¹⁶³ Individually, each substantive area reflects wide variation in pleading requirements. Collectively, the mix of common law and statutory claims, as well as their vintage, provide a solid cross-section of federal pleading practice. The blended image is the pleading circle.

A. Antitrust

Our antitrust laws serve to protect competitive freedom.¹⁶⁴ The Sherman Act serves as the cornerstone of our antitrust laws.¹⁶⁵ Section 1 of the Sherman Act applies to collective action and makes illegal “[e]very contract, combination . . . or

160. See *Foster*, 2000 WL 33170897, at *1 (stating that dismissal ordinarily is reserved for those cases where the complaint is “so ambiguous, vague, or otherwise unintelligible, that its true substance, if any, is well disguised”). Some courts have also used Rule 12(e) as a response to a prolix pleading. See *McHenry*, 84 F.3d at 1177. Rule 12(e) allows for a motion for a more definite statement if the pleading is so vague or ambiguous that a party cannot form a responsive pleading. If the motion is granted and not obeyed, the court can strike the pleading. FED. R. CIV. P. 12(e). This rule is intended to add *more* detail to a pleading and hardly seems appropriate for the overly-detailed prolix pleading. See *supra* notes 32–35 and accompanying text (describing use of Rule 12(e)).

161. “[U]pon the court’s own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” FED. R. CIV. P. 12(f).

162. See, e.g., *Foster*, 2000 WL 33170897, at *1 (applying Rule 12(f) striking paragraphs of the prolix complaint).

163. This list of surveyed substantive areas is obviously nonexhaustive. Nonetheless, it is sufficiently diverse to generate the macro-model and illustrate the disconnect between pleading practice and the notice pleading myth.

164. *Silver v. New York Stock Exch., Inc.*, 373 U.S. 341, 359–60 (1963).

165. Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2003)).

conspiracy, in restraint of trade.¹⁶⁶ Section 2 prohibits monopolization and targets primarily single firm behavior.¹⁶⁷ While heightened pleading emerged in both types of claims,¹⁶⁸ pleading with particularity is not the general rule in antitrust cases post-*Leatherman*. However, targeted use of heightened pleading to certain elements of antitrust claims remains prevalent. Hyperpleading is also present in some jurisdictions.

The application of heightened pleading requirements to antitrust actions is a rather recent development. In the decades immediately following adoption of the Federal Rules, both courts¹⁶⁹ and commentators¹⁷⁰ rejected application of special

166. Sherman Act, 15 U.S.C. § 1. To succeed with a Section 1 claim, a plaintiff must establish: (1) at least two or more entities acting in concert; (2) an unreasonable restraint on trade; and (3) an effect on interstate commerce. *See* *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 220 (4th Cir. 1994). The literal language of Section 1 banning “restraints on trade” was judicially modified early on by the Supreme Court to apply only to unreasonable restraints. *See* *Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (“Every agreement concerning trade, every regulation restrains The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”); *see also* JAMES E. MEEKS, *ANTITRUST CONCERNS IN THE MODERN PUBLIC UTILITY ENVIRONMENT* 14 (1996).

167. *See* MEEKS, *supra* note 166, at 27. A successful Section 2 claim requires proof of: (1) possession of monopoly power in the relevant market; and (2) willful acquisition or maintenance of the power distinguished from growth and development as a consequence of a superior product, business acumen, or historical accident. *See* *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924 (9th Cir. 1980); *Ebay, Inc. v. Bidder’s Edge, Inc.*, No. C-99-21200 RMW, 2000 WL 1863564, at *3 (N.D. Cal. July 25, 2000); *see also* HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* 268 (2d ed. 1999).

168. Application of heightened pleading is not restricted to only Sherman Act claims under Section 1 or 2. Other elements of antitrust actions have also been subject to heightened pleading. For example, to bring a private, treble damage suit under antitrust laws, a plaintiff must show standing under section 4 of the Clayton Act. *Jayco Sys., Inc. v. Savin Bus. Mach. Corp.*, 777 F.2d 306, 313 (5th Cir. 1985). This requires proof of antitrust injury—that is, injury of the type that antitrust laws are intended to prevent. *See* *Cargill, Inc. v. Montford of Colorado, Inc.*, 479 U.S. 104, 109–11 (1986). Heightened pleading has been applied to this issue of antitrust injury, as a component of antitrust standing. *See* *Universal Computer Sys., Inc. v. Volvo Cars of N. Am., Inc.*, No. Civ. A. H-96-2389, 1997 WL 1433879, at *6 (S.D. Tex. Sept. 29, 1997) (requiring heightened pleading for standing allegations based on *Associated General*); *Hahn v. Rifkin/Narragansett S. Fla. CATV Ltd. P’ship*, 941 F. Supp. 1196, 1199 (S.D. Fla. 1996) (same). *But see* *Ebay, Inc. v. Bidder’s Edge, Inc.*, No. C-99-21200 RMW, 2000 WL 1863564, at *7 (N.D. Cal. July 25, 2000) (rejecting heightened pleading for antitrust injury post-*Leatherman*). My focus on Section 1 and 2 is therefore intended to be illustrative.

169. *See, e.g.*, *Monument Builders of Greater Kansas City, Inc. v. Am. Cemetery Ass’n of Kansas*, 891 F.2d 1473, 1481 (10th Cir. 1989) (rejecting need for detailed facts at pleading stage on antitrust conspiracy claim); *Fusco v. Xerox Corp.*, 676 F.2d 332, 337 (8th Cir. 1982) (stating liberal rules of pleading apply to antitrust actions); *Corey v. Look*, 641 F.2d 32, 38 (1st Cir. 1981) (“There is no special rule requiring more factual specificity in antitrust pleadings.”); *Hunt-Wesson*, 627 F.2d at 924 (applying Rule 8 and declaring no special rule requiring specificity in antitrust pleadings exists); *Nagler v. Admiral Corp.*, 248

pleading rules to antitrust cases. The Ninth Circuit expressed the rejection succinctly: “[T]here are no special rules of pleading in antitrust cases.”¹⁷¹

Indeed, the Supreme Court repeatedly instructed the lower courts to use dismissals very sparingly in antitrust cases prior to giving plaintiffs ample opportunity for discovery, especially where the proof rested in the hands of the alleged conspirators.¹⁷² However, in 1983, the Court introduced confusion over the appropriate antitrust pleading standard in *Associated General Contractors of California v. California State Council of Carpenters*.¹⁷³ In the context of a union-employer dispute,¹⁷⁴ the Court affirmed the dismissal of a complaint as insufficient based upon both the nature of the alleged injury and improper parties to bring the action.¹⁷⁵ In so doing, the Court added in dicta footnote 17:

Had the District Court required the Union to describe the nature of the alleged coercion with particularity before ruling on the motion to dismiss, it might well have been evident that no violation of law had been alleged. In making the contrary assumption for purposes of our decision, we are perhaps stretching the rule of *Conley v. Gibson* . . . too far. Certainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.¹⁷⁶

This footnote provided precisely the excuse needed for some lower courts to impose heightened pleading in antitrust cases.

District courts seemed primed to embrace heightened pleading as a solution to both the rising costs of litigation—chiefly discovery—and mounting

F.2d 319, 322–24 (2d Cir. 1957) (rejecting special pleading rules in antitrust cases as contrary to Federal Rules); *Package Closure Corp. v. Sealright Co.*, 141 F.2d 972, 978–79 (2d Cir. 1944) (rejecting pleading with particularity in Sherman Act case as inconsistent with liberal rules governing pleadings).

170. See Clark, *supra* note 35, at 48–49 (discussing and rejecting application of heightened pleading in Sherman Act cases).

171. Walker Distrib. Co. v. Lucky Lager Brewing Co., 323 F.2d 1, 3 (9th Cir. 1963). The court continued: “Rule 8 . . . is applicable here as in any other case. No-where in the Rules is there any contrary indication. The fact that Rule 9(b) requires particularity of statement of circumstances constituting fraud or mistake indicates that such particularity is not required in other cases, including antitrust cases.” *Id.* Interestingly, this type of *expressio unius* reasoning is precisely the rationale seized upon by the Supreme Court in *Leatherman*. See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

172. See *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746 (1976); *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962).

173. 459 U.S. 519 (1983).

174. The collective-bargaining agreement dispute involved two unions representing 50,000 individuals and a membership corporation representing approximately 250 construction contractors and an alleged 1,000 unidentified co-conspirators. See *Associated Contractors*, 459 U.S. at 521.

175. *Id.* at 545–46.

176. *Id.* at 528 n.17.

federal caseloads.¹⁷⁷ Dismissal at the pleading stage would conserve resources for courts and litigants alike. Not surprisingly, after *Associated General*, lower courts routinely dismissed antitrust complaints for failure to plead with particularity relying on footnote 17.¹⁷⁸

Three approaches emerged. Consistent with the Federal Rules, some courts granted Rule 12(b)(6) dismissals where the factual allegations in the complaint simply did not state an antitrust action.¹⁷⁹ In essence, the story the

177. See *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (listing costs of modern litigation, increasing caseloads, and discovery as justifications for heightened pleading); *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984) (explaining that heavy costs of litigation, especially antitrust litigation, federal caseloads, and discovery warrant increased factual detail and citing *Associated General*); *TV Communications Network, Inc. v. ESPN, Inc.*, 767 F. Supp. 1062, 1070 (D. Colo. 1991) (highlighting heavy costs and massive discovery as rationales), *aff'd*, 964 F.2d 1022 (10th Cir. 1992); *Garshman v. Universal Res. Holding, Inc.*, 641 F. Supp. 1359, 1367 (D.N.J. 1986) (explaining that antitrust litigation costs and federal caseloads militate toward pleading particularity), *aff'd*, 824 F.2d 223 (3d Cir. 1987); see also Edward Cavanagh, *Pleading Rules in Antitrust Cases: A Return to Fact Pleading?*, 21 REV. LITIG. 1, 11–13 (2002) (describing case for specificity).

178. See *Car Carriers*, 745 F.2d at 1106–07 (requiring facts outlining Section 1 violation and citing *Associated General*); *Arbitron Co. v. Tropicana Prod. Sales, Inc.*, No. 91 Civ. 3697 (PKL), 1993 WL 138965, at *10 (S.D.N.Y. Apr. 28, 1993) (dismissing Section 2 complaint for failure to meet heightened *Associated General* standard); *Futurevision Cable Sys. of Wiggins, Inc. v. Multivision Cable TV Corp.*, 789 F. Supp. 760, 771–72 (S.D. Miss. 1992) (dismissing Section 1 complaint for failure to meet *Associated General*'s heightened standard), *aff'd*, 986 F.2d 1418 (5th Cir. 1993); *TV Communications*, 767 F. Supp. at 1070 (dismissing Sherman Act claims for failure to meet Supreme Court's "mandated" heightened standard); *Garshman*, 641 F. Supp. at 1367 (citing *Associated General* for requiring greater specificity with antitrust complaint), *aff'd*, 824 F.2d 223 (3d Cir. 1987); see also *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1359 & n.2 (10th Cir. 1989) (noting Section 1 claim requires pleading with particularity based on footnote 17), *aff'g*, No. 86-C-123-B, 1987 WL 11751 (N.D. Okla. Jan. 5., 1987) (dismissing Section 1 claim on both heightened and *Conley* standards); Cavanagh, *supra* note 177, at 13 (pointing to *Associated General* as tool for district courts to use heightened pleading).

However, application of heightened pleading was not universal. See *Baxley-DeLamar Monuments, Inc. v. Am. Cemetery Ass'n*, 843 F.2d 1154–56 (8th Cir. 1988) (reversing dismissal where Sherman Act claim properly met Rule 8 pleading); *Lombard's Inc. v. Prince Mfg., Inc.*, 753 F.2d 974, 975 (11th Cir. 1985) ("Notice pleading is all that is required for a valid antitrust complaint."); *Electronic Data Sys. Corp. v. Computer Assocs. Int'l, Inc.*, 802 F. Supp. 1463, 1466 (N.D. Tex. 1992) ("[T]he Federal Rules of Civil Procedure do not impose heightened pleading requirements in antitrust claims."); *GTE Data Servs., Inc. v. Electronic Data Sys. Corp.*, 717 F. Supp. 1487, 1489 (M.D. Fla. 1989) ("There is no heightened scrutiny required merely because this is an antitrust violation.").

179. Judge Posner's opinion in *Sutliff* is a good example. He contends that the *Conley* standard has "never been taken literally" and that a pleader must set out sufficient facts to outline the elements of his cause of action. *Sutliff*, 727 F.2d at 654 (citing WRIGHT & MILLER, *supra* note 17, § 1216). Posner further explained that if a plaintiff claims an antitrust violation, but the facts narrated do not at least outline one, dismissal is proper. See

plaintiff tells does not amount to the type of wrong redressed by our antitrust laws.¹⁸⁰ This is not really a heightened standard at all, but recognition that the factual details provided by the plaintiff are legally insufficient to state a claim. Nonetheless, courts taking this approach can introduce confusion by characterizing the plaintiff's obligation as "heightened."¹⁸¹

A second approach targets heightened pleading to a particular element of an antitrust action. For example, a Section 1 claim requires a conspiracy.¹⁸² Some courts require greater factual specificity as to the conspiracy element of a Section 1 claim.¹⁸³ The standard typically imposes dismissal where allegations of conspiracy are made without sufficient supporting facts constituting the conspiracy, its object, and accomplishment.¹⁸⁴ Use of factual specificity in this context actually predates *Associated General*¹⁸⁵ and is undoubtedly related to the broader use of heightened pleading in the conspiracy context.¹⁸⁶

id. Accordingly, the panel dismissed the antitrust claim at issue because the factual allegations in the complaint did not state an antitrust claim. *Id.* at 655.

180. For example, if a plaintiff alleges a Section 1 violation based upon collusion between a parent corporation and subsidiary, the claim is subject to dismissal. Regardless of the factual details, a parent and wholly-owned subsidiary are incapable of conspiring for purposes of Section 1. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984) (overruling prior decisions to the contrary).

181. *See, e.g., Cayman*, 873 F.2d at 1359 (declining to specify how many facts are sufficient to state a claim under a heightened pleading standard because plaintiff's allegations were legally insufficient to state a claim); *Car Carriers*, 745 F.2d at 1106, 1110 (reciting specificity requirement yet affirming dismissal based on legal insufficiency); *Garshman*, 641 F. Supp. at 1367, 1369–70 (noting heightened requirement and holding that even if every allegation were proven, defendant's conduct did not violate Section 2), *aff'd*, 824 F.2d 223 (3d Cir. 1987).

182. 15 U.S.C. § 1 (2003); *see Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 779 (7th Cir. 1994) (noting Section 1 typically applies to conspiracies).

183. Section 2 also makes illegal conspiracies to monopolize. These claims would also fall under Section 1 and typically are litigated as Section 1 claims. *See HOVENKAMP, supra* note 167, at 286–87; MEEKS, *supra* note 166, at 27 & n.90.

184. *See Garshman*, 641 F. Supp. at 1370–71 (dismissing Section 1 claim for failure to allege sufficient conspiracy facts), *aff'd*, 824 F.2d 223 (3d Cir. 1987); *Five Smiths, Inc. v. Nat'l Football League Players Ass'n*, 788 F. Supp. 1042, 1048 (D. Minn. 1992) (stating that generally notice pleading applies to antitrust claims, but that general allegations of conspiracy, without facts constituting the conspiracy, its object and accomplishment are inadequate); *see also Fort Wayne Telsat v. Entm't & Sports Programming Network*, 753 F. Supp. 109, 113 (S.D.N.Y. 1990) (dismissing conspiracy to monopolize Section 2 claim for failure to plead conspiracy with particularity).

185. *See, e.g., Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 273 (5th Cir. 1979) ("The pleader must allege the facts constituting the conspiracy, its object and accomplishment."); *Heart Disease Research Found. v. Gen. Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972) ("[A] bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal.")

186. For example, *Garshman* cites *Kalmanovitz v. G. Heileman Brewing Co.*, 595 F. Supp. 1385 (D. Del. 1984), for the conspiracy particularity requirement. 641 F. Supp. at 1370. *Kalmanovitz*, however, involved a common law conspiracy claim. *See* 595 F. Supp. at

Similarly, heightened pleading is applied to allegations of fraudulent concealment when raised to avoid a limitations defense.¹⁸⁷ Sherman Act claims are controlled by a four-year statute of limitations.¹⁸⁸ However, limitations is extended where the defendant engages in fraudulent concealment.¹⁸⁹ When an antitrust plaintiff attempts to invoke fraudulent concealment to combat limitations, some courts require pleading affirmative acts with particularity.¹⁹⁰ When a rationale is offered, it is typically that fraudulent concealment is controlled by Rule 9(b)'s particularity requirement for fraud.¹⁹¹ However, there is no judicial consensus on precisely how to apply Rule 9(b) in this context.¹⁹²

Another example of targeted use of heightened pleading arises in application of the *Noerr-Pennington* doctrine.¹⁹³ This doctrine creates a general rule of antitrust immunity where the party is exercising its First Amendment right

1400–01. A complete discussion of heightened pleading in the conspiracy context is *infra* subpart IV.D.

187. See Cavanagh, *supra* note 177, at 10 (claiming particularized pleading exists for fraudulent concealment); see generally Guido Saveri & Lisa Saveri, *Pleading Fraudulent Concealment in an Antitrust Price Fixing Case: Rule 9(b) v. Rule 8*, 17 U.S.F. L. REV. 631 (1983) (discussing the applicability of Rule 9(b) and heightened pleading to fraudulent concealment in antitrust price-fixing cases).

188. 15 U.S.C. § 15(b) (2003).

189. See *Berkson v. Del Monte Corp.*, 743 F.2d 53, 55 (1st Cir. 1984) (“To invoke the doctrine of fraudulent concealment, a plaintiff must plead and prove three elements: (1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff’s due diligence until discovery of the facts.”).

190. See *Donahue v. Pendleton Woolen Mills, Inc.*, 633 F. Supp. 1423, 1443 (S.D.N.Y. 1986) (“Courts furthermore require particularity in pleading fraudulent concealment.”); see also *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978) (stating plaintiff invoking fraudulent concealment must allege facts showing affirmative conduct); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975) (applying pleading with particularity to fraudulent concealment).

191. See *Dayco*, 523 F.2d at 394 (stating Rule 9(b) applies to fraudulent concealment); see also Saveri & Saveri, *supra* note 187, at 639–40 (“Courts granting these motions [to dismiss] often rely on the particularity requirement of Rule 9(b) or find that the plaintiff has not pleaded its claim with sufficient factual specificity.”). This application of Rule 9(b) seems misplaced. None of the supposed justifications for the rule—notice, reputational protection, deterrence of frivolous suits, and resistance to reopening completed transaction—are enhanced by particularized pleading of fraudulent concealment as a defense to an affirmative defense of limitations. See *supra* note 23 and accompanying text (outlining purposes of Rule 9(b)).

192. See Saveri & Saveri, *supra* note 187, at 641–44 (comparing a “relaxed” application of Rule 9(b) to complex and lengthy transactions with a “literal” application).

193. The doctrine gets its name from a trilogy of cases: *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.* 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); and *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

to petition the legislative, administrative, or judicial branches of government.¹⁹⁴ However, the Supreme Court has recognized an exception to *Noerr-Pennington* where the action is a mere sham to cover an attempt to directly interfere with a competitor.¹⁹⁵ Some courts have applied heightened pleading to this “sham exception” requiring it to be pleaded with factual particularity.¹⁹⁶ The rationale offered for heightened pleading in this context is protection for petitioning activity and avoidance of chilling First Amendment rights.¹⁹⁷

A third approach is even more troublesome. Mischaracterizing footnote 17 as a Supreme Court “mandate” for antitrust pleading specificity, these courts impose hyperpleading requiring factual support for every element of an alleged antitrust violation.¹⁹⁸ Obviously when this type of heightened pleading is required, there is room for substantial disagreement as to whether sufficient factual specificity has been provided to allow the case to go forward.¹⁹⁹

194. See *Or. Natural Res. Council v. Mohla*, 944 F.2d 531, 533–34 (9th Cir. 1991) (describing *Noerr-Pennington* protection); HOVENKAMP, *supra* note 167, § 18.2 (describing the scope of antitrust petitioning immunity).

195. See *California Motor*, 404 U.S. at 512–13 (describing shams); *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1060 (9th Cir. 1998) (describing sham exception); see also HOVENKAMP, *supra* note 167, § 18.3 (describing the sham exception).

196. See *Oregon Natural*, 944 F.2d at 533 (“Where a claim involves the right to petition governmental bodies under *Noerr-Pennington*, however, we apply a heightened pleading standard.”); *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886, 894 (9th Cir. 1988) (requiring specific allegations in *Noerr-Pennington* context); *Michael Anthony Jewelers, Inc. v. Peacock Jewelry, Inc.*, 795 F. Supp. 639, 649 (S.D.N.Y. 1992) (applying Rule 9(b) to fraud allegations under *Noerr-Pennington*). *But see Sage Int’l, Ltd. v. Cadillac Gage Co.*, 507 F. Supp. 939, 943–44 (E.D. Mich. 1981) (surveying the cases addressing the issue and concluding that the better approach is not to engraft a heightened pleading requirement onto sham litigation cases).

The Ninth Circuit is the leader in applying heightened pleading in this context. The court first adopted the standard in *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976). In creating the standard, the court required a complaint to include allegations of specific activities, not protected by *Noerr*. See *Franchise Realty*, 542 F.2d at 1082. The majority, however, explicitly rejected that it was adopting a “fact pleading” rule. *Id.* In dissent, Judge Browning criticized the majority for crafting a new pleading standard contrary to notice pleading. See *id.* at 1089–90 (Browning, J., dissenting). As *Oregon Natural* illustrates, the court is now apparently comfortable with embracing the heightened pleading label.

197. See *Oregon Natural*, 944 F.2d at 533 (grounding heightened pleading in First Amendment protection); *Boone*, 841 F.2d at 894 (same).

198. See, e.g., *Futurevision Cable Sys. of Wiggins, Inc. v. Multivision Cable TV Corp.*, 789 F. Supp. 760, 771–72 (S.D. Miss. 1992) (recounting the Supreme Court mandate, characterizing it as requiring facts as to each element, and dismissing Section 1 claim); *John’s Insulation, Inc. v. Siska Constr. Co.*, 774 F. Supp. 156, 162–63 (S.D.N.Y. 1991) (dismissing Section 1 claim as conclusory); *TV Communications Network, Inc. v. ESPN, Inc.*, 767 F. Supp. 1062, 1070 (D. Colo. 1991) (stating district court power to require specificity and dismissing as “not grounded in well-pleaded facts”).

199. The Fourth Circuit’s panel opinion in *Faulkner Advertising Associates v. Nissan Motor Corp. in U.S.A.*, 905 F.2d 769 (1990), is illustrative. The majority found that the plaintiff advertising agency had sufficiently alleged a Section 1 “tying” violation. Judge

In the aftermath of *Leatherman*, antitrust heightened pleading has certainly been curtailed. Finding the *Leatherman* rationale applicable to antitrust, many lower courts have re-embraced notice pleading and Rule 8 as the appropriate pleading standard in antitrust cases.²⁰⁰ The Seventh Circuit is illustrative. Soon

Hall dissented describing the complaint as legal conclusions and puffery and invoking a heightened standard under *Associated General*. See 905 F.2d at 776 & n.1 (Hall, J., dissenting). The Fourth Circuit reheard the case en banc and affirmed by an equally divided panel. See 945 F.2d 694, 695 (4th Cir. 1991) (en banc). Again in a dissenting opinion, Judge Hall found the complaint deficient, however, this time invoking *Conley*. *Id.* (Hall, J., dissenting). This confusion on the proper standard and its application underscores the inherent difficulty of a heightened pleading standard. See also JOHN MILES, HEALTH CARE AND ANTITRUST LAW § 9A:2 (2002) (noting judges differ substantially on amount of factual support required).

200. See *S. Austin Coalition Cmty. Council v. SBC Communications, Inc.*, 274 F.3d 1168, 1171 (7th Cir. 2001) (concluding on the strength of *Leatherman* that district courts must apply Rule 8 in antitrust cases); *Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869, 876–77 (3d Cir. 1995) (finding impatience with notice pleading precluded by *Leatherman*); *MCM Partners, Inc. v. Andrews-Bartlett & Assocs., Inc.* 62 F.3d 967, 976 (7th Cir. 1995) (explaining that judicial attempts to apply heightened pleading in antitrust actions have been scotched by *Leatherman*); *Rozema v. Marshfield Clinic*, No. 96-C-592-C, 1997 WL 416292, at *6 (W.D. Wisc. Mar. 10, 1997) (noting that cases applying heightened pleading in antitrust cases “cannot be considered authoritative after *Leatherman*”); *Gross v. New Balance Athletic Shoe, Inc.*, 955 F. Supp. 242, 244–45 (S.D.N.Y. 1997) (finding no heightened pleading in antitrust based on *Leatherman*); *Chowdhury v. Marathon Oil Co.*, No. 95 C 0805, 1996 WL 19584, at *3 (N.D. Ill. Jan. 16, 1996) (stating an antitrust plaintiff is not required to plead the particulars of its claim after *Leatherman*); *In re Brand Name Prescription Drug Antitrust Litig.*, No. 94 C 897, MDL 997, 1994 WL 240537, at *5 (N.D. Ill. May 27, 1994) (concluding no heightened pleading in antitrust after *Leatherman*); see also 5 WRIGHT & MILLER, *supra* note 17, § 1228 (stating that post-*Leatherman*, “there is no heightened pleading standard in antitrust cases.”).

Other courts have reiterated a notice pleading standard without explicit mention of *Leatherman*. See *Theme Promotions, Inc. v. News Am. FSI*, No. 01-16329, 2002 WL 869941, at *1 (9th Cir. May 3, 2002) (“Antitrust cases do not require a heightened form of pleading.”); *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) (“No heightened pleading requirements apply in antitrust cases.”); *Cook Inc. v. Boston Scientific Corp.*, No. 01 C 9479, 2002 WL 335314, at *4 (N.D. Ill. Feb. 28, 2002) (“[A]ntitrust claims are not among the special matters of Fed. R. Civ. Proc. 9 that require heightened pleading.”); *United States Info. Sys., Inc. v. Int’l Bhd. of Elec. Workers Local Union No. 3*, No. 00 Civ. 4763 (RMB), 2002 WL 91625, at *2 (S.D.N.Y. Jan. 23, 2002) (noting no heightened pleading in antitrust cases); *In re Mercedes-Benz Antitrust Litig.*, 157 F. Supp. 2d 355, 359 (D.N.J. 2001) (“There is no heightened pleading standard in antitrust cases”); *Griffiths v. Blue Cross & Blue Shield of Ala.*, 147 F. Supp. 2d 1203, 1214 (N.D. Ala. 2001) (applying notice pleading standard); *Greene v. Connecticut Bd. of Accountancy*, No. CIVA3: 00CV599 (CFD), 2001 WL 286855, at *4 (D. Conn. Mar. 20, 2001) (“[A]n antitrust claim is not subject to any heightened pleading requirement”); *Ebay, Inc. v. Bidder’s Edge, Inc.*, No. C-99-21200 RMW, 2000 WL 1863564, at *1 (N.D. Cal. July 25, 2000) (noting no special rule requiring factual specificity in antitrust pleadings); *Eleven Line, Inc. v. N. Tex. State Soccer Ass’n*, No. CA 3-95-C-3120-R, 1998 WL 25566, at *5 (N.D. Tex. Jan. 13, 1998) (“There is no heightened pleading standard for antitrust claims”); *Ralph Kearney & Sons, Inc. v. Emerson Elec. Co.*, Civ. A. No. 96-3280, 1996 WL 502315, at *3 (E.D. Pa. Aug. 29, 1996) (“There is no heightened pleading standard in

after *Leatherman*, the court made clear that the “nascent movement” to add judge-made exceptions to notice pleading was now precluded.²⁰¹ Consequently, antitrust plaintiffs were not required to plead with particularity.²⁰² Moreover, the court denounced pre-*Leatherman* cases applying heightened pleading as no longer authoritative.²⁰³

Thus, the current antitrust pleading landscape illustrates the macro-model. There are jurisdictions applying notice pleading to antitrust cases. However, despite this judicial move back toward Rule 8, heightened pleading remains. Consider the targeted use of heightened pleading. Numerous courts retain heightened pleading for specific elements of antitrust cases including: conspiracy,²⁰⁴ fraudulent concealment,²⁰⁵ and sham exceptions.²⁰⁶ Moreover, there

antitrust cases.”); *Audell Petroleum Corp. v. Suburban Paraco Corp.*, 903 F. Supp. 364, 367 (E.D.N.Y. 1995) (“In short, the Court finds that there is no heightened pleading requirement for antitrust claims.”); *TCA Bldg. Co. v. Northwestern Res. Co.*, 861 F. Supp. 1366, 1373–74 (S.D. Tex. 1994) (applying notice pleading standard); see also *Cavanagh*, *supra* note 177, at 24 (concluding that Federal Rules impose no particularity requirement in antitrust cases and that courts should not create one). Similarly, state courts interpreting state antitrust laws (modeled on federal law) and pleading practice have rejected a heightened standard. See, e.g., *Taylor v. Philip Morris Inc.*, No. Civ.A. CV-00-203, 2001 WL 1710710, at *2 (Me. Super. Ct. May 29, 2001) (rejecting heightened pleading under Maine Antitrust Act); *In re Milk Indirect Purchaser Antitrust Litig.*, 588 N.W.2d 772, 774–75 (Minn. Ct. App. 1999) (rejecting heightened standard of specificity in pleading violation of Minnesota antitrust laws).

201. See *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 778 (7th Cir. 1994) (Posner, J.).

202. *Id.* at 778, 782.

203. *Id.* at 782. Judge Posner did salvage his opinion in *Sutliff* by characterizing it not as a heightened pleading case, but one where the plaintiff simply pleaded himself out of court. The Author agrees. See *supra* notes 179–80 and accompanying text. The district courts now similarly read *Sutliff* as not creating a heightened standard post-*Leatherman*. See *RX Sys., Inc. v. Med. Tech. Sys., Inc.*, No. 94 C 50358, 1995 WL 577659, at *4 (N. D. Ill. Sept. 29, 1995).

204. See, e.g., *Granite Partners, L.P. v. Bear Stearns & Co.*, 58 F. Supp. 2d 228, 238 (S.D.N.Y. 1999) (requiring Sherman Act conspiracy claim to include factual basis including relevant product market, co-conspirators, and nature and effects of conspiracy); *In re Milk Prods. Antitrust Litig.*, 84 F. Supp. 2d 1016, 1019–20 (D. Minn. 1997) (recognizing that liberal pleading applies to antitrust actions, but requiring antitrust conspiracy claim to include facts constituting the conspiracy, object, and accomplishments); *In re Lease Oil Antitrust Litig.*, No. Civ. A. C-98-048, 1998 WL 690947, at *6 (S.D. Tex. May 7, 1998) (describing specificity required in conspiracy context as facts constituting the conspiracy, objects and accomplishments). But see *In re Commercial Explosives Litig.*, Civil No. 2:96-MD-1093S, 1996 WL 795270, at *2 (D. Utah Dec. 20, 1996) (“Because ‘conspiracy may be proven by circumstantial evidence,’ requiring detailed facts at the pleading stage is ‘contrary to the substantive law of antitrust conspiracy.’”).

205. See, e.g., *In re Buspirone Patent Litig.*, 185 F. Supp. 2d 363, 379 (S.D.N.Y. 2002) (requiring plaintiff to plead fraudulent concealment with particularity); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 138 F. Supp. 2d 25, 26, 28–29 (D. Me. 2001) (recognizing notice pleading is general rule in antitrust cases, but requiring heightened particularity of Rule 9 with fraudulent concealment allegations); But see *In re*

are still courts that appear to maintain a general rule of hyperpleading in antitrust cases post-*Leatherman*—although this must now be considered a distinctly minority view.²⁰⁷ After *Swierkiewicz*, it is even more difficult to see how a pleading standard requiring factual specificity as to every element of an antitrust claim is justifiable.²⁰⁸ Nonetheless, even where there has been tacit rejection of

Commercial Explosives, 1996 WL 795270, at *2–3 (allowing allegations asserting affirmative conduct to conceal unlawful conduct sufficient at pleading stage).

206. The Ninth Circuit continues to apply heightened pleading to *Noerr-Pennington* sham exceptions post-*Leatherman*. See *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1063 (9th Cir. 1998) (employing heightened pleading standard); *Formula One Licensing, B.V. v. Purple Interactive Ltd.*, No. C 00-2222 MMC, 2001 U.S. Dist. LEXIS 2968, at *6 (N.D. Cal. Feb. 6, 2001) (requiring heightened pleading with sham exception); *Aggregate Prods., Inc. v. Granite Constr. Co.*, Civil No. 98-0900-E(AJB), 1998 U.S. Dist. LEXIS 21717, at *11 (S.D. Cal. Aug. 26, 1998) (stating antitrust allegations implicating the First Amendment are subject to the Ninth Circuit's heightened pleading standard).

The Ninth Circuit's use of heightened pleading is particularly troubling when a particular variant of the sham exception—the misrepresentation exception—is considered. This exception involves whether misrepresentations to the government are protected by *Noerr-Pennington* or fall within the sham exception. See *Armstrong Surgical Ctr., Inc. v. Armstrong County Mem'l Hosp.*, 185 F.3d 154, 160 (3d Cir. 1999) (describing exception); see generally Scott Filmore, Comment, *Defining the Misrepresentation Exception to the Noerr-Pennington Doctrine*, 49 KAN. L. REV. 423 (2001). The Ninth Circuit recognizes a misrepresentation exception and requires proof of knowing or intentional misrepresentations. See *Liberty Lake Invs., Inc. v. Magnuson*, 12 F.3d 155, 158–59 (9th Cir. 1993). Combined with the circuit's heightened pleading requirement, a plaintiff can be compelled to plead with particularity the defendant's state of mind—a nearly impossible task absent discovery. See Filmore, *supra*, at 454. This is the same inherent problem in heightened pleading revealed in other contexts such as civil rights and securities fraud. See generally Fairman, *supra* note 6.

The Ninth Circuit, however, is not alone. See *Sanderson v. Brugman*, No. IP00-459-C-H/G, 2001 WL 699876, at *6 (S.D. Ind. May 29, 2001) (requiring facts to be pleaded to support sham exception allegation); *In re Nine West Shoes Antitrust Litig.*, 80 F. Supp. 2d 181, 192 (S.D.N.Y. 2000) (“[C]ourts require particularity in pleading fraudulent concealment.”); *Music Ctr. S.N.C. Di Luciano Pisoni & Co. v. Prestini Musical Instruments Corp.*, 874 F. Supp. 543, 549, 551–52 (E.D.N.Y. 1995) (requiring pleading with particularity on sham exception to prevent excessive discovery, strike suits, and First Amendment chill). But see *Skinder-Strauss Assocs. v. Mass. Continuing Legal Educ., Inc.*, 870 F. Supp. 8, 11 (D. Mass. 1994) (rejecting heightened pleading for sham exceptions post-*Leatherman*).

207. See *Dickson v. Microsoft Corp.*, 309 F.3d 193, 212–13 (4th Cir. 2002) (requiring plaintiff in antitrust complaint to meet the “basic pleading requirement that a plaintiff set forth facts sufficient to allege each element of his claim”); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 220–22 (4th Cir. 1994) (holding in section 1 case that plaintiff must plead sufficient facts to support each element of the antitrust violation); *Syncsort Inc. v. Sequential Software, Inc.*, 50 F. Supp. 2d 318, 328 (D.N.J. 1999) (requiring antitrust violations to plead with particularity).

208. See *First Med Representatives, LLC v. Futura Med. Corp.*, 195 F. Supp. 2d 917, 922 (E.D. Mich. 2002) (applying *Swierkiewicz* in state antitrust action modeled on Sherman Act). But see *Dickson*, 309 F.3d at 213 (contending *Swierkiewicz* did not alter the basic pleading requirement that a plaintiff must set forth facts sufficient to allege each element of the claim). Judge Gregory dissented from the Fourth Circuit's panel decision

heightened pleading, the lingering shadow of particularity remains as courts struggle to give credence to notice pleading and their previous experience.²⁰⁹ Given this survey, pleading with particularity continues to thrive in the antitrust context post-*Leatherman*.

B. CERCLA

In 1980, Congress created the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)²¹⁰ to facilitate the cleanup of hazardous waste sites²¹¹ and assure that “those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions.”²¹² Consistent with this purpose, CERCLA extends liability broadly to cover responsible parties from generation through disposal.²¹³ It also creates a private cause of action where certain costs of response to the disposal of hazardous substances can be recovered.²¹⁴ To recover under CERCLA, a plaintiff must prove that: (1) the defendant is a responsible party under the statute; (2) the site is a

arguing it violated notice pleading and *Swierkiewicz*. *Id.* at 218–20. A Ninth Circuit panel has been similarly split. *See Vangala v. St. Mary’s Regional Med. Ctr.*, No. 01-55627, 2002 WL 461779, at *1 (9th Cir. Mar. 19, 2002) (Ferguson, J., dissenting) (arguing panel majority was applying heightened pleading to antitrust injury in contravention of *Swierkiewicz*).

209. Consider *DM Research, Inc. v. College of American Pathologists*, 170 F.3d 53 (1st Cir. 1999). After stating that there was no heightened pleading in antitrust cases, the district court nonetheless dismissed a Section 1 claim for failure to allege facts that establish all the elements of the claim. *See DM Research, Inc. v. Coll. of Am. Pathologists*, 2 F. Supp. 2d 226, 228 (D.R.I. 1998). The First Circuit affirmed. It did so without mention of *Leatherman* or heightened pleading. Rather the court relied on its previous holding in *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 514 (1st Cir. 1988), requiring factual allegation respecting each material element necessary to sustain recovery. *DM*, 170 F.3d at 55. It is hard to see how this is much different from a heightened pleading standard. At least one district court recently implied that the *Gooley* standard cannot be good law post-*Swierkiewicz*. *See Grennier v. Pace*, Local No. 1188, 201 F. Supp. 2d 172, 176–77 (D. Me. 2002).

Another good example of this tension is *Lone Star Milk Producers, Inc. v. Dairy Farmers of Am., Inc.*, No. 5:00-CV-191, 2001 WL 1701532 (E.D. Tex. Jan. 22, 2001). In *Lone Star*, the district court clearly states the rule that there is no heightened pleading in antitrust cases, yet also contends that “a plaintiff must plead facts concerning every element of his antitrust claim.” *Id.* at *4. These positions seem inconsistent especially given *Lone Star*’s reliance on *TV Communications*, a Tenth Circuit affirmation of pre-*Leatherman* heightened pleading. *See id.*; *supra* note 178 (describing *TV Communications*).

210. Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601–75 (2000) (CERCLA).

211. *Exxon Corp. v. Hunt*, 475 U.S. 355, 359–60 (1986).

212. *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 514 (2d Cir. 1996) (quoting S. Rep. 848, 96th Cong., 2d Sess. 13 (1980)).

213. Responsible parties under CERCLA include: (1) present owners and operators of facilities that accepted hazardous substances, (2) past owners and operators of such facilities, (3) generators of hazardous substances, and (4) certain transporters of hazardous substances. 42 U.S.C. § 9607(a)(1)–(4) (2003).

214. *Id.* § 9607(a).

“facility” as defined by the statute; (3) there is a release or threatened release of hazardous substances at the facility; (4) the plaintiff has incurred response costs consistent with the national contingency plan.²¹⁵ While these proof burdens are well settled, what a plaintiff must plead to avoid dismissal is not. Several variations of heightened pleading emerge, illustrating the many stages of the macro-pleading model.

CERCLA heightened pleading begins with concerns over response costs. A pair of court of appeals cases demonstrates response cost heightened pleading and the associated difficulties with deviation from a simplified notice standard.²¹⁶ *McGregor v. Industrial Excess Landfill, Inc.*,²¹⁷ appears to be the first reported decision imposing a particularity requirement as to response costs by requiring private plaintiffs to allege specific amounts of response costs.²¹⁸ The Sixth Circuit revealed its rationale: “[t]he district court was not, therefore, required to presume facts that would turn plaintiffs’ apparently frivolous claim . . . into a substantial one.”²¹⁹

Less than five months later, the Ninth Circuit tackled a similar question in *Ascon Properties, Inc. v. Mobil Oil Co.*²²⁰ Despite an allegation that the plaintiff had incurred “response costs,” the district court dismissed the complaint with prejudice finding the conclusory allegations contained insufficient facts to survive a Rule 12(b)(6) motion.²²¹ In articulating the proper pleading standard, the Ninth Circuit recounted the extensive litigation surrounding recoverable response costs—

215. *Id.*; see *B.F. Goodrich*, 99 F.3d at 514 (listing CERCLA requirements); *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1152–53 (9th Cir. 1989) (same).

216. A notice standard concerning response costs would be met by an allegation that the plaintiff “has incurred response costs.” See *New York v. Gen. Elec. Co.*, 592 F. Supp. 291, 298 (N.D.N.Y. 1984) (stating that as a pleading matter the plaintiff did not have to particularize response costs and that complaint alleging the plaintiff “has incurred and will continue to incur expenses and costs” was sufficient).

217. 856 F.2d 39 (6th Cir. 1988).

218. The private plaintiffs alleged: “The United States, the State of Ohio, and plaintiffs have incurred and will incur costs in connection with activities under CERCLA including costs of investigation, clean up, removal and remedial action at the facility. Response costs were incurred . . . in a manner consistent with the National Contingency Plan” *Id.* at 42. Nonetheless, the district court dismissed the private plaintiffs’ complaint for failure to specifically allege response costs because later in the complaint in a section labeled “Expenditures,” the only response costs alleged by plaintiffs were incurred by the State of Ohio and the United States. *Id.* In affirming the district court’s dismissal with prejudice, the Sixth Circuit found that the plaintiffs “pled with specificity” the response costs undertaken by the federal and state governments, “but failed to allege any similar factual basis for their conclusory allegation that they personally incurred response costs.” *Id.* at 43.

219. *Id.* The court’s inappropriate “peek at the merits” also colors its affirmance of dismissal with prejudice. In an ironic twist, the court found that the plaintiffs were put on notice by the motion to dismiss; therefore, the plaintiffs’ failure to try to amend their complaint justified the dismissal with prejudice. *Id.* at 44.

220. 866 F.2d 1149 (9th Cir. 1989).

221. *Id.* at 1152–53.

an essential element of a prima facie case.²²² Because it would “assist in the proper processing of these actions, . . . [i]t therefore makes sense to impose as a pleading requirement that a claimant must allege at least one type of response cost cognizable under CERCLA.”²²³ In this case, the plaintiff met this heightened standard by alleging “cleanup costs” and development of a remedial action plan—both recognized CERCLA response costs.²²⁴ The Ninth Circuit balked, however, at requiring any greater factual specificity akin to *McGregor*, finding it limited to its unique factual situation.²²⁵

Despite the difference in degree of specificity required, both the Sixth and Ninth Circuits premise their versions of heightened pleading on docket control. Both conclude that it would be more efficient for district courts to quickly dispense with meritless litigation by requiring a pleading burden on response costs that more closely aligns with the plaintiff’s burden of proof at trial.²²⁶ This is especially true given that the information required on response costs is in the plaintiff’s hands; therefore, pleading it would not be burdensome.²²⁷ While expedient, this is still a departure from notice pleading.²²⁸ The allegation that one “has incurred response costs” in the context of a CERCLA complaint puts a defendant on notice sufficient to answer. Future details as to the types of response costs or specific amounts could easily be handled through discovery.²²⁹ A plaintiff’s inability to produce some evidence post-discovery would then subject it to summary judgment.²³⁰ Nonetheless, the lure of quickly disposing of meritless cases proved too enticing for several district courts.

In the aftermath of *McGregor* and *Ascon*, a flurry of district courts seized upon the heightened response cost pleading standard. Confronted with a pleading that alleged “plaintiffs have incurred response costs,” some courts adopted an

222. *Id.* at 1154.

223. *Id.*

224. *See id.* (describing allegations of response costs).

225. *See id.* at 1156 (distinguishing *McGregor*).

226. *See id.* at 1154 (noting specificity requirement would “assist in the proper processing” of CERCLA actions); *McGregor v. Indus. Excess Landfill, Inc.*, 856 F.2d 39, 43 (6th Cir. 1988) (labeling the claim as “apparently frivolous” for failing to include facts supporting allegation of personally incurred response costs).

227. *See McGregor*, 856 F.2d at 43 (quoting *O’Brien v. DiGrazia*, 544 F.2d 543 (1st Cir. 1976), for the proposition that omitting facts that, if they existed, would dominate the case, is grounds for dismissal); *see also* *Cook v. Rockwell Int’l Corp.*, 755 F. Supp. 1468, 1475 (D. Colo. 1991) (“[I]f plaintiffs have incurred cognizable response costs, it presents no undue burden to identify them in the complaint.”).

228. *See New York v. Shore Realty Corp.*, 648 F. Supp. 255, 262 (E.D.N.Y. 1986) (noting that while the plaintiff has the burden of pleading and proving response costs consistent with the national contingency plan, specificity is not required by Rule 8 because that goes to recovery of costs, not existence of claim).

229. *See Stilloe v. Almy Bros., Inc.*, 759 F. Supp. 95, 104 (N.D.N.Y. 1991) (“The Federal Rules intend that such facts will be ascertained through discovery.”).

230. *See United States v. Azrael*, 774 F. Supp. 376, 379 (D. Md. 1991) (“The Federal Rules contemplate that such facts will be gathered through the discovery process, and if sufficient facts are not ascertained, that motions for summary judgment will be appropriate.”).

Ascon-type standard requiring a plaintiff to identify in its complaint a response cost cognizable under CERCLA.²³¹ Others courts embraced the *McGregor* standard requiring allegation of specific expenses.²³² Regardless of the standard, the rationale for adoption of heightened pleading was uniform—to quickly weed out meritless cases.²³³ This purpose was then typically buttressed by reliance on the use of heightened pleading in other substantive areas.²³⁴

The pinnacle of this approach is *Cash Energy, Inc. v. Weiner*.²³⁵ Confronted with a complaint that failed “to state or outline the facts beneath allegations”²³⁶ that the defendants participated in contamination, Judge Robert Keeton²³⁷ explored the trend toward pleading with particularity. After tracing the Rule 9(b) fraud standard and its relationship to deterring meritless strike suits, Judge Keeton surveyed the judicial extension of heightened pleading to other substantive areas such as civil rights, securities fraud, RICO, and antitrust.²³⁸ He

231. See, e.g., *Cook*, 755 F. Supp. at 1475 (holding that to withstand a Rule 12(b)(6) dismissal motion, a plaintiff must identify in their complaint a response cost cognizable under CERCLA).

232. See, e.g., *Bradley Indus. Park v. Xerox Corp.*, No. 88 Civ. 7574 (CSH), 1991 U.S. Dist. LEXIS 1492, at *18 (S.D.N.Y. Feb. 4, 1991) (holding a CERCLA plaintiff must allege that it has incurred a specific cost or expense qualifying under the statute); *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233, 1253 (M.D. Pa. 1990) (quoting *McGregor* and requiring the complaint to state costs incurred or actions taken).

233. See *Cook*, 755 F. Supp. at 1475 (“Pleadings do more than merely give notice; they also serve to identify meritless claims at an early stage in the litigation.”); *Ambrogi*, 750 F. Supp. at 1252 (“Specificity in CERCLA matters would assist in weeding out unsound claims . . .”). The *Cook* rationale is particularly troubling given its misconception of the role of modern pleading. As designed, the Federal Rules do not imbue pleadings with more than notice function. The elimination of frivolous claims is left to other procedural devices. See *supra* subpart II.A. (discussing the rubric of the Federal Rules).

234. See *Cook*, 755 F. Supp. at 1475 (noting greater specificity is warranted and relying on the Supreme Court’s antitrust opinion in *Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983)); *Ambrogi*, 750 F. Supp. at 1251–52 (drawing an analogy between the need for heightened pleading in civil cases and CERCLA actions).

235. 768 F. Supp. 892 (D. Mass. 1991).

236. *Id.* at 896–97.

237. The significance of Judge Keeton’s analysis was magnified by his role as chair of the Committee on Rules of Practice and Procedure (Standing Committee) of the Judicial Conference at the time of the opinion. See Carl W. Tobias, *Elevated Pleading in Environmental Litigation*, 27 U.C. DAVIS L. REV. 358, 361–64 (1994) (discussing Judge Keeton’s position).

238. See *Cash*, 768 F. Supp. at 897–99 (describing use of heightened pleading in these areas). To be sure, each of these areas is fruitful in understanding the compulsion toward heightened pleading. Some are more fully examined in this Article. See *supra* notes 120–23 and accompanying text (discussing Rule 9(b)); subpart IV.A (antitrust); subpart IV.C (civil rights); subpart IV.G (RICO). Judicial use of heightened pleading in securities fraud has been replaced by the statutory heightened pleading under the PSLRA. Legislative use of heightened pleading is outside the scope of this Article. For complete treatment of the use and misuse of heightened pleading and securities fraud, see Fairman, *supra* note 6, at 596–612.

found a similarity in CERCLA claims and these other areas due to the potential for severe individual liability and expense of litigating patently nonmeritorious claims.²³⁹ Judge Keeton concluded that “it is a reasonable prediction that higher courts . . . will extend specificity to CERCLA cases” and “until guidance to the contrary appears in legislation or precedent, I will so rule.”²⁴⁰ Interestingly, in extending heightened pleading to CERCLA, Keeton did not rely on *Ascon*, *McGregor*, or any of the previous CERCLA pleading cases. Consequently, the precise contour of his vision of heightened pleading is unknown. However, his approach seems to require broad factual particularization as to the CERCLA allegations, as opposed to a more targeted approach.²⁴¹

This rush toward heightened pleading alarmed commentators.²⁴² However, many federal district courts routinely rejected *Cash* and its broad heightened pleading requirement.²⁴³ Other courts rejected the need for particularization of response costs in pleadings.²⁴⁴ Thus, prior to *Leatherman*, four distinct pleading standards emerge: (1) a simplified notice pleading standard where the allegation that “plaintiff incurred response costs” suffices; (2) a slightly heightened *Ascon*-standard requiring the plaintiff to plead a cognizable response cost; (3) a heightened *McGregor*-standard requiring specific response cost expenses; and (4) a broader heightened pleading not limited to the response cost element. This pre-*Leatherman* CERCLA experience nicely illustrates the many stages of the pleading circle.

Post-*Leatherman*, the most aggressive variations of heightened pleading have been judicially denounced. Courts now routinely state that CERCLA complaints must be measured against Rule 8(a) and the “very low threshold of

239. See *Cash*, 768 F. Supp. at 900 (“CERCLA involves many of the circumstances that have led courts to invoke higher standards of specificity in other contexts.”).

240. *Id.*

241. The difficulty in understanding what level of particularity is required stems from the variants of specificity required in other areas. Thus, the macro-pleading model illustrates a wide tolerance in different levels of specificity required in different substantive areas. See *supra* subpart IV.A. (describing macro-model). Because Judge Keeton appears to advocate a broader particularization requirement, the Author disagrees with Professor Tobias’s characterization of *Cash* as “representative.” Tobias, *supra* note 237, at 367. Rather, *Cash* illustrates a high water mark for CERCLA pleading.

242. See, e.g., Carl Tobias, *Letter to Editor*, 22 ENVTL. L. 412, 412–15 (1992) (discussing *Cash* and heightened pleading and noting risks to litigants).

243. See *United States v. Azrael*, 774 F. Supp. 376, 379 (D. Md. 1991) (rejecting heightened pleading and declining to follow *Cash*); *Stiloe v. Almy Bros., Inc.*, 759 F. Supp. 95, 104 (N.D.N.Y. 1991) (rejecting proposition that CERCLA claim must be pled with specificity greater than Rule 8); see also *Quadion Corp. v. Mache*, 738 F. Supp. 270, 275 (N.D. Ill. 1990) (stating federal pleading does not require factual specification); cf. *CBS, Inc. v. Henkin*, 803 F. Supp. 1426, 1432 (N.D. Ind. 1992) (stating Rule 8 applies to CERCLA pleading, distinguishing *Cash*, yet finding plaintiff met both standards).

244. See *Alloy Briquetting Corp. v. Niagara Vest, Inc.*, 756 F. Supp. 713, 717 (W.D.N.Y. 1991) (noting that CERCLA complaint must allege response costs but need not particularize them); *Mesiti v. Microdot, Inc.*, 739 F. Supp. 57, 62 (D.N.H. 1990) (stating that under Rule 8 response costs need not be pleaded with specificity).

sufficiency prescribed by the Federal Rules of Civil Procedure as interpreted by the Supreme Court.”²⁴⁵ In particular, *Cash* is now disregarded because *Leatherman* is exactly the type of “guidance to the contrary” Judge Keeton foreshadowed.²⁴⁶ In general, heightened pleading applied to response costs is now also rejected.²⁴⁷ *McGregor*-style heightened pleading on response costs has been repudiated.²⁴⁸ Even the *Ascon* approach to heightened response cost pleading has been criticized.²⁴⁹ In sum, *Leatherman* has clearly affected pleading standards in CERCLA cases, returning the norm to a notice pleading standard.

While the current rhetoric in CERCLA cases is notice pleading, pre-*Leatherman* heightened pleading has certainly left an indelible mark.²⁵⁰ The

245. *Canadyne-Georgia Corp. v. NationsBank*, 183 F.3d 1269, 1276 (11th Cir. 1999); *see* *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 521 (2d Cir. 1996) (“[T]here is no heightened pleading standard in CERCLA cases”); *EnergyNorth Natural Gas, Inc. v. UGI Utils., Inc.*, Civ. No. 00-500-B, 2001 U.S. Dist. LEXIS 4686, at *2 (D.N.H. Mar. 26, 2001) (stating notice pleading applies in CERCLA cases post-*Leatherman*); *Hillsborough County v. A & E Road Oiling Serv.*, 853 F. Supp. 1402, 1411 (M.D. Fla. 1994) (adopting *Leatherman* analysis and holding “CERCLA litigation does not require a higher level of specificity in pleadings”); *see also* Carl Tobias, *Clear the Air: A Millennial Update on Procedural Issues in Environmental Litigation*, 30 ENVTL. L. 227, 229 (2000) (noting both the declining number of requests for dismissals based on heightened pleading and the increasing rejection of such requests post-*Leatherman*); Robin Kundis Craig, *Notice Letters and Notice Pleading: The Federal Rules of Civil Procedure and the Sufficiency of Environmental Citizen Suit Notice*, 78 OR. L. REV. 105, 168 (1999) (“As such, the *Leatherman* decision should mean that the notice pleading standard governs complaints in environmental suits.”); Tobias, *supra* note 237, at 372 (“Federal judges should apply the holding and underlying rationales in *Leatherman* to environmental litigation.”).

246. *See* *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 421 n.7 (7th Cir. 1994) (rejecting the approach taken in *Cash* due to *Leatherman*); *Barnet Aluminum Corp. v. Brantley & Son, Inc.*, 914 F. Supp. 159, 165 (W.D. Ky. 1995) (rejecting the specificity in pleadings required by *Cash* on the strength of *Leatherman*); *Warwick Admin. Group v. Avon Prods., Inc.*, 820 F. Supp. 116, 120 (S.D.N.Y. 1993) (finding *Leatherman* precludes *Cash* approach).

247. *See* *GNB Battery Techs., Inc. v. Gould, Inc.*, 65 F.3d 615, 620–21 (7th Cir. 1995) (stating there are no special pleading requirements for environmental litigation in the context of a response cost challenge); *Murray v. Bath Iron Works Corp.*, 867 F. Supp. 33, 46 (D. Me. 1994) (“While the plaintiffs must allege that they have personally incurred response costs, as they have done, they need not particularize those costs.”); *Pape v. Great Lakes Chem. Co.*, 93 C 1585, 1993 U.S. Dist. LEXIS 14674, at *19 & n.2 (N.D. Ill. Oct. 19, 1993) (finding complaint alleging that plaintiffs “have incurred response costs” sufficient post-*Leatherman*).

248. *See* *Warwick*, 820 F. Supp. at 120 (finding *McGregor* precluded by *Leatherman*).

249. *See id.* at 120–21 (noting the thorny problem of response costs and implying *Ascon* standard does not comport with *Leatherman*).

250. For example, Judge Keeton seems resistant to abandoning particularity post-*Leatherman*. *See* *Feliciano v. DuBois*, 846 F. Supp. 1033, 1047 (D. Mass. 1994) (using case statements in prisoner litigation); Marcus, *Puzzling*, *supra* note 5, at 1776 (discussing use of case statements as an alternative to achieve specificity).

Ascon-standard requiring the pleading of a cognizable response cost survives.²⁵¹ It has even been justified as an extension of notice pleading.²⁵² Nonetheless, this enhanced pleading burden, however slight, is a deviation from notice pleading as both courts and commentators note.²⁵³ *McGregor* even appears to have some vitality and has not been revisited by the Sixth Circuit post-*Leatherman*.²⁵⁴ However, one of the more troubling legacies of heightened pleading is the rhetoric district courts use in applying pleading standards. For example, some courts require a “showing of concrete facts” while justifying the requirement under Rule 8.²⁵⁵ If a court truly equates the two, then it is merely imposing a heightened standard under the guise of notice pleading. This type of rhetoric, forged pre-*Leatherman*, is an unfortunate legacy for future CERCLA claims.

C. Civil Rights

The history of heightened pleading in the civil rights context is already well-documented.²⁵⁶ From an acorn of a district court case,²⁵⁷ sprang the oak of

251. See *Soo Line R.R. Co. v. Tang Indus., Inc.*, 998 F. Supp. 889, 895 (N.D. Ill. 1998) (citing *Ascon* and stating that “to make out a prima facie case, plaintiff must only allege one type of cognizable response costs under CERCLA”); *Romeo v. Gen. Chem. Corp.*, 922 F. Supp. 287, 289 (N.D. Cal. 1994) (citing both *Ascon* and *McGregor* for the proposition that a cognizable response cost must be pled and silent as to *Leatherman*).

252. See *Soo Line*, 998 F. Supp. at 895 (reciting *Ascon* standard in the context of “liberal notice pleading” and Rule 8).

253. See *Warwick*, 820 F. Supp. at 120 & n.1 (describing and rejecting *Ascon*-type heightened pleading); Tobias, *supra* note 237, at 365 (describing *Ascon* as a form of “elevated pleading”).

254. See *Romeo*, 922 F. Supp. at 289 (citing *McGregor* favorably in dismissal for failure to plead response costs).

255. Consider *Barnes Landfill, Inc. v. Town of Highland*, 802 F. Supp. 1087 (S.D.N.Y. 1992). In 1992, the district granted a motion to dismiss challenging the sufficiency of the complaint. The court found that “plaintiff’s allegation that it has spent approximately \$2 million on ‘closure costs to abate the alleged release of hazardous substances’ without further detail is conclusory.” *Id.* at 1088. The court further opined that because of the complexity of the litigation, “more of a showing of concrete facts supporting the CERCLA claims should be required before allowing this case to go forward, in order to assure there is some factual basis for having initiated the litigation.” *Id.* It is hard to describe the court’s approach as anything other than response cost heightened pleading motivated by concern for quick disposition of meritless claims. Nonetheless, the district court itself disagreed. After granting the plaintiff an opportunity to replead, the amended complaint was once again before the court on a motion to dismiss. See *Barnes Landfill, Inc. v. Town of Highland*, 91 Civ. 5410 (VLB), 1993 U.S. Dist LEXIS 17739 (S.D.N.Y. Dec. 13, 1993). Amazingly, the court characterized its earlier decision as “based on uniform pleading requirements under Fed. R. Civ. P. 7 and 8” and cited *Leatherman* for the proposition that no separate standards of pleading exist for particular claims. *Id.* at *8. Despite the absence of a breakdown of the costs incurred, the court denied the motion to dismiss where the amended complaint now alleged recovery of past and present response costs amounting to approximately \$3 million. *Id.* This judicial about-face is appropriate.

256. See *supra* note 6 (listing authorities examining civil rights). Because the dialogue concerning pre-*Leatherman* heightened pleading practice is so well developed, this section addresses chiefly post-*Leatherman* developments.

judicially-imposed heightened pleading to thwart would-be fears of meritless claims and harassed defendants.²⁵⁸ Indeed, the improper use of heightened pleading in civil rights cases spawned both *Leatherman* and *Swierkiewicz*.²⁵⁹ It is therefore amazing that heightened pleading survives in this area, much less flourishes. Its resilience, however, perfectly supports the pleading circle model.

Leatherman bans heightened pleading in § 1983 cases against municipalities.²⁶⁰ The circuits, however, fracture on the extent to which *Leatherman* controls outside of that context.²⁶¹ There are circuits that now unequivocally embrace a simplified notice standard in all civil rights cases.²⁶² Under Rule 8, all a complaint must state is “I was turned down for a job because of my race.”²⁶³ However, this standard is far from universal.

Other circuits use targeted heightened pleading. The most common use targets civil rights cases where subjective intent is an element of the claim and qualified immunity is at issue.²⁶⁴ For example, a claim of illegal search based upon

257. See *Valley v. Maule*, 297 F. Supp. 958 (D. Conn. 1968). *Valley* is recognized as the first civil rights case to impose heightened pleading. Blaze, *supra* note 7, at 948. For a discussion and criticism of *Valley*, see Fairman, *supra* note 6, at 575–76.

258. See Fairman, *supra* note 6, at 577–82 (explaining the spread of heightened pleading in civil rights cases).

259. See *supra* subpart II.B (discussing Supreme Court authority).

260. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

261. Although categorizing is not always easy, a three-way circuit split exists on application of *Leatherman* to non-*Monell* actions. Some read *Leatherman* broadly and apply it to all civil rights cases. Others take the opposite approach and restrict its holding solely to *Monell* cases. A third interpretation permits heightened pleading, but only in cases involving subjective intent. See Fairman, *supra* note 6, at 583–90 (detailing post-*Leatherman* circuit split).

262. See *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 734 (7th Cir. 1994) (“[T]here is no heightened pleading requirement for civil rights actions.”); see also *Currier v. Doran*, 242 F.3d 905, 916 (10th Cir. 2001) (abandoning the circuit’s previous post-*Leatherman* heightened pleading standard).

263. *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998). This is not an isolated example. A complaint alleging “Defendant engaged in discriminatory practices against Plaintiff regarding the terms and conditions of [his] employment on the basis of race, including but not limited to, engaging in a pattern and practice of humiliation and harassment of Plaintiff” satisfies simplified notice pleading. *Onuoha v. Grafton Sch., Inc.*, 182 F. Supp. 2d 473, 481 (D. Md. 2002); see *Oladokun v. Grafton Sch., Inc.*, 182 F. Supp. 2d 483, 491 (D. Md. 2002) (accord).

264. This form of targeted heightened pleading existed before *Leatherman* in the Ninth Circuit. See *Branch v. Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991) (requiring heightened pleading when subjective intent is an element of a constitutional tort). The Ninth Circuit continued to use its subjective intent targeted heightened pleading after *Leatherman*. See *Housley v. United States*, 35 F.3d 400, 401 (9th Cir. 1994) (maintaining heightened pleading requirement in subjective intent cases post-*Leatherman*); *Mendocino Envtl. Ctr. v. Mendocino County*, 14 F.3d 457, 461 (9th Cir. 1994) (adhering to *Branch* after *Leatherman*). After *Swierkiewicz*, at least one district court in the Ninth Circuit rejected the heightened standard finding *Swierkiewicz* as intervening Supreme Court authority. See *Gallardo v. DiCarlo*, 203 F. Supp. 2d 1160, 1162–64 (C.D. Cal. 2002). Most recently, the

judicial deception has subjective intent as an element of the claim.²⁶⁵ To protect the official's right to be free from harassing discovery, some jurisdictions apply heightened pleading.²⁶⁶ The standard could be met by nonconclusory allegations setting forth specific evidence of unlawful intent.²⁶⁷ Failure to meet the standard leads to dismissal without discovery. This type of targeted heightened pleading imposes an extremely heavy burden on plaintiffs by requiring the pleading of information on state of mind that would normally be in the defendant's possession.²⁶⁸ Other forms of targeted heightened pleading also survive.²⁶⁹

Other courts use more broad-based heightened pleading in non-*Monell* civil rights cases. Sometimes heightened pleading is triggered by § 1983 cases

Ninth Circuit completely abandoned its former targeted heightened pleading as inconsistent with *Crawford-El* and *Swierkiewicz*. See *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1121 (9th Cir. 2002); see also *Porter v. Jones*, No. 01-55585, 2003 WL 253236, at *8 (9th Cir. Feb. 6, 2003) (accord).

The First Circuit—although under fire from sister courts—firmly retains this type of targeted heightened pleading. See *Judge v. City of Lowell*, 160 F.3d 67, 72–73 (1st Cir. 1998) (stating that illegal motive must be pleaded with specific, nonconclusory facts after *Leatherman*). *Judge* is criticized for misreading the Supreme Court's dicta in *Crawford-El*. See *supra* note 67 (discussing *Crawford-El*). By ignoring a “thus,” the First Circuit allegedly based its heightened pleading on express language allowing specific nonconclusory facts to be raised only in a Rule 7(a) reply or Rule 12(e) motion for a more definite statement. See *Gallardo*, 203 F. Supp. 2d at 1164.

The Second Circuit continued to use targeted heightened pleading in subjective intent cases post-*Leatherman*. See *Blue v. Koren*, 72 F.3d 1075, 1082 (2d Cir. 1995) (using a heightened standard for subjective intent post-*Leatherman*). The D.C. Circuit may be retreating from its post-*Leatherman* use in subjective intent cases. See *Harbury v. Deutch*, 233 F.3d 596, 611 (D.C. Cir. 2000) (stating in dicta that constitutional claims based on improper motive need not meet any special pleading standard), *rev'd on other grounds sub nom.*, *Christopher v. Harbury*, 536 U.S. 403 (2002); see also *Galbraith*, 307 F.3d at 1125 (“The D.C. Circuit . . . has disavowed its heightened standard.”).

265. *Mendocino*, 14 F.3d at 462. This is distinguished from intent as part of a qualified immunity. Of course, there is no subjective intent in immunity analysis. See *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (reformulating qualified immunity analysis into objective standards).

266. *Judge*, 160 F.3d at 72 n.3.

267. See *id.* at 72–73 (articulating standard).

268. This type of standard is also directly contrary to Rule 9(b) allowing state of mind to be averred generally. See FED. R. CIV. P. 9(b).

269. Targeted heightened pleading directed at conspiracy to violate civil rights is common. See, e.g., *Scott v. Hern*, 216 F.3d 897, 907 (10th Cir. 2000) (holding § 1983 conspiracy claim alleging conspiracy between private actors and government officials must specifically present facts tending to show agreement and concerted action and explicitly noting this rule survives *Leatherman*); *Malloy v. Coleman*, 961 F. Supp. 1568, 1571 (M.D. Fla. 1997) (stating that general and conclusory claims of conspiracy in a § 1983 action will be dismissed as insufficient); *Meyer v. Reno*, 911 F. Supp. 11, 15 (D.D.C. 1996) (requiring factual basis to support conclusion of governmental conspiracy in § 1983 case); *Bieros v. Nicola*, 860 F. Supp. 223, 225 (E.D. Pa. 1994) (holding plaintiffs must allege conspiracy with particularity even though *Leatherman* bans it in civil rights cases against individuals); *Loftus v. Southeastern Pa. Transp. Auth.*, 843 F. Supp. 981, 986–87 (E.D. Pa. 1994) (same).

where qualified immunity of the defendant is at issue.²⁷⁰ Other courts appear to retain heightened pleading standards that seem to parallel the Second Circuit's former hyperpleading practice in employment discrimination cases that spawned *Swierkiewicz*.²⁷¹

Civil rights pleading practice—already confusing post-*Leatherman*—is just as exciting post-*Swierkiewicz*. Unquestionably, a simplified notice standard applies in employment discrimination cases.²⁷² While it is still early, *Swierkiewicz* appears to impact civil rights cases outside of job discrimination as well. For those courts already using notice pleading, *Swierkiewicz* adds reinforcement.²⁷³ Others seem confused.²⁷⁴ Some courts, however, show change.²⁷⁵ Still others are firmly entrenched in their use of fact-based pleading variants.²⁷⁶

270. See *GJR Invs., Inc. v. County of Escambia*, 132 F.3d 1359, 1367 (11th Cir. 1998) (continuing use of circuit's tightened pleading requirement in qualified immunity cases); *Schultea v. Wood*, 47 F.3d 1427, 1432-34 (5th Cir. 1995) (en banc) (requiring heightened pleading in a Rule 7 reply brief in qualified immunity cases); *White v. Downs*, No. 95-2177, 1997 WL 210858, at *3 (4th Cir. Apr. 30, 1997) (applying heightened pleading); *Hinds v. Slagel*, No. 3:00-CV-2372-D, 2001 WL 1543844, at *3-6 (N.D. Tex. Nov. 29, 2001) (dismissing complaint for failure to meet *Schultea* heightened pleading standard in a Rule 7 reply); *Henrise v. Horvath*, 94 F. Supp. 2d 765, 766-67 (N.D. Tex. 2000) (ordering a Rule 7 reply brief to meet circuit's heightened pleading requirement).

271. See *supra* notes 140-41 and accompanying text (discussing hyperpleading in civil rights cases); *Keene v. Thompson*, 232 F. Supp. 2d 574, 579 (M.D.N.C. 2002) (requiring facts to support each element of discrimination claim); *Barbier v. The Durham County Bd. of Educ.*, 225 F. Supp. 2d 617, 624 (M.D.N.C. 2002) ("Nevertheless, if a complaint fails to sufficiently state facts to support each element of the claims asserted therein, dismissal for failure to state a claim is proper."); *Cruz-Baez v. Negron-Irizarry*, 220 F. Supp. 2d 77, 80 (D.P.R. 2002) ("In order to survive a motion to dismiss, plaintiff must set forth 'factual allegations, either direct or inferential, regarding each element necessary to sustain recovery.'"); *Eaton v. Meneley*, 180 F. Supp. 2d 1247, 1249 (D. Kan. 2002) ("Although plaintiffs need not precisely state each element of their claims, they must plead minimal factual allegations on those material elements that must be proved.").

272. See, e.g., *Burch v. Beth Israel Med. Ctr.*, No. 02 Civ. 3798 (JSR) (GWG), 2003 WL 253177, at *5 (S.D.N.Y. Feb. 5, 2003) (applying *Swierkiewicz* in an ADA complaint and finding "I was not accommodated for this position" sufficient allegation). However, the United States District Court for the Southern District of New York is not always so liberal in its application. For example, the court found a reverse discrimination complaint "which set forth dates and events relevant to her claims" and alleges racially-motivated termination meets *Swierkiewicz*. *Jowers v. DME Interactive Holdings, Inc.*, No. 00Civ.4735(LTS)(KNF), 2003 WL 230739, at *4 (S.D.N.Y. Feb. 3, 2003); see *Madera v. Metropolitan Life Ins. Co.*, No. 99 Civ. 4005(MBM), 2002 WL 1453827, at *7 (S.D.N.Y. July 3, 2002) (stating that under *Swierkiewicz* a discrimination complaint must "detail the events alleged to be adverse"). Of course, the rigors with which a court demands "dates and events" could exceed a notice standard. Some complaints do not survive for other reasons. See *Marshall v. Nat'l Ass'n of Letter Carriers Branch 36*, No. 00 Civ. 3167(LTS), 2003 WL 223563, at *8 (S.D.N.Y. Feb. 3, 2003) (dismissing racial discrimination claim where plaintiff alleged he was black, harassed and disciplined, but failed to allege that "this discipline was a result of discrimination against him on the basis of race"). In another Title VII action, the magistrate judge issued his report dismissing a retaliation claim because the plaintiff "has not stated a prima facie case of retaliation." *Pearson-Fraser v. Bell Atl.*, No.

01 Civ. 2343(WK), 2003 WL 43367, at *3 (S.D.N.Y. Jan. 6, 2003). Despite clearly violating a *Swierkiewicz* standard, the district court found that “[t]he Report might also be read more generally to suggest that the Plaintiff’s retaliation claim should be dismissed because she arguably failed to comply with the ordinary rules of notice pleading” and remanded the case back to the magistrate judge for “clarification” on whether the “retaliation claim should be dismissed in light of the ordinary rules of notice pleading.” This second bite at the dismissal apple also seems inconsistent with *Swierkiewicz*. *Id.* at *4.

273. *Swierkiewicz* reinforces the Seventh Circuit’s notice pleading position. See *Walker v. Thompson*, 288 F.3d 1005, 1007 (7th Cir. 2002) (“[T]here is no requirement in federal suits of pleading the facts or the elements of a claim”); *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002) (“[A]s the Supreme Court and this court have emphasized, there are no special pleading rules for prisoner civil rights cases.”); *Smith v. Chicago Archdiocese*, No. 02 C 2261, 2003 WL 174199, at *3–4 (N.D. Ill. Jan. 27, 2003) (denying motion to dismiss and motion for more definite statement in a § 1981 complaint that put defendants on notice); *Paxson v. County of Cook*, No. 02 C 2028, 2002 WL 1968561, at *1 (N.D. Ill. Aug. 23, 2002) (“[A] plaintiff need only plead the bare minimum facts necessary to put a defendant on notice of the claim so that the defendant can file an answer.”).

274. The First Circuit has now twice dodged the issue post-*Swierkiewicz*. See *Calderon-Ortiz v. Laboy-Alvarado*, 300 F.3d 60, 63 (1st Cir. 2002) (declining to decide whether the heightened standard applies because the complaint survived either standard); *Gorski v. New Hampshire Dep’t of Corr.*, 290 F.3d 466, 473 (1st Cir. 2002) (stating that while its cases suggested heightened pleading in certain civil rights cases, no heightened pleading applies in employment discrimination cases post-*Swierkiewicz*).

The Sixth Circuit clearly wants targeted heightened pleading; it just cannot decide who gets to create the rule. In between *Leatherman* and *Swierkiewicz*, the circuit continued to use heightened pleading requiring specific, nonconclusory factual allegations in the complaint when qualified immunity was at issue. See *Rippy v. Hattaway*, 270 F.3d 416, 424–25 n.3 (6th Cir. 2001); *Veney v. Hogan*, 70 F.3d 917, 922 (6th Cir. 1995). Even though *Rippy* had just reaffirmed heightened pleading, a recent panel overturned the circuit’s heightened pleading rule by relying not on *Swierkiewicz*, but on *Crawford-El*. See *Goad v. Mitchell*, 297 F.3d 497, 503 (6th Cir. 2002) (“We conclude that the Supreme Court’s decision in *Crawford-El* invalidates the heightened pleading requirement that we enunciated in *Veney*.”). What the court took away with one hand it gave back with the other: “[A]lthough *Crawford-El* invalidates *Veney*’s circuit-created heightened pleading requirement, *Crawford-El* permits *district courts* to require plaintiffs to produce specific, nonconclusory factual allegations of improper motive before discovery in cases in which the plaintiff must prove wrongful motive and in which the defendant raises the affirmative defense of qualified immunity.” *Id.* at 504–05. Therefore, it appears that in the Sixth Circuit, the district courts can impose the same targeted heightened pleading requirement previously required by the circuit.

275. See *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1121 (9th Cir. 2002) (“In light of intervening Supreme Court cases, we hold that the *Branch* heightened pleading standard no longer applies.”); *Pryor v. Nat’l Collegiate Athletic Ass’n*, 288 F.3d 548, 564 (3d Cir. 2002) (noting that discrimination claims only require a short and plain statement post-*Swierkiewicz*); *Keil v. Coronado*, 52 Fed. Appx. 995, 2002 WL 31855695, at *1 (9th Cir. Dec. 18, 2002) (applying *Swierkiewicz* and Rule 8 to a hostile work environment case brought under § 1981); *Greenier v. Pace*, Local No. 1188, 201 F. Supp. 2d 172, 176–77 (D. Me. 2002) (declining to follow the circuit’s rule finding *Swierkiewicz* as intervening Supreme Court authority); *In re Bayside Prison Litig.*, 190 F. Supp. 2d 755, 762–65 (D.N.J. 2002) (abandoning heightened pleading in a § 1983 prison litigation case).

While pleading practice in this substantive area is in the greatest state of flux, the macro-model still surfaces. The circuits uniformly reject broad, conclusory allegations as inappropriate pleading.²⁷⁷ Simplified notice pleading is evident; the Seventh Circuit is the epitome. Other jurisdictions choose targeted heightened pleading such as requiring it only as to subjective intent in a subset of claims. Broader Rule 9(b)-type heightened pleading is used by courts in § 1983 cases implicating qualified immunity. Even hyperpleading seems to survive.

D. Conspiracy

Civil conspiracy is a well-established common law “mechanism for subjecting co-conspirators to liability when one of their member committed a tortious act.”²⁷⁸ A conspiracy claim is not by itself an independent action.²⁷⁹ Rather, some wrongful act to the plaintiff’s damage must have been done by one

276. The resistance to notice pleading by some circuits—even in the face of Supreme Court authority—is amazing. In *O’Connor v. Northshore International Insurance Services*, 536 U.S. 919 (2002), the Supreme Court granted certiorari, vacated the judgment, and summarily remanded for reconsideration in light of its holding in *Swierkiewicz*. On remand, the First Circuit reaffirmed its dismissal contending it did not hold the complaint to a heightened pleading standard in the first place; the complaint failed to satisfy the notice requirements of Rule 8. See *O’Connor v. Northshore Int’l Ins. Servs.*, 61 Fed. Appx. 722, 723–24 (1st Cir. Apr. 11, 2003). Not surprisingly, district courts in the circuit continue to use targeted heightened pleading in subjective intent cases. See, e.g., *Lorenzo v. Gallant*, No. Civ. A. 01-30210-MAP, 2002 WL 31833751, at *8–9 (D. Mass. Dec. 16, 2002) (requiring specific, nonconclusory factual allegations to establish improper motive based on *Judge and Crawford-El*); *Cruz-Baez v. Negron-Irizarry*, 220 F. Supp. 2d 77, 80–81 (D.P.R. 2002) (explaining *Judge* standard); *Smith v. Maine Sch. Admin. Dist. No. 5*, No. 00-284-P-C, 2001 WL 68305, at *6 (D. Me. Jan. 29, 2001) (requiring nonconclusory factual allegations but finding complaint complied in part). The Sixth Circuit maintains that its targeted heightened pleading in § 1983 prisoner litigation requiring the complaint to specifically allege exhaustion of administrative remedies is not affected by *Swierkiewicz* because the standard derives from the Prison Litigation Reform Act, not the Federal Rules. See *Baxter v. Rose*, 305 F.3d 486, 489–90 (6th Cir. 2002). The Eleventh Circuit’s commitment to heightened pleading remains. In a recent panel decision by the Eleventh Circuit, Chief Judge Tjoflat boldly proclaimed: “In examining the factual allegations in the complaint, we must keep in mind the heightened pleading requirements for civil rights cases, especially those involving the defense of qualified immunity.” *Gonzalez v. Reno*, 325 F.3d 1228, 1235 (11th Cir. 2003). Chief Judge Tjoflat does not even mention *Swierkiewicz* or *Leatherman*.

277. See, e.g., *Fernandez-Montes v. Allied Pilots Ass’n*, 987 F.2d 278, 284 (5th Cir. 1993) (stating legal conclusions will not prevent a motion to dismiss); *David v. Assumption Parish Police Jury*, No. Civ. A. 02-765, 2003 WL 57039, at *2 (E.D. La. Jan. 6, 2003) (“However, ‘conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.’”); *Kozel v. City of Chicago*, No. 02 C 4300, 2003 WL 145422, at *1 (N.D. Ill. Jan. 21, 2003) (“A complaint will not avoid dismissal if it contains ‘bare legal conclusions’ absent facts outlining the basis of the claims.”).

278. *Beck v. Prupis*, 529 U.S. 494, 503 (2000).

279. *Id.*

or more of the defendants.²⁸⁰ Pleading practice in civil conspiracy illustrates an interesting range of factual specificity requirements.

Prior to *Leatherman*, every circuit applied some form of heightened pleading to conspiracy claims.²⁸¹ There were, however, significant differences in how the circuits applied it. Some invoked Rule 8, but stated that the rule should be applied more rigidly to allegations of conspiracy.²⁸² Without a statement of facts, the conspiracy claim was merely a conclusory allegation subject to dismissal.²⁸³

Other courts articulate a standard similar to Rule 9(b). A frequent expression is requiring the time, place, persons involved, harmful acts and alleged effects to be pleaded.²⁸⁴ This mirrors the traditional Rule 9(b) newspaper questions.²⁸⁵

Because a conspiracy claim requires an underlying tort to be viable, heightened pleading has also been applied when that underlying tort invoked the

280. *Id.*

281. *See, e.g.,* *Sparkman v. McFarlin*, 601 F.2d 261, 274–75 (7th Cir. 1979) (en banc) (Swygert, J., dissenting) (noting that five of eight judges in the circuit hold that plaintiffs failed to state their conspiracy complaint with sufficient factual detail); *Powell v. Workmen's Comp. Bd.*, 327 F.2d 131, 137 (2d Cir. 1964) (complaints based on conspiracies must “allege with at least some degree of particularity overt acts which defendant engaged in which were reasonably related to the promotion of the alleged conspiracy”); *Gross v. Bohn*, 782 F. Supp. 173, 181 (D. Mass. 1991) (“Moreover, the complaint must state with specificity the facts demonstrating the existence and scope of the alleged conspiracy.”).

282. *See Picking v. State Fin. Corp.*, 332 F. Supp. 1399, 1403 (D. Md. 1971) (“However, while Rule 8 demands only a ‘short and plain statement of the claim showing that the pleader is entitled to relief,’ in a pleading of conspiracy it is important that within the pleader’s ability to do so, and without going into unnecessary detail, the opposing party be informed of the nature of the conspiracy charged . . .”).

283. *See Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 913–14 (5th Cir. 1953) (“It is the well recognized rule that in pleading a conspiracy in an action such as this, a general allegation of conspiracy, without a statement of the facts constituting the conspiracy to restrain trade, its object and accomplishment, is but an allegation of a legal conclusion, which is insufficient to constitute a cause of action.”).

284. *See Dwares v. City of New York*, 985 F.2d 94, 100 (2d Cir. 1993) (stating that plaintiff should make an effort to plead details of time and place and the alleged effect of the conspiracy); *Hall v. Pa. State Police*, 570 F.2d 86, 89 (3d Cir. 1978) (finding plaintiff alleged conduct, time, place, and those responsible); *Black & Yates, Inc. v. Mahogany Ass’n, Inc.*, 129 F.2d 227, 231–32 (3d Cir. 1941) (stating plaintiff must “plead the facts constituting the conspiracy, its object and accomplishment” and listing the newspaper questions); *Kalmanovitz v. G. Heileman Brewing Co.*, 595 F. Supp. 1385, 1401 (D. Del. 1984) (“Only allegations of conspiracy which are particularized, such as those addressing the period of the conspiracy, the object of the conspiracy, and certain actions of the alleged conspirators taken to achieve that purpose, will be deemed sufficient.”).

285. *Compare Black & Yates*, 129 F.2d at 231–32 (listing newspaper questions for conspiracy pleading), *with DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990) (listing newspaper questions for fraud pleading under Rule 9(b)).

device. The best example is a conspiracy to defraud. With fraud as the anchoring tort of the conspiracy, the fraud element must be pleaded with particularity.²⁸⁶

Courts offer multiple justifications for these higher pleading burdens. There is concern for quickly exposing meritless or sham claims.²⁸⁷ Protection of public officials who are often the targets of conspiracy claims is another reason.²⁸⁸ Conservation of judicial time and expense is also asserted.²⁸⁹ Some courts even apply state law heightened pleading requirements.²⁹⁰ Irrespective of the rationale, conspiracy was consistently required to be pleaded at a level higher than Rule 8 throughout the federal courts pre-*Leatherman*.

Pleading standards for civil conspiracy are no less varied post-*Leatherman*. There are, however, courts that clearly state that Rule 8 and notice pleading apply to conspiracy claims.²⁹¹ For example, the Seventh Circuit rejects the need to plead facts or elements of a conspiracy claim after *Leatherman* and *Swierkiewicz*.²⁹² To meet the notice standard, Judge Posner explains: "Hence it is enough in pleading conspiracy merely to indicate the parties, general purpose, and

286. See, e.g., *Greene v. Brown & Williamson Tobacco Corp.*, 72 F. Supp. 2d 882, 893 (W.D. Tenn. 1999) (requiring fraud element of conspiracy to defraud claim be detailed with specific acts under Rule 9(b)).

287. See *Sparkman v. McFarlin*, 601 F.2d 261, 267 (7th Cir. 1979) (en banc) (Sprecher, J., concurring) (discouraging frivolous actions is a goal of heightened pleading); *Defina v. Latimer*, 79 F.R.D. 5, 6 (E.D.N.Y. 1977) (stating the rule is designed to reveal sham claims and defenses).

288. See *Sparkman*, 601 F.2d at 267.

289. See *id.* (adhering to strict standard of pleading prevents chilling of judicial time and expense).

290. See *Tracida Corp. v. DaimlerChrysler AG*, 197 F. Supp. 2d 42, 74 (D. Del. 2002) ("Further, both California and Delaware apply a heightened pleading standard to claims of civil conspiracy."). Application of state law pleading requirements would appear to be improper under well-established *Erie*-doctrine. This is similar to the pre-*Hanna* application of heightened pleading in the defamation context. See *infra* notes 345-49 and accompanying text.

291. See *Walker v. Thompson*, 288 F.3d 1005, 1007 (7th Cir. 2002) (holding no requirement to plead facts or elements of a conspiracy claim post-*Swierkiewicz*); *Abbott v. Latshaw*, 164 F.3d 141, 148 (3d Cir. 1998) (reversing dismissal of complaint in conspiracy case that "easily satisfied the standards of notice pleading"); *Gale v. Perovic*, 124 F.3d 203, 203 (7th Cir. 1997) (unpublished) (applying Rule 8 to conspiracy claim); *Pratt v. Capozzo*, 107 F.3d 873, 873 (7th Cir. 1997) (unpublished) ("It is true that plaintiffs who charge civil conspiracy are subject only to the requirements of notice pleading under Fed. R. Civ. P. 8."); *Breuer v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1128 (10th Cir. 1994) (finding complaint did not allege specific details such as time, location, or capacity, but holding complaint was sufficient under the minimum requirements for pleading conspiracy); *Fobbs v. Holy Cross Health Sys. Corp.*, 29 F.3d 1439 (9th Cir. 1994) (applying Rule 8 and *Leatherman* to conspiracy allegation), *overruled on other grounds*, *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131 (9th Cir. 2001) (en banc).

292. *Walker*, 288 F.3d at 1007.

approximate date, so that the defendant has notice of what he is charged with.”²⁹³ Provided notice is sufficient, additional details are left to discovery.²⁹⁴

In contrast, there are post-*Leatherman* courts continuing to use heightened pleading.²⁹⁵ The most common particularity requirement is requiring “facts constituting the conspiracy, its object and accomplishment.”²⁹⁶ Despite exceeding what would be required for simplified notice, Rule 8 is sometimes invoked as justification for this particularity requirement.²⁹⁷ Another expression of heightened pleading is requiring facts constituting a “meeting of the minds.”²⁹⁸ Depending upon its incarnation, this standard approaches hyperpleading. For example, one district court requiring “some detail about the conspiracy” wanted detail on “the time period in which the actions allegedly took place, the object of the conspiracy, the actions taken in furtherance of the scheme, facts evidencing an

293. *Id.* (Posner, J.). Requiring the pleading of the parties and general purpose are notice issues. The approximate date could also be relevant for notice purposes. Not all courts, however, require dates as part of notice. *See* *Reese v. Teamsters Local Union No. 541*, 993 F. Supp. 1376, 1379 (D. Kan. 1998) (finding a complaint sufficient that alleged Jackson and Fisher conspired with Healey, Keaton, and Roland to “keep him terminated” on account of his race).

294. *See* *Johnson v. California*, 207 F.3d 650, 655 (9th Cir. 1999) (stating where complaint alleges more than bare allegation of conspiracy, additional facts can be developed through discovery); *Brever*, 40 F.3d at 1126 (noting that the nature of conspiracies often makes it impossible to provide details at the pleading stage and the pleader should be allowed to resort to discovery process and not be subjected to dismissal of his complaint); *see also* 5 *WRIGHT & MILLER*, *supra* note 17, §1233, at 257.

295. *See* *Riser v. WSYX-TV ABC-6*, No. C2-02-091, 2002 WL 31409427, at *6–7 (S.D. Ohio July 17, 2002) (dismissing conspiracy claim for failing to plead specific factual allegations with some degree of specificity as to the existence of conspiracy, as well as allegations that the conspiring defendants acted with the specific intent to deprive to the defendants of equal protection); *Bieros v. Nicola*, 860 F. Supp. 223, 225 (E.D. Pa. 1994) (holding plaintiffs must allege conspiracy with particularity post-*Leatherman*); *Loftus v. Southeastern Pa. Transp. Auth.*, 843 F. Supp. 981, 986–87 (E.D. Pa. 1994) (same).

296. *A-Valey Eng’rs, Inc. v. Bd. of Chosen Freeholders*, 106 F. Supp. 2d 711, 718 (D.N.J. 2000) (applying Rule 8 but defining it in the conspiracy context as alleging “facts constituting the conspiracy, its object and accomplishment” (quoting *Black & Yates, Inc. v. Mahogany Ass’n, Inc.*, 129 F.2d 227, 232 (3d Cir. 1941))); *In re Milk Prods. Litig.*, 84 F. Supp. 2d 1016, 1020 (D. Minn. 1997).

297. *See A-Valey*, 106 F. Supp. 2d at 718 (applying Rule 8 but defining it in the conspiracy context as alleging “facts constituting the conspiracy, its object and accomplishment” (quoting *Black & Yates*, 129 F.2d at 232)); *In re Milk*, 84 F. Supp. 2d at 1020 (stating Rule 8 applies and claim must include a statement of the facts constituting the conspiracy, its object and accomplishment); *Meyer v. Reno*, 911 F. Supp. 11, 15 (D.D.C. 1996) (observing that conspiracy complaint must specify in detail the factual basis necessary to enable the defendants to prepare their defense).

298. *See* *Sims v. Unified Gov’t of Wyandotte County*, 120 F. Supp. 2d 938, 957 (D. Kan. 2000) (stating conspiracy requires factual allegations showing meeting of the minds); *Samuel v. City of Chicago*, 41 F. Supp. 2d 801, 804 (N.D. Ill. 1999) (requiring allegations of conspiracy to be supported by facts suggesting a meeting of the minds); *Kaufmann v. United States*, 876 F. Supp. 1044, 1051 (E.D. Wis. 1995) (stating conspiracy requires factual allegations suggesting meeting of the minds and relying on *Sparkman*).

agreement among the conspirators, and facts showing that defendants knew their actions constituted racketeering.”²⁹⁹ Such a standard is at least as stringent as Rule 9 if not more so.

Targeted heightened pleading also survives post-*Leatherman* manifesting in specific types of conspiracy claims. For example, when the underlying tort is fraud, heightened pleading applies.³⁰⁰ Similarly, alleged conspiracies between private actors and government officials are subject to heightened pleading in some jurisdictions.³⁰¹

Pleading experience in civil conspiracy claims demonstrates the wide variation in judicially-imposed standards. Conclusory allegations are consistently rejected, but that ends the consensus. After *Leatherman*, there are jurisdictions true to both the language and spirit of Rule 8 and simplified notice pleading. Yet this is far from a majority rule. All types of fact-based heightened pleading remain including targeted heightened pleading, Rule 9(b)-type particularity, and even hyperpleading. The importance of these specificity requirements is magnified given the interrelationship between conspiracy and other substantive areas such as antitrust, civil rights, fraud, and RICO.³⁰²

E. Copyright

From this nation’s infancy, Congress has promoted the progress of science and the “useful arts.”³⁰³ The Copyright Act of 1976³⁰⁴ is one expression of this goal. “The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public.”³⁰⁵ The Copyright Act assures people that their original work will be legally protected, thereby encouraging production of more creative works.

299. *Gubitosi v. Zegeye*, 946 F. Supp. 339, 346 (E.D. Pa. 1996).

300. *See Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 297 (S.D.N.Y. 2000) (“A proper allegation of conspiracy to commit fraud in a civil complaint must set forth with certainty facts showing particularly: (1) what a defendant or defendants did to carry the conspiracy into effect; (2) whether such acts fit within the framework of the conspiracy alleged; and (3) whether such acts, in the ordinary course of events, would proximately cause injury to plaintiff.”).

301. *See Scott v. Hern*, 216 F.3d 897, 907 (10th Cir. 2000) (holding claims alleging conspiracy between private actors and government officials must specifically present facts tending to show agreement and concerted action and explicitly noting the rule survives *Leatherman*).

302. *See, e.g., In re Milk Prods. Litig.*, 84 F. Supp. 2d 1016, 1020 (D. Minn. 1997) (antitrust); *Breuer v. Rockwell Int’l Corp.*, 40 F.3d 1119, 1128 (10th Cir. 1994) (civil rights conspiracy); *Odyssey*, 85 F. Supp. 2d at 297 (fraud); *A-Valey*, 106 F. Supp. 2d at 718 (RICO).

303. U.S. CONST., art. I, § 8, cl. 8; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

304. 17 U.S.C. §§ 101–1332 (2000).

305. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994).

In 1909, the Supreme Court adopted special procedural rules of practice for copyright cases.³⁰⁶ Predating the Federal Rules and transsubstantivity,³⁰⁷ the Copyright Rules of Practice applied solely to copyright cases. After promulgation, the Supreme Court applied the Federal Rules to copyright cases “in so far as they are not inconsistent with” the Copyright Rules of Practice.³⁰⁸ As originally crafted, the Copyright Rules required copies of the allegedly infringing and infringed works to accompany the complaint.³⁰⁹ Failure to comply with the requirement rendered the pleading defective.³¹⁰ This additional pleading burden was eventually rescinded in 1966 as an unnecessary deviation from the general pleading rules and “a nuisance.”³¹¹ Ultimately in 2001, the Copyright Rules of Practice were completely abrogated leaving the Federal Rules alone to control.³¹² Nonetheless, the experience under the Copyright Rules primed both litigants and courts that copyright procedure—especially pleading—differs from the Federal Rules.

As it developed, copyright pleading practice provides an excellent example of the disconnect between the Federal Rules and pleading reality. When the Federal Rules were adopted, there was pressure to create separate pleading rules for copyright cases; this was rejected in favor of a transsubstantive standard.³¹³ There is now uniform recognition that Rule 8, requiring only a short, plain statement of the claim, applies in copyright actions.³¹⁴ A leading copyright

306. A copy of the Rules of Practice as Amended can be found following 17 U.S.C.A. § 501 (West 1977).

307. See *supra* Part III.A (discussing adoption of the transsubstantive Federal Rules of Civil Procedure).

308. Rules of Practice as Amended, R. 1; *Aarismaa v. Maye*, 889 F. Supp. 68, 69 (N.D.N.Y. 1995).

309. Rules of Practice as Amended, R. 2 (rescinded); see 4 WRIGHT & MILLER, *supra* note 17, § 1018 (describing Copyright Rule 2 as both unnecessary and a nuisance); 5 WRIGHT & MILLER, *supra* note 17, § 1237 (describing Copyright Rule 2 as “an objectionable deviation from the liberal pleading rules applicable in all other actions.”).

310. See *Cole v. Allen*, 3 F.R.D. 236, 237 (S.D.N.Y. 1942) (explaining failure to comply with Copyright Rule 2 rendered pleading defective); *Tully v. Triangle Film Corp.*, 229 F. Supp. 297, 297 (S.D.N.Y. 1916) (highlighting failure to comply with Rule 2 and noting remedy could be either dismissal or amendment).

311. Rules of Practice as Amended, R. 2, advisory committee note, 17 U.S.C.A. § 501 (West 1990) (explaining 1966 rescission).

312. See H.R. Doc. No. 107-61 (2001) (communication from Chief Justice to Congress); 4 WRIGHT & MILLER, *supra* note 17, § 1018 (“Finally, the Supreme Court ordered the abrogation of the Copyright Rules, effective December 1, 2001.”). Rule 81(a)(1) was then amended to reflect the change. *Id.*

313. See 5 WRIGHT & MILLER, *supra* note 17, § 1221 (noting the pressure for and the rejection of separate copyright rules); see also *Nagler v. Admiral Corp.*, 248 F.2d 319, 322–23 (2d Cir. 1957) (rejecting special pleading rules in copyright cases as contrary to Federal Rules).

314. See *Wildlife Internationale, Inc. v. Clements*, 591 F. Supp. 1542, 1547 (S.D. Ohio 1984) (“Rule 8, requiring a ‘short and plain statement of the claim,’ has been made applicable to copyright proceedings.”); *April Prods., Inc. v. Strand Enters., Inc.*, 79 F. Supp. 515, 516 (S.D.N.Y. 1948) (“This rule [Rule 8] is applicable to copyright actions.”); see also 5 WRIGHT & MILLER, *supra* note 17, § 1237 (“The requirement of a short and plain statement of the claim in Rule 8(a) applies to actions for copyright . . .”).

commentator gives the following advice: "Pleading in federal court . . . is notice pleading; strict adherence to formulaic phrases and boilerplate paragraphs is not only unnecessary but actively discouraged in pleading a federal cause of action. In other words, pleading in federal court is relatively easy."³¹⁵ This, however, is not the case.

Despite the rhetoric of Rule 8 application, courts still require pleading with specificity. As one court states, "[i]n applying Rule 8 to copyright infringement actions, courts have required that particular infringing acts be alleged with some specificity."³¹⁶ Such a specificity requirement under the guise of notice pleading is still heightened pleading. However, unlike many other substantive areas, the specific requirements of copyright heightened pleading appear to be well-defined.

Courts imposing heightened pleading essentially embrace a four-part requirement. To be sufficient under Rule 8, an infringement claim must state: (1) which specific original work is the subject of the copyright claim, (2) that the plaintiff owns the copyright, (3) that the work in question has been registered in compliance with the statute, and (4) by what acts and during what time the defendant infringed the copyright.³¹⁷ Despite being cast as necessary to provide sufficient notice, this is clearly a heightened standard. Specificity as to the original work or the infringing acts is unnecessary if the defendant could adequately answer the complaint or develop additional details through discovery.³¹⁸

315. 6 NIMMER ON COPYRIGHT § 31.01 (2002).

316. *Wildlife*, 591 F. Supp. at 1547; see *Hartman v. Hallmark Cards, Inc.*, 639 F. Supp. 816, 820 (W.D. Mo. 1986) ("In applying Rule 8 to copyright infringement actions, courts have required that particular infringing acts be alleged with some specificity."), *aff'd*, 833 F.2d 117 (8th Cir. 1987). *But see* *Conan Props., Inc. v. Mattel, Inc.*, 601 F. Supp. 1179, 1183 (S.D.N.Y. 1984) (quoting *Conley* and stating that the Federal Rules do not require a claimant to set out detailed facts in a copyright complaint).

317. *Gee v. CBS, Inc.*, 471 F. Supp. 600, 643 (E.D. Pa. 1979), *aff'd*, 612 F.2d 572 (3d Cir. 1979); see *Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 36 (S.D.N.Y. 1992) (stating the four-part test for a properly plead copyright complaint), *aff'd*, 23 F.3d 398 (2d Cir. 1994); *Franklin Elec. Publishers, Inc. v. Unisonic Prods. Corp.*, 763 F. Supp. 1, 4 (S.D.N.Y. 1991) (same); *Foster v. WNYC-TV Found.*, No. 88 Civ. 4584 (JFK), 1989 U.S. Dist. LEXIS 13724, at *11-12 (S.D.N.Y. Nov. 20, 1989) (quoting *Gee*); see also *Hartman*, 639 F. Supp. at 820 (citing *Gee* and applying specificity to original work and infringing acts).

318. See *Mid Am. Title Co. v. Kirk*, 991 F.2d 417, 421 (7th Cir. 1993) (reversing dismissal of copyright infringement complaint where defendants were put on notice that a "factual compilation" was at issue and discovery provided an opportunity to pursue the matter in detail); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 167 F. Supp. 2d 1114 (C.D. Cal. 2001) (denying motion to dismiss for failure to state every image that is infringed, specific web pages that infringe, and dates of infringement because complaint provided fair notice of the allegations); *Tin Pan Apple, Inc. v. Miller Brewing Co., Inc.*, 737 F. Supp. 826, 839 (S.D.N.Y. 1990) ("Defendants may develop additional details—for example, which musical compositions and sound recordings defendants are alleged to have infringed—through customary pre-trial discovery."); *QTL Corp. v. Kaplan*, No. C-97-20531 EAI, 1998 U.S. Dist. LEXIS 10670 (N.D. Cal. Feb. 2, 1998) (denying motion for more definite statement where complaint failed to specifically identify which portions of several

While explaining the genesis and resilience of this heightened standard is difficult, part of the answer appears to be confusion over application of a pleading burden versus a proof burden. Failure to produce some evidence of the elements of a copyright infringement action post-discovery could properly support summary judgment.³¹⁹ This authority, however, has been inappropriately applied to pre-discovery motions to dismiss.³²⁰

The Federal Forms may also have contributed to the resilience. Federal Form 17 models a complaint for infringement of copyright and unfair competition.³²¹ Form 17 includes allegations: (1) identifying the specific "original book" by title, (2) that the plaintiff owns the copyright, (3) that the plaintiff complied in all respects with the Copyright Act and other laws, and that (4) the "defendant infringed said copyright by publishing and placing upon the market a book . . . which was copied largely from plaintiff's copyrighted book."³²² Form 17 has been cited as support for the four-part heightened pleading standard.³²³ The form, however, is merely illustrative.³²⁴ While mirroring the form is sufficient under the rules, the form certainly does not supplant Rule 8's notice pleading standard.³²⁵

catalogs infringed copyrighted works but the information could be obtained through discovery); *see also* 5 WRIGHT & MILLER, *supra* note 17, § 1237, at 283 (1990) ("Complaints [for copyright infringement] simply alleging present ownership by plaintiff, registration in compliance with the applicable statute, and infringement by the defendant, have been held sufficient under the rules."). Even failure to allege registration may not be fatal under a true notice standard. *See* Jetform Corp. v. Unisys Corp., 11 F. Supp. 2d 788, 790 (E.D. Va. 1998) (denying motion to dismiss where complaint did not allege registration because the software at issue was Berne Convention work not of U.S. origin).

319. *See* *Gee*, 471 F. Supp. at 643–56 (describing the post-discovery noncompliance with the four-part requirement and granting summary judgment); *cf.* *IDS Life Ins. Co. v. SunAmerica, Inc.*, 958 F. Supp. 1258, 1278–79 (N.D. Ill. 1997) (describing the four-part standard as what "plaintiffs must prove," noting that there was no evidence of copyright infringement, and denying a preliminary injunction).

320. *See* *Gee*, 471 F. Supp. at 643–56 (describing the complaint's noncompliance with the four-part requirement "inexcusable . . . in view of the discovery already taken" and granting both a motion to dismiss and summary judgment); *see also* *Hartman*, 639 F. Supp. at 820–23 (finding complaint failed to allege infringing acts with specificity but denying motion to dismiss in favor of summary judgment). This difference in procedural posture has been recognized by some district courts. *See* *QTL*, 1998 U.S. Dist. LEXIS 10670 (distinguishing *Hartman* based on its summary judgment posture).

321. Form 17, App. of Forms, FED. R. CIV. P.

322. *Id.* ¶¶ 2, 4, 6–7.

323. *See* *Gee*, 471 F. Supp. at 644 (stating four-part pleading standard and citing Federal Form 17 as illustrating a proper complaint), *aff'd*, 612 F.2d 572 (3d Cir. 1979).

324. *See* Introductory Statement, App. of Federal Forms, FED. R. CIV. P. ("The following forms are intended for illustration only.").

325. *See* FED. R. CIV. P. 84 ("The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement that the rules contemplate."); 5 WRIGHT & MILLER, *supra* note 17, § 1237 (noting illustrative complaint is "not mandatory"). Moreover, Form 17 does not really comport with the heightened standard imposed by district courts. For example, the fourth prong of the

Whatever the explanation for the development and maintenance of heightened pleading in copyright cases, *Leatherman* should have extinguished it. In fact, in the aftermath of *Leatherman*, there is some recognition of the impropriety of the heightened pleading standard. The Seventh Circuit illustrates the renewed commitment to copyright notice pleading in *Mid America Title Co. v. Kirk*³²⁶ where it emphatically rejects a heightened pleading standard: "We cannot accept the argument that plaintiffs in cases such as this one must be held to a particularity requirement akin to Federal Rule of Civil Procedure 9(b)."³²⁷ The rationale was equally simple—*Leatherman* precludes it.³²⁸ Some federal district courts have adopted the *Mid America* approach and rejected a heightened standard on the strength of *Leatherman*.³²⁹

heightened pleading standard (what acts and during what time the defendant infringed the copyright) is not met by the indefinite allegation of paragraph 7 of Form 17 that "[a]fter March 10, 1936" the defendant infringed the copyright given that March 10, 1936 was the date alleged of copyright in paragraph 4. See Form 17, ¶¶ 4, 7, App. of Forms, FED. R. CIV. P.

Even more troubling from a notice pleading standpoint is that compliance with Form 17 has been found *insufficient* under the heightened standard. In *Foster v. WNYC-TV Foundation*, No. 88 Civ. 4584 (JFK), 1989 U.S. Dist. LEXIS 13724, at *12 (S.D.N.Y. Nov. 20, 1989), the district court found that the complaint "tracks exactly the model complaint for copyright infringement actions of Form 17." Nonetheless, the court opined: "This attention to form, however, does not save the amended complaint from this Rule 8 attack." *Id.* After reciting the heightened standard, the court dismissed the complaint for failure to sufficiently plead infringement despite an allegation that "[a]fter August 1, 1986, defendants . . . infringed said copyright by publishing and placing upon the market a film entitled 'Diggers,' which is identical to plaintiff's copyrighted film entitled 'Diggers.'" *Id.* at *13–14. This allegation certainly put the defendant on notice of the alleged infringing act.

326. 991 F.2d 417 (7th Cir. 1993).

327. *Mid America*, 991 F.2d at 421. *Mid America* alleged that Kirk substantially copied one of its title commitments. *Id.* at 418. The district court granted Kirk's motion to dismiss for failure to state a claim because the complaint did not put the defendant on notice of the specific elements of originality allegedly infringed. *Id.* at 419. On review, the Seventh Circuit reversed, holding that the complaint adequately stated a copyright infringement claim because "the defendants were put on notice that the compilation was at issue and shall have abundant opportunity to pursue the matter in detail through the discovery process." *Id.* at 421.

328. *Id.* at 422.

329. Two examples are *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 167 F. Supp. 2d 1114 (C.D. Cal. 2001) and *Jetform Corp. v. Unisys Corp.*, 11 F. Supp. 2d 788 (E.D. Va. 1998). In *Perfect 10*, the court rejected a heightened burden stating that "[c]opyright claims need not be pled with particularity." 167 F. Supp. 2d at 1120 (citing *Mid America*). It held that the plaintiff did not have to plead each infringed and infringing image or the dates of infringement. *Id.* To do so "would defeat the regime established by Rule 8." *Id.* The court hinged its rejection on *Leatherman*: "The purpose of modern rules of civil procedure is to avoid a regime of heightened pleading with the exceptions listed in Federal Rule of Civil Procedure 9(b)." *Id.* Similarly, in *Jetform* the defendant argued that copyright infringement claims must be alleged with greater specificity. The district court rejected heightened pleading adopting the Seventh Circuit's *Mid America* approach. *Jetform*, 11 F. Supp. 2d at 790. According to the district court, a copyright infringement claim must merely state sufficient facts to enable the defendant to draft a responsive pleading. *Id.* Other courts have

Despite *Leatherman's* clarity, district courts considering the issue continue to cling to a heightened pleading standard. The Eastern District of Virginia was one of the first federal courts to consider the pleading issue post-*Leatherman* in *Paragon Services, Inc. v. Hicks*.³³⁰ After recognizing the general notice pleading standard,³³¹ the court stated: "An exception to this general rule, however, has been recognized when the claimant is asserting a copyright violation. In such cases, courts have required a greater degree of specificity."³³² The court then articulated the now-familiar four-part heightened pleading standard and dismissed the complaint because "the plaintiff has not met the third and fourth factors."³³³ The four-part heightened pleading burden continues to be used by district courts as a judicially-imposed exception to Rule 8.³³⁴

Denying copyright plaintiffs a federal forum based on heightened pleading is, of course, inconsistent with both the Federal Rules and Supreme Court precedent. In conjunction with the unequivocal federal interest involved in copyright cases, stripping away a common, national forum for resolution of copyright disputes is unwarranted.³³⁵ The burden on plaintiffs of copyright heightened pleading is, however, sometimes tempered. While use of Rule 12(b)(6) dismissal motions predominate, copyright heightened pleading is sometimes raised by defendants through a Rule 12(e) motion for a more definite statement where by

also recently rejected a heightened standard albeit without reference to *Leatherman*. See *Salerno v. City Univ. of N.Y.*, 191 F. Supp. 2d 352, 356 (S.D.N.Y. 2001) ("[T]here is no such heightened requirement for copyright claims.").

330. 843 F. Supp. 1077 (E.D. Va. 1994).

331. *Paragon*, 843 F. Supp. at 1081.

332. *Id.*

333. *Id.* It is unclear precisely what standard controls in the Eastern District of Virginia. Judge Raymond Jackson of the Norfolk Division wrote *Paragon*. More recently, Judge James Cacheris of the Alexandria Division explicitly rejected *Paragon* and heightened pleading in *Jetform*. See *supra* note 329 (describing *Jetform*). Professors Wright and Miller, however, have little difficulty in describing the proper approach—post-*Leatherman* the four-part heightened pleading burden retained in *Paragon* is inappropriate. See 5 WRIGHT & MILLER, *supra* note 17, § 1237 (Supp. 2002) (stating that imposition of a heightened pleading standard in copyright cases post-*Leatherman* is a clear violation of Rule 8's mandate).

334. See *Sefton v. Jew*, 201 F. Supp. 2d 730, 747 (W.D. Tex. 2001) (stating that while Rule 8 applies, some courts impose the four-part heightened pleading requirement and then evaluate the copyright claim using the heightened standard); *Vapac Music Publ'g, Inc. v. Tuff 'N' Rumble Mgmt.*, 99 Civ. 10656 (JGK), 2000 U.S. Dist. LEXIS 10027, at *17–18 (S.D.N.Y. July 19, 2000) (stating that Rule 8 requires infringing acts to be set out with some specificity, noting the four-part standard, and concluding that the complaint failed to satisfy the requirements); *DiMaggio v. Int'l Sports Ltd.*, 97 Civ. 7767 (HB), 1998 U.S. Dist. LEXIS 13468 (S.D.N.Y. Aug. 31, 1998) (stating that Rule 8 requires "particular infringing acts be alleged with specificity," reciting the four-part standard, and dismissing the copyright claim for failure to meet the heightened burden); *Tom Kelley Studios Inc. v. Int'l Collectors Soc'y Inc.*, 97 Civ. 0056 (WK), 1997 U.S. Dist. LEXIS 14571 (S.D.N.Y. Sept. 25, 1997) (same); *IDS Life Ins. Co. v. SunAmerica, Inc.*, 958 F. Supp. 1258, 1278–79 (N.D. Ill. 1997) (stating *Paragon* standard).

335. See NIMMER, *supra* note 315, § 31.01 (noting both the clear federal interest in copyright claims and the benefits of a common national forum).

definition plaintiffs have an opportunity to replead.³³⁶ Thus, such plaintiffs avoid being denied merits determination based solely on their pleadings.³³⁷ However, this second opportunity to meet judicially-imposed heightened pleading is not a justification for it.

The heightened pleading experience in copyright infringement cases certainly supports the macro-pleading model. As a general observation, courts continue to cloak themselves with the rhetoric of Rule 8 and notice pleading in the copyright context. Some are even true to the standard. However, most district courts—both before and after *Leatherman*—require greater specificity when pleading copyright infringement. Ironically, some maintain that Rule 8 itself requires the greater specificity.³³⁸ More recently, other courts have explicitly stated that copyright heightened pleading is simply an exception to notice pleading.³³⁹ However, the central lesson of this examination of copyright pleading practice is simple: notice pleading is not a uniform rule.

F. Defamation

Exploration of pleading practice in defamation claims is another excellent opportunity to see the wide variance of pleading requirements required by the federal courts. Defamation includes both slander for spoken words and libel for published words.³⁴⁰ The basic elements of slander or libel include: (1) a

336. *Compare* *Mid Am. Title Co. v. Kirk*, 991 F.2d 417 (7th Cir. 1993) (Rule 12(b)(6) motion); *Salerno v. City Univ. of N.Y.*, 191 F. Supp. 2d 352 (S.D.N.Y. 2001) (Rule 12(b)(6) motion); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 167 F. Supp. 2d 1114 (C.D. Cal. 2001) (Rule 12(b)(6) motion); *Sefton*, 201 F. Supp. 2d at 744–45 (Rule 12(b)(6) motion); *DiMaggio*, 1998 U.S. Dist. LEXIS 13468 (12(b)(6) motion); *Jetform*, 11 F. Supp. 2d 788 (Rule 12(b)(6) motion); *and Paragon Servs., Inc. v. Hicks*, 843 F. Supp. 1077 (E.D. Va. 1994) (Rule 12(b)(6) motion), *with Vapac*, 2000 U.S. Dist. LEXIS 10027 (Rule 12(e) motion); *QTL Corp. v. Kaplan*, No. C-97-20531 EAI, 1998 U.S. Dist. LEXIS 10670 (N.D. Cal. Feb. 2, 1998) (Rule 12(e) motion); *and Tom Kelley Studios*, 1997 U.S. Dist. LEXIS 14571 (Rule 12(e) motion).

337. Even when Rule 12(b)(6) motions are used, some courts dismiss without prejudice giving plaintiffs an opportunity to replead. *See DiMaggio*, 1998 U.S. Dist. LEXIS 13468 (granting motion to dismiss but allowing plaintiff to replead within thirty days); *Paragon*, 843 F. Supp. at 1081 (granting motion to dismiss without prejudice and allowing plaintiff to replead copyright claim). There is, however, a troublesome effect of heightened pleading in this area—subject matter jurisdiction. Because copyright infringement claims have federal question jurisdiction, failure to meet the heightened pleading standard could be used to support Rule 12(b)(1) dismissals for lack of subject matter jurisdiction. *See Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 37 n.6 (S.D.N.Y. 1992) (“Therefore, to the extent that the complaint fails to allege proper statutory registration of the copyrights in question, this Court lacks jurisdiction over the infringement action.”), *aff’d*, 23 F.3d 398 (2d Cir. 1994). Without leave to replead, these plaintiffs would be denied the benefits of a federal forum.

338. *See, e.g., Vapac*, 2000 U.S. Dist. LEXIS 10027, at *17 (“Rule 8 requires that the particular infringing acts be set out with some specificity.”).

339. *See, e.g., Sefton*, 201 F. Supp. 2d at 747 (stating that in copyright infringement cases courts impose “a heightened pleading requirement”).

340. *See Belli v. Orlando Daily Newspapers, Inc.*, 389 F.2d 579, 586 (5th Cir. 1967) (describing the historical development of written defamation (libel) and spoken

defamatory statement concerning another, (2) published to a third party, (3) with fault amounting to at least negligence, and (4) special damages or actionability irrespective of special damages.³⁴¹ Historically, defamation claims have been considered vexatious and disfavored.³⁴² These traditional attitudes infiltrate modern pleading practice. Both before and after *Leatherman*, some federal courts require pleading with factual specificity contrary to Rule 8. As in so many areas where heightened pleading emerges and remains, the reason for particularity is simple: courts disfavor the claims.

The Supreme Court has never addressed the appropriate pleading standard for defamation.³⁴³ Nonetheless, due to the disfavored status of defamation, many states adopted pleading requirements requiring defamation to be

defamation (slander)); *Vargas v. Royal Bank of Can.*, 604 F. Supp. 1036, 1042 (D.P.R. 1985) (“Libel refers in general terms to the written communication, whereas slander is applied to oral defamation.”).

341. See *Walters v. Linhof*, 559 F. Supp. 1231, 1234 (D. Colo. 1983) (listing elements of defamation).

342. See *Geisler v. Petrocelli*, 616 F.2d 636, 640 (2d Cir. 1980) (describing libel and slander as “vexatious and their litigation discouraged by requirements that such contentions be set forth in considerable detail”); *Sterling Interiors Group, Inc. v. Haworth, Inc.*, 94 Civ. 9216 (CSH), 1996 U.S. Dist. LEXIS 10756, at *70 (S.D.N.Y. July 30, 1996) (stating that libel and slander were formerly considered vexatious in this circuit); 5 WRIGHT & MILLER, *supra* note 17, § 1245, at 392 (noting unfavored nature of libel and slander).

343. See Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO ST. L.J. 1753, 1768–69 (1998) (noting the Court has never been asked to articulate the libel pleading standard). Under the Federal Rules, there are no special pleading requirements for defamation claims. However, a defamation claim can invoke the special pleading requirements of Rule 9(g). Rule 9(g) states: “When items of special damage are claimed, they shall be specifically stated.” FED. R. CIV. P. 9(g). As a matter of substantive law, defamatory statements are traditionally divided into two categories—*per se* and *per quod*. *Per se* defamation claims are deemed so obviously and materially harmful that injury is presumed. See *Silk v. City of Chicago*, No. 95 C 0143, 1996 U.S. Dist. LEXIS 8334, at *105 (N.D. Ill. 1996) (defining *per se* defamation); *Appraisers Coalition v. Appraisal Inst.*, 845 F. Supp. 592, 609 (N.D. Ill. 1994) (same). For example, words that impute the commission of a crime are considered defamation *per se*. *Silk*, 1996 U.S. Dist. LEXIS 8334, at *106. In addition, *per se* defamation also includes: Words that impute infection with a loathsome disease; words that impute an inability to perform or want of integrity in the discharge of duties or office or employment; or words that prejudice a party, or impute lack of inability, in his trade, profession or business. *Id.* With statements that are defamatory *per quod*, the defamatory character is not apparent and extrinsic facts showing special damages are required. *Id.* at *105; *Appraisers*, 845 F. Supp. at 609. As such, with *per quod* defamation a plaintiff must specifically plead special damages in the complaint under Rule 9(g). See *Bose Corp. v. Consumers Union of the United States, Inc.*, 57 F.R.D. 528 (D. Mass. 1973) (dismissing complaint for failure to plead special damages with specificity under Rule 9(g)). Similarly, a disparagement of property claim may require that a plaintiff plead special damages and meet the heightened pleading requirement of Rule 9(g). See *Browning v. Clinton*, 292 F.3d 235, 245 (D.C. Cir. 2002) (applying Rule 9(g)’s heightened pleading to a disparagement claim).

pleaded with particularity.³⁴⁴ Prior to the Supreme Court's seminal *Erie*-doctrine opinion, *Hanna v. Plumer*,³⁴⁵ some federal courts adopted particularity on the assumption that state pleading rules applied.³⁴⁶ However, this was not uniform and other federal courts took Rule 8 at its word and applied simplified notice pleading.³⁴⁷

After *Hanna*, most federal courts embrace at least the rhetoric of Rule 8 and notice pleading in defamation cases. As the Second Circuit articulates: "Although charges of libel and slander under former practice were considered largely vexatious and their litigation discouraged by requirements that such contentions be set forth in considerable detail, . . . the federal rules do not require special pleading."³⁴⁸ Accordingly, Rule 8 and its notice pleading standard applies.³⁴⁹ Consequently, defamation plaintiffs need not meet a general heightened pleading requirement,³⁵⁰ plead the exact words, *in haec verba*, alleged to be

344. See, e.g., N.Y. C.P.L.R. 3016(a) (2003) ("In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally."); WISC. STAT. ANN. § 802.03(6) (West 2003) ("In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their publication and their application to the plaintiff may be stated generally."); see *Royal Palace Homes, Inc. v. Channel 7 of Detroit, Inc.*, 495 N.W.2d 393, 395 (Mich. Ct. App. 1992) ("The law is well settled that the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they are based, will not suffice to state a cause of action."); *Nazeri v. Missouri Valley Coll.*, 860 S.W.2d 303, 313 (Mo. 1993) (en banc) (requiring *in haec verba* for libel); see also Gilles, *supra* note 343, at 1800 ("Many states already have [heightened] pleading requirements in place . . .").

345. 380 U.S. 460 (1965).

346. See, e.g., *Holliday v. Great Atl. & Pac. Tea Co.*, 256 F.2d 297, 302 (8th Cir. 1958) (adopting the Missouri rule that "[i]n an action for slander or libel the words alleged to be defamatory must be pleaded and proved"); *Foster v. United States*, 156 F. Supp. 421, 424 (S.D.N.Y. 1957) ("The alleged slanderous statements should be set forth substantially in the language in which they are uttered or written."); *Dorney v. Dairymen's League Coop. Ass'n*, 149 F. Supp. 615, 619 (D.N.J. 1957) "[S]pecial meanings of a derogatory nature must be specially pleaded in the complaint by way of innuendo, explanation or colloquium."); *Simpson v. Oil Transfer Corp.*, 75 F. Supp. 819, 822 (N.D.N.Y. 1948) (stating that New York law must be applied requiring defamatory words to be set forth in the complaint); see also 5 WRIGHT & MILLER, *supra* note 17, § 1245, at 309 ("Some of the courts that have required strict pleading of defamation claims have done so on the ground that the state pleading requirements for libel and slander are controlling . . .").

347. See *Foltz v. Moore, McCormack Lines*, 189 F.2d 537, 539 (2d Cir. 1951) (finding sufficient compliance with Rule 8 despite exact words not being pleaded); *Carroll v. Paramount Pictures, Inc.*, 3 F.R.D. 95, 97 (S.D.N.Y. 1942) (stating that the Federal Rules do not require libel to be pleaded with particularity because it is not listed in Rule 9).

348. *Geisler v. Petrocelli*, 616 F.2d 636, 640 (2d Cir. 1980); *accord Kelley v. Schmidberger*, 806 F.2d 44, 46 (2d Cir. 1986).

349. *Geisler*, 616 F.2d at 640; *Price v. Viking Press, Inc.*, 625 F. Supp. 641, 643 (D. Minn. 1985); *Linker v. Custom-Bilt Machinery, Inc.*, 594 F. Supp. 894, 901-02 (E.D. Pa. 1984); *Stabler v. New York Times Co.*, 569 F. Supp. 1131, 1138 (S.D. Tex. 1983).

350. See *DeSalle v. Key Bank of S. Me.*, 685 F. Supp. 282, 283 (D. Me. 1988) ("However, Plaintiff is not required to assert specifically the time, place, and substance in a defamation action."); *Linker*, 594 F. Supp. at 901-02 (noting defamation pleading does not

defamatory,³⁵¹ nor meet any other targeted heightened pleading.³⁵² Additional information, if needed, would be developed through discovery.³⁵³ Despite this general shift to notice pleading, some district courts still held tightly to heightened pleading.³⁵⁴

The landscape of defamation pleading changes little after *Leatherman*. Most federal courts continue to state that Rule 8 and notice pleading control.³⁵⁵ Broad-based heightened pleading is routinely rejected.³⁵⁶ Nonetheless, heightened pleading lingers. First, courts continue to require *in haec verba* pleading of defamatory words.³⁵⁷ Ironically, many district courts interpret the notice standard

need to set out detailed facts); *Seldon v. Heublein, Inc.*, No. 81 Civ. 4456 (RLC), 1982 U.S. Dist. LEXIS 10432, at *3 (S.D.N.Y. Jan. 5, 1982) (“And, there is no special requirement of heightened pleading detail where allegations of libel and slander are involved.”).

351. See *Stabler*, 569 F. Supp. at 1138 (holding Rule 8 does not require plaintiff to plead *in haec verbis*); *Pirre v. Printing Devs., Inc.*, 432 F. Supp. 840, 843 (S.D.N.Y. 1977) (pleading *in haec verba* was unnecessary if defendant has sufficient notice).

352. See *Fleck Bros. Co. v. Sullivan*, 385 F.2d 223, 225 (7th Cir. 1967) (reversing dismissal of complaint for failure to plead special damages with particularity because complaint sufficiently notified defendants); *Price*, 625 F. Supp. at 643 (holding plaintiff did not have to plead facts showing reckless regard for the truth).

353. See *Geisler*, 616 F.2d at 640 (“Such additional information is now available through the liberalized discovery provisions.”).

354. See *Walters v. Linhof*, 559 F. Supp. 1231, 1234 (D. Colo. 1983) (dismissing complaint for failure to “substantially set forth the words alleged to be defamatory”); *Liguori v. Alexander*, 495 F. Supp. 641, 648 (S.D.N.Y. 1980) (finding complaint failed to plead *in haec verba* and requiring plaintiff to replead); *Drummond v. Spero*, 350 F. Supp. 844, 845 (D. Vt. 1972) (“We believe that the plaintiff should have so pleaded and the slanderous words should have been set out *in haec verba* or at least substantially so in her complaint.”).

355. See *Croixland Props. L.P. v. Corcoran*, 174 F.3d 213, 215 n.2 (D.C. Cir. 1999) (“[T]he Federal Rules of Civil Procedure impose no special pleading requirements for defamation”); *Suarez Corp. v. CBS, Inc.*, No. 93-3307, 1994 U.S. App. LEXIS 9373, at *15 (6th Cir. Apr. 19, 1994) (reversing dismissal of complaint for failure to delineate defamatory statements stating that notice pleading applies in defamation claim citing *Leatherman*); *O’Diah v. New York City*, No. 02 CIV.274 (DLC), 2002 WL 1941179, at *17 (S.D.N.Y. Aug. 21, 2002) (“A defamation action brought in federal court, however, is governed by Rule 8 of the Federal Rules of Civil Procedure, and not by particularized state pleading requirements.”); *Palladino ex rel. United States v. VNA of S. N.J., Inc.*, 68 F. Supp. 2d 455, 475 (D.N.J. 1999) (“[T]here are no special requirements for defamation actions under the federal rules); *Sterling Interiors Group, Inc. v. Haworth, Inc.*, 94 Civ. 9216 (CSH), 1996 U.S. Dist. LEXIS 10756, at *70 (S.D.N.Y. July 30, 1996) (stating slander allegations are subject to Rule 8(a)); *Borrell v. Weinstein Supply Corp.*, Civil Action No. 94-2857, 1994 U.S. Dist. LEXIS 13741, at *8 n.3 (E.D. Pa. Sept. 27, 1994) (“The law of the Second Circuit requires a plaintiff alleging defamation in federal court merely to comply with Rule 8”).

356. See *Sterling*, 1996 U.S. Dist. LEXIS 10756, at *74 (rejecting that plaintiff must allege the exact time, place, and speaker of defamatory statements under Rule 8); *Borrell*, 1994 U.S. Dist. LEXIS 13741, at *7-8 (holding time and place do not need to be alleged).

357. See *Celli v. Shoell*, 995 F. Supp. 1337, 1346 (D. Utah 1997) (requiring plaintiff to identify specific defamatory words); *Goldstein v. Kinney Shoe Corp.*, 931 F.

itself as requiring greater specificity in defamation cases.³⁵⁸ Even though most overt forms of heightened pleading have largely disappeared, some courts still incorrectly call for particularity.³⁵⁹

The “traces of disfavor”³⁶⁰ against defamation not only motivate courts to retain heightened pleading, but influence commentators as well.³⁶¹ The use of heightened pleading in defamation cases is one of the few areas where advocates even call for its expansion.³⁶² Professor Gilles is one of the most recent proponents. Describing the defamation procedure as “focusing on accuracy and ignoring speed and efficiency,”³⁶³ Gilles calls for the resurrection of *in haec verba*: “A requirement that the plaintiff plead the exact words which she claims are defamatory should deter filing by those who have only a vague feeling that they

Supp. 595, 597 (N.D. Ill. 1996) (“Federal pleading standards generally require a plaintiff (or counter-plaintiff) pleading a state law defamation claim to recite the specific words alleged to be defamatory.”). *But see* *Stamm v. Sullivan Foods Corp.*, No. 02 C 50257, 2002 WL 31487814, at *1–2 (N.D. Ill. Nov. 6, 2002) (applying notice pleading to defamation claim and refusing to dismiss claim that alleged the defendants “knowingly made and published false allegations to other employees . . . concerning [plaintiff’s] discharge”).

358. *See Celli*, 995 F. Supp. at 1346 (stating notice standard but dismissing complaint for failure to allege specific defamatory words); *Croslan v. Housing Auth. for the City of New Britain*, 974 F. Supp. 161, 169–170 (D. Conn. 1997) (stating notice standard but finding complaint failed to state a claim for failure to assert who heard defamatory comments, when they were made, and the context in which they were made); *Sterling*, 1996 U.S. Dist. LEXIS 10756, at *72–73 (finding *in haec verba* is favored by federal courts to the extent necessary to provide notice); *Silk v. City of Chicago*, No. 95 C 0143, 1996 U.S. Dist. LEXIS 8334, at *105 (N.D. Ill. 1996) (stating that a factual pleading requirement does not apply to defamation, but maintaining that a “complaint must contain some factual allegations from which malice can be inferred”); *Lee v. Radulovic*, 94 C 930, 1994 WL 502844, at *2 (N.D. Ill. Sept. 13, 1994) (dismissing complaint because the “defendants have failed to plead specific facts from which the inference of actual malice can be drawn”). *But see Stamm*, 2002 WL 31487814, at *1 (applying Rule 9(b) and allowing malice to be averred generally).

359. For example, one district court has applied Rule 9 to a defamation claim post-*Leatherman*. *See Jones v. Capital Cities/ABC Inc.*, 874 F. Supp. 626, 629 (S.D.N.Y. 1995) (“Moreover, to the extent that plaintiff has made a claim of defamation, she has completely failed to identify with specificity the alleged defamatory words as required by Fed. R. Civ. P. 9.”).

360. 5 WRIGHT & MILLER, *supra* note 17, § 1245, at 308.

361. Professors Wright and Miller note: “There is little doubt that because of the unfavored status of libel and slander actions, it is advisable for the pleader to set forth his claim for relief as clearly as possible . . .” *Id.* at 308–09. This is certainly good advice given the current, yet inappropriate resilience of heightened pleading. Unfortunately, they seem to acquiesce in the use itself: “Perhaps insistence upon a greater degree of detail can be tolerated because of the disfavor with which some courts view defamation claims . . .” *Id.* at 309.

362. *See Gilles*, *supra* note 343, at 1798–1800 (calling for changes in pleading rules for defamation cases); Barbara Arco, Comment, *When Rights Collide: Reconciling the First Amendment Rights of Opposing Parties in Civil Litigation*, 52 U. MIAMI L. REV. 587, 630–32 (1998) (advocating amendment of the Federal Rules to require a heightened pleading standards).

363. Gilles, *supra* note 343, at 1798.

have been wronged but cannot point to any specific factual error in the article.”³⁶⁴ Gilles notes that such a requirement would be easy to adopt and apply given the state pleading models and Rule 9(b) experience.³⁶⁵ Thus, once again the existence of heightened pleading in other areas serves as a potential breeding ground for its expansion.³⁶⁶

Given current federal pleading practice in defamation cases, uncertainty remains as to precisely what pleading standard applies.³⁶⁷ This, of course, supports the macro pleading model. Some courts faithfully apply simplified notice pleading. Others impose a targeted particularity requirement—typically *in haec verba*—either overtly or under the ruse of notice pleading. Still others maintain a broader form of Rule 9(b)-type heightened pleading. This wide post-*Leatherman* variance, forged by hostility to the claims themselves, serves as a perfect reminder that the rhetoric and reality of pleading practice do not always match.

G. Negligence

Negligence is the archetypal notice pleading claim. Its elements are basic and well known: duty, breach, causation, and damages.³⁶⁸ Putting a party on notice of a negligence claim should be just as easy. It is therefore surprising to think that non-notice based pleading requirements might pop up in this area. Nonetheless, they do.

364. *Id.* at 1799; see also *Arco*, *supra* note 362, at 632 (contending heightened pleading would decrease risk of having to defend against pretextual claim).

365. Gilles, *supra* note 343, at 1800. Of course, the existence of other heightened pleading models does not justify its use contrary to the Federal Rules of Civil Procedure and *Leatherman*. Application in this context would certainly run afoul of these standards, as well as further erode transsubstantivity. As for ease of application, given the wide variety of heightened pleading surveyed in this Article, such a claim underestimates the difficulty in consistency when we deviate from notice pleading.

366. Moreover, part of Professor Gilles’s support for heightened pleading rests on *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976), which imposed heightened pleading in an antitrust case involving the sham exception to *Noerr-Pennington*. See Gilles, *supra* note 343, at 1769 n.54 (discussing *Franchise*); *supra* notes 193–97 and accompanying text (describing the use of heightened pleading in *Noerr-Pennington* cases). As such, Gilles imports antitrust heightened pleading as a justification for extension to defamation. See also *infra* subpart V.B (arguing existence of heightened pleading in other substantive areas leads to its spread).

367. See ROBERT D. SACK, I SACK ON DEFAMATION § 2.4.13, at 2-52–2-53 (2000) (describing differences in pleading in federal courts including: no *in haec verba*, “defamation pleaded with enough specificity for defendant to respond,” requiring *in haec verba* or claiming it is favored, and requiring factual specificity with malice); *Arco*, *supra* note 362, at 631 (“Thus, it is evident that even among the federal jurisdictions, what constitutes sufficient notice to maintain a cause of action for defamation is unclear.”).

368. See *James v. Meow Media, Inc.*, 300 F.3d 683, 689 (6th Cir. 2002) (stating actionable tort requires duty, breach, proximate cause, and damages); *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995) (“The elements of a negligence cause of action are a duty, a breach of that duty, and damages proximately caused by the breach of duty.”).

When Charles Clark envisioned the prototype of notice pleading, he selected a negligence claim—an automobile accident.³⁶⁹ Federal Form 9 embodies the simplicity of notice pleading such a claim. The four-sentence “Complaint for Negligence” includes only the date and location, the allegation that “defendant negligently drove a motor vehicle against plaintiff,” and a general description of damages.³⁷⁰ Even a complaint this brief satisfies the Rule 8 standard.³⁷¹

Because simplified notice pleading roots itself in a negligence model, it is predictable that many jurisdictions would reject heightened pleading requirements for negligence claims. However, there is a dearth of authority directly addressing the question.³⁷² When negligence pleading is considered, most post-*Leatherman* courts are quite explicit. A plaintiff does not have to plead the specific elements of a tort or a “prima facie tort.”³⁷³ Similarly, heightened Rule 9(b)-type pleading is inapplicable in claims for breach of fiduciary duty,³⁷⁴ negligent misrepresentation,³⁷⁵ gross negligence,³⁷⁶ and mismanagement.³⁷⁷

369. Judge Clark was fond of discussing the automobile example. See Clark, *supra* note 12, at 461–62; Clark, *supra* note 14, at 317; Clark, *supra* note 20, at 182–83.

370. Form 9, App. of Forms, FED. R. CIV. P.

371. See FED. R. CIV. P. 84 (stating the forms comply with the Federal Rules).

372. *In re Fruehauf Trailer Corp.*, 250 B.R. 168, 197 (D. Del. 2000) (noting dearth of case law); see *Breeden v. Richmond Cmty. Coll.*, 171 F.R.D. 189, 199 (M.D.N.C. 1997) (noting lack of controlling authority on pleading with particularity in a negligent misrepresentation claim).

373. See *Thomson Multimedia, Inc. v. Vassel*, Cause No. IP 02-0191-C H/K, 2002 WL 31741467, at *2 (S.D. Ind. Nov. 1, 2002) (holding plaintiff does not have to plead prima facie elements of tort claim). This is, of course consistent with *Swierkiewicz*. See *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 508 (2002) (rejecting the need to plead prima facie elements of a discrimination claim).

374. See, e.g., *Precision Vascular Sys., Inc. v. Sarcos L.C.*, 199 F. Supp. 2d 1181, 1192 (D. Utah 2002) (holding allegations of breach of fiduciary duty grounded in negligence require only Rule 8 short and plain statement of a claim); *In re Walnut Leasing Co.*, No. 99-526, 1999 WL 729267, at *5 n.13 (E.D. Pa. Sept. 8, 1999) (“Claims of . . . breach of fiduciary duty are not subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b).”); *Kaiser v. Stewart*, No. Civ. A. 96-6643, 1997 WL 476455, at *16 (E.D. Pa. Aug. 19, 1997) (holding breach of fiduciary duty claim is not subject to Rule 9(b)); *cf. United States v. Kearns*, 595 F.2d 729, 733 n. 18 (D.C. Cir. 1978) (“We note, however, that the claim of breach of fiduciary duty would not appear to be a matter of fraud covered by [Rule 9(b)].”). *But see Thornton v. Evans*, 692 F.2d 1064, 1083 n.43 (7th Cir. 1992) (noting “even claims of a breach of fiduciary duties are subject to Rule 9(b)”).

375. See, e.g., *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass’n*, 142 F.3d 26, 41 (1st Cir. 1998) (applying Rule 8 instead of Rule 9 to negligent misrepresentation claim); *In re Cendant Corp. Sec. Litig.*, 190 F.R.D. 331, 337 (D.N.J. 1999) (refusing to apply Rule 9 to misrepresentation claim); *Small v. Provident Life & Accident Ins. Co.*, 1998 WL 848112, at *3 (E.D. Pa. Dec. 4, 1998) (“Because a claim of misrepresentation is distinct from a claim of fraud . . . Rule 9(b) does not apply to the former according to its terms.”). *But see Atl. Richfield Co. v. Ramirez*, No. 98-56371, 1999 WL 273241, at *1 (9th Cir. May 4, 1999) (affirming dismissal of negligent misrepresentation counterclaim for failure to comply with Rule 9(b)’s particularity requirement).

376. See, e.g., *Resolution Trust Corp. v. Farmer*, 823 F. Supp. 302, 309 (E.D. Pa. 1993) (finding Rule 9(b) inapplicable to claim for gross negligence).

Nonetheless, there are jurisdictions that apply Rule 9(b) to negligent misrepresentation claims post-*Leatherman*. Some of these decisions can be explained as examples where the gravamen of the claim is misrepresentation based on fraud.³⁷⁸ However, other jurisdictions appear to adopt a blanket rule for negligent misrepresentation.³⁷⁹ The offered rationale is similarity to fraud.³⁸⁰

Hyperpleading even exists in the negligence area. Consider *Iodice v. United States*.³⁸¹ Injured in an automobile accident, the plaintiffs brought a Federal Tort Claims Act suit against a VA hospital for prescribing narcotics to the addicted motorist who caused the collision.³⁸² The Fourth Circuit affirmed the dismissal of their negligence claim for failure to allege that the VA employees provided narcotics and knew that the driver was at that time intoxicated and would shortly be driving.³⁸³ In so doing, the court pronounced: "Dismissal of a complaint for failure to state facts supporting each of the elements of a claim is, of course, proper."³⁸⁴ While recognizing *Swierkiewicz*, the court maintained that failure "to allege facts sufficient to state elements of such a claim" warrants dismissal even "in these days of notice pleading."³⁸⁵ Despite this statement, it is difficult to distinguish this action from requiring a plaintiff to plead the elements of a discrimination claim—now precluded by the Supreme Court. Indeed, district courts already rely on *Iodice* for imposing hyperpleading requirements outside of the negligence area.³⁸⁶

A contemporary discussion of negligence pleading requirements is incomplete without some mention of the recently-dismissed obesity class action

377. See, e.g., *In re Walnut Leasing*, 1999 WL 729267, at *5 n.13 ("Claims of mismanagement . . . are not subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b)."). But see *In re Delmarva Sec. Litig.*, 794 F. Supp. 1293, 1304 (D. Del. 1992) (applying Rule 9(b) to mismanagement claim).

378. See *Pitten v. Jacobs*, 903 F. Supp. 937, 951 (D.S.C. 1995) (applying Rule 9(b) where the gravamen of negligent misrepresentation claim is fraud).

379. See *Breeden v. Richmond Cmty. Coll.*, 171 F.R.D. 189, 202 (M.D.N.C. 1997) (holding Rule 9(b) applies to negligent misrepresentation claim "wherein the major component involves significant delusion or confusion of a party, whether intentional or not"); *Lindner Dividend Fund, Inc. v. Ernst & Young*, 880 F. Supp. 49, 57 (D. Mass. 1995) ("[T]his district has 'clearly held that Rule 9(b) applies to claims of negligent misrepresentations.'").

380. See *Breeden*, 171 F.R.D. at 199–202 (comparing negligent misrepresentation and fraud claims at length).

381. 289 F.3d 270 (4th Cir. 2002).

382. *Id.* at 273.

383. *Id.* at 280–81.

384. *Id.* at 281. The court's authority for such a rule, however, was a North Carolina intermediate appellate court case, *Winters v. Lee*, 446 S.E.2d 123, 126 (N.C. Ct. App. 1994), which would be uncontrolling on the question of federal pleading requirements.

385. *Id.* (emphasis in original).

386. See *Dickson v. Microsoft Corp.*, 309 F.3d 193, 212–13 (4th Cir. 2002) (applying hyperpleading in antitrust case and citing *Iodice*); *Keene v. Thompson*, 232 F. Supp. 2d 574, 579 (M.D.N.C. 2002) (using hyperpleading in civil rights case and citing *Iodice*); *Barbier v. The Durham County Bd. of Educ.*, 225 F. Supp. 2d 617, 624 (M.D.N.C. 2002) (same).

lawsuit filed by a group of New York teenagers against McDonald's—*Pelman v. McDonald's Corp.*³⁸⁷ The suit alleges both negligence claims and violations of the state Consumer Protection Act. At bottom, the claims center around the idea that McDonald's knew that its food was unhealthy, yet continued to make and market it without disclosing the associated risks, and as a result minors who consumed the food have become obese.³⁸⁸ All the claims were dismissed by the district court for failure to meet heightened pleading standards.³⁸⁹ While the district court granted leave to amend and even suggested ways to comply with its elevated threshold,³⁹⁰

387. 237 F. Supp. 2d 512 (S.D.N.Y. 2003).

388. *Id.* at 516. As to negligence, the plaintiffs allege McDonald's acted negligently by selling dangerous products, failing to warn that its food could lead to health problems, and for marketing an addictive product. *Id.* at 520. The Consumer Protection Act claims include: failing to disclose the ingredients and health effects of the high-fat food, describing its food as nutritious, encouraging consumers to buy "value meals" without disclosing negative health effects, and marketing to children. *Id.*

389. The district court explicitly dismissed the Consumer Protection Act claims for failure to meet heightened pleading requirements. *Id.* at 526 ("A plaintiff must plead with specificity the allegedly deceptive acts or practices that form the basis of a claim under the Consumer Protection Act."). For some of the allegations, the record reflects McDonald's had actual notice. *See id.* at 527 (noting specific deceptive acts presented in opposition papers). For others, the court admits the plaintiffs pleaded the acts, but failed "to show why the omission was deceptive." *Id.* at 529. For still others, the court appears to impose substantive proof obligations at the pleading stage. *See id.* ("The plaintiffs fail to allege that the information with regard to the nutritional content of McDonalds' products was solely within McDonalds' possession or that a consumer could not reasonably obtain such information."). These types of specific allegations would be unnecessary under a simplified notice standard. This erroneous extension of heightened pleading to the Consumer Protection Act is already being applied in subsequent cases. *See Rey-Willis v. Citibank, N.A.*, No. 03 Civ. 2006(SAS), 2003 WL 21714947, at *7 (S.D.N.Y. July 23, 2003) (applying Rule 9(b)'s heightened pleading requirement to a Consumer Protection Act claim and citing *Pelman*).

The court is less explicit in its treatment of the negligence claims. Still heightened standards are present. For example, the court states that the complaint "does not specify how often the plaintiffs ate at McDonalds" and "fails to allege with sufficient specificity that the McDonalds' products were a proximate cause of plaintiffs' obesity and health problems." *Pelman*, 237 F. Supp. 2d at 538, 540. These are unquestionably targeted heightened pleading requirements. The court, however, left no doubt about its heightened standard as it concluded: "While some of these questions necessarily may not be answered until discovery (should this claim be replead [sic] and survive a motion to dismiss), . . . a complaint must contain some specificity in order to survive a motion to dismiss."). *Id.* at 542.

390. *Pelman*, 237 F. Supp. 2d at 543 (granting leave to amend). The district court recently dismissed the plaintiffs' amended complaint and denied leave to amend. *See Pelman v. McDonald's Corp.*, No. 02 Civ. 7821(RWS), 2003 WL 22052778, at *15 (S.D.N.Y. Sept. 3, 2003). Prior to oral argument, the plaintiffs dropped their negligence claim and proceeded solely on the statutory Consumer Protection Act claims. *Id.* at *2. Despite having pleaded that one plaintiff ate McDonald's food "five times per week, ordering two meals per day," and the court's own recognition that "[s]uch frequency is sufficient to begin to raise a factual issue" as to the role McDonald's food played in the plaintiff's health problems, the court dismissed for failure to adequately plead causation. *Id.*

one issue remains central: the court was motivated by a fear of future frivolous “McLawsuits.”³⁹¹ To prevent this specter from occurring, the court chose heightened pleading as its tool “to protect against crushing exposure to liability.”³⁹²

Pleading practice in the negligence area thus reflects the pleading model. Simplified notice pleading still dominates. However, Rule 9(b)-type heightened pleading exists. Even hyperpleading proves resilient in this area. Equally significant is the interrelationship between non-notice pleading standards and fraud and frivolousness justifications.³⁹³

H. RICO

The Racketeer Influenced and Corrupt Organizations Act (RICO)³⁹⁴ is a statutory tool designed to tackle the problem of organized crime.³⁹⁵ To successfully state a RICO claim, a plaintiff must prove four elements: “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.”³⁹⁶ The statute then defines “racketeering activity” through a list of criminal activities known as predicate acts for RICO purposes.³⁹⁷ RICO permits any person injured in his business or property by a pattern of racketeering activity to sue the racketeer in

at *11. According to the court, the plaintiffs also should have included information about what else they ate, their amounts of exercise, and family histories of disease. *Id.* Otherwise, “McDonald’s does not have sufficient information to determine if its foods are the cause of plaintiffs’ obesity, or . . . only a contributing factor.” *Id.* If this is the *pleading* burden, one wonders what remains for trial.

391. *Pelman*, 237 F. Supp. 2d at 518.

392. *Id.* For additional commentary on the heightened pleading issue in *Pelman*, see Christopher M. Fairman, *No McJustice for the Fat Kids*, LEGAL TIMES, Feb. 17, 2003, at 42. Heightened pleading aside, the court’s decision has certainly been met with popular praise. See, e.g., James V. Grimaldi, *Legal Kibitzers See Little Merit in Lawsuit Over Fatty Food at McDonald’s*, WASH. POST, Jan. 27, 2003, at E10 (discussing the legal merits of the claims); *Big Mac Repels Attack*, BOSTON HERALD, Jan. 24, 2003, at 026 (“U.S. District Court Judge Robert Sweet in New York City deserves the thanks of a grateful nation for whacking the Big Mac lawsuit.”). But see Adam Cohen, *The McNugget of Truth in the Lawsuits Against Fast-Food Restaurants*, N.Y. TIMES, Feb. 3, 2003, at A24 (noting that the “Pelman plaintiffs have plainly identified a problem”), available at <http://www.nytimes.com/2003/02/03/opinion/03MON4.html>.

393. See *infra* subpart V.A.

394. 18 U.S.C. §§ 1961–1964 (2000).

395. See *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 487 (2d Cir. 1985) (discussing purpose of RICO), *rev’d on other grounds*, 473 U.S. 479 (1985); see also Michael Goldsmith, *Judicial Immunity for White-Collar Crime: The Ironic Demise of Civil RICO*, 30 HARV. J. ON LEGIS. 1 (1993) (detailing the nature and function of RICO).

396. *Sedima*, 473 U.S. at 496.

397. For example, bribery, mail fraud, wire fraud, and obstruction of justice are predicate acts. See 18 U.S.C. §§ 201 (bribery); 1341 (mail fraud); 1343 (wire fraud); 1503 (obstruction of justice). For a complete listing of predicate acts, see 18 U.S.C. § 1961(1).

federal court for treble damages.³⁹⁸ It is with this form of civil RICO that fact-based pleading requirements emerge.

The rise of various pleading standards coincides with the transformation of the use of RICO. Originally used to target organized crime, by the 1980s RICO became attractive to plaintiffs because of its treble damages and attorneys fees remedies.³⁹⁹ As RICO claims developed in the context of more conventional business relationships, federal courts split as to the propriety of RICO application.⁴⁰⁰ Confronted with the fear of growing dockets of RICO litigation,⁴⁰¹ some courts—such as the Second Circuit—developed pleading solutions.⁴⁰² The Second Circuit required pleading a prior criminal conviction against the defendant to establish a predicate act.⁴⁰³ The Supreme Court, while recognizing the attractiveness of civil RICO to plaintiffs, struck down this pleading requirement.⁴⁰⁴ However, the tensions that led the Second Circuit to deviate from notice pleading remain.⁴⁰⁵

Currently, RICO pleading practice encompasses an array of heightened pleading requirements, typically of the targeted variety.⁴⁰⁶ In fact, the judicial

398. 18 U.S.C. § 1964(c).

399. See 5 WRIGHT & MILLER, *supra* note 17, § 1251.1, at 352 (describing original purpose and explosion of litigation).

400. *Id.* at 353 (highlighting the “tremendous variation in practice . . . among the circuits”).

401. See *Sedima*, 473 U.S. at 481 (“The initial dormancy of this provision and its recent increased utilization are now familiar history.”).

402. See Michael Goldsmith & Evan S. Tilton, *Proximate Cause in Civil Racketeering Cases: The Misplaced Role of Victim Reliance*, 59 WASH. & LEE L. REV. 83, 98 (2002) (listing onerous pleading burdens as part of the “judicial assault” on civil RICO); Goldsmith, *supra* note 395, at 19–20 (describing judicial hostility to civil RICO by requiring undue specificity in pleadings).

403. *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 503 (2d Cir. 1985) (“To bring a private civil action, there must be a ‘violation,’ that is, criminal convictions on the underlying predicate offenses.”), *rev’d*, 473 U.S. 479 (1985).

404. See *Sedima*, 473 U.S. at 496; see also *W. Assocs. Ltd. P’ship v. Market Square Assocs.*, 235 F.3d 629, 636 (D.C. Cir. 2001) (noting Supreme Court’s recognition of the use of RICO against garden-variety lawsuits, but stressing Court’s unwillingness to countenance procedural restrictions). The Second Circuit also required proof of a special “racketeering injury.” The Court also rejected this requirement. *Sedima*, 473 U.S. at 498–99. For a complete discussion of *Sedima* see Goldsmith, *supra* note 395, at 13–15.

405. See, e.g., *In re Sumitomo Copper Litig.*, 995 F. Supp. 451, 455 (S.D.N.Y. 1998) (stating civil RICO has resulted in a flood of what should be state cases reframed to get treble damages).

406. See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1011–12 (2003) (concluding that for RICO violations “Rule 9(b) motions, often in conjunction with Rule 12(b)(6) motions, appear to be made routinely, and courts are now demanding more specificity and granting the motions with greater frequency than in the past or in other legal contexts”). Factual particularity is also imposed outside of pleadings by some courts through the use of RICO case statements. These standing court orders require particularity in the case statement document, thereby avoiding conflict with the Federal Rules. See, e.g., *Burke v. Town of E. Hampton*, No. 99-

rhetoric is that particularity must be applied “strictly”⁴⁰⁷ with “force”⁴⁰⁸ and “urgency.”⁴⁰⁹ The rationale is a common one with heightened pleading: a need to “flush out” potentially frivolous claims.⁴¹⁰ The need is magnified by the stigmatizing effect of racketeering allegations.⁴¹¹

The most prevalent use of fact-based pleading is applying Rule 9(b) to predicate acts. For example, RICO predicate acts that consist of acts of fraud must be pled with particularity.⁴¹² Conversely, if the predicate act does not involve fraud, Rule 9 should not apply.⁴¹³ There is universal application of this form of

CV-5798, 2001 WL 624821 (E.D.N.Y. Mar. 16, 2001) (dismissing RICO claim for failure to articulate specifics in complaint or RICO case statement); *Northland Ins. Co. v. Shell Oil Co.*, 930 F. Supp. 1069, 1073 n.5 (D.N.J. 1996) (detailing a dozen federal judicial districts routinely employing RICO Case Statements); *Wee v. Rome Hosp.*, No. 93-CV-498, 1996 WL 191970, at *5–6 (N.D.N.Y. Apr. 15, 1996) (requiring case statement and dismissing for failure to plead with particularity).

407. See *Sumitomo*, 995 F. Supp. at 455 (stating the “overwhelming trend” amongst the lower courts is to apply Rule 9(b) strictly in order to effect dismissal of civil RICO suits”).

408. *Nasik Breeding & Research Farm Ltd. v. Merck & Co.*, 165 F. Supp. 2d 514, 537 (S.D.N.Y. 2001) (“The courts of this Circuit have recognized that the policies behind Rule 9(b)’s particularity requirement apply with particular force in RICO actions.”).

409. *Sumitomo*, 995 F. Supp. at 455 (“Rule 9(b) has great ‘urgency’ in civil RICO actions.”).

410. See *Nasik*, 165 F. Supp. 2d at 537 (stating courts should “flush out” frivolous RICO claims because of stigmatizing effect on defendants); *Brooks v. Bank of Boulder*, 891 F. Supp. 1469, 1476 (D. Colo. 1995) (“The purpose of Rule 9(b) is to inhibit the filing of complaints as a pretext to discover unknown wrongs, to protect the defendant’s reputation, and to give notice to the defendant regarding the complained of conduct.”); *D’Orange v. Feely*, 877 F. Supp. 152, 158 (S.D.N.Y. 1995) (applying Rule 9(b) because of strike suits in civil RICO and discovery abuse); see also *Miller*, *supra* note 406, at 1011–12 (“Clearly, the more stringent application of Rule 9(b) reflects the concern that courts are overly burdened with disputes, and that in the fraud and RICO contexts, lawsuits are instituted too easily.”). But see *Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass’n*, 176 F.3d 315, 322 (6th Cir. 1999) (“The purpose of Rule 9(b) is to provide fair notice to the defendant so as to allow him to prepare an informed pleading responsive to the specific allegations of fraud.”).

411. See *Atl. Gypsum Co. v. Lloyds Int’l Corp.*, 753 F. Supp. 505, 512 (S.D.N.Y. 1990) (stating concerns over protection of defendant’s reputation are more immediate in RICO actions because they implicate the reputation interests by accusing of racketeering offenses).

412. See *DeMauro v. DeMauro*, No. 99-1589, 2000 WL 231255, at *2 (1st Cir. Feb. 16, 2000) (“It is well-settled in this circuit that when a plaintiff relies on predicate acts containing fraud, they are subject to Rule 9(b)’s heightened pleading requirement.”); *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 172 (2d Cir. 1999) (stating Rule 9(b) applies if predicate act sounds in fraud); *DeVries v. Taylor*, Civ. A. No. 92-B-409, 1993 WL 331001, at *2 (D. Colo. June 28, 1993) (applying Rule 9(b) to RICO claim based on fraudulent concealment).

413. See *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 919 (8th Cir. 2001) (“If the racketeering activity alleged were bribery, for example, Rule 9(b) would not apply . . .”); *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 945 F. Supp. 1355, 1379 (D. Or. 1996) (“However, as in this case, where the alleged RICO predicate acts do not involve fraud, the more lenient pleading standard in Rule 8(a)

targeted heightened pleading where mail or wire fraud is the predicate act.⁴¹⁴ However, when Rule 9(b) is applied to fraud-based predicate acts, the standard is far from universal. Some jurisdictions maintain that Rule 9(b) specificity is met by facts showing the time, place, and content of the alleged misrepresentation.⁴¹⁵ Other jurisdictions additionally require the identity of the persons, the purpose, or other facts.⁴¹⁶ In others, the burden is even more onerous because particularity is

applies.”); *Lewis v. Sporck*, 612 F. Supp. 1316, 1324 (N.D. Cal. 1985) (“The better rule of pleading the predicate acts is to apply the Federal Rules in the usual manner. Thus, when the predicate acts sound in fraud, they must be alleged with particularity as required by Rule 9(b). However, if the racketeering acts are not frauds, the general principles of pleading embodied in Rule 8 apply.”).

414. See *W. Assocs. Ltd. P’ship v. Market Square Assocs.*, 235 F.3d 629, 637 (D.C. Cir. 2001) (noting particularity necessary for RICO claims premised on mail and wire fraud); *N. Bridge Assocs., Inc. v. Boldt*, 274 F.3d 38, 43 (1st Cir. 2001) (applying Rule 9(b) to mail and wire fraud); *Anatian v. Coutts Bank (Switz.) Ltd.*, 193 F.3d 85, 88 (2d Cir. 1999); *Warden v. McLelland*, 288 F.3d 105, 114 (3d Cir. 2002) (“Where acts of mail and wire fraud constitute the alleged predicate racketeering acts, those acts are subject to the heightened pleading requirement of Rule 9(b).”); *Chisolm v. Transouth Fin. Corp.*, 164 F.3d 623, 1998 WL 709311, at *2 (4th Cir. Oct. 5, 1998) (unpublished) (applying Rule 9(b) to mail fraud); *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997) (“Fed. R. Civ. P. 9(b) applies to . . . RICO claims resting on allegations of fraud.”); *VanDenBroeck v. Commonpoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000) (applying Rule 9(b) to mail and wire fraud); *Slaney v. Int’l Amateur Athletic Fed’n*, 244 F.3d 580, 597 (7th Cir. 2001) (“Furthermore, allegations of fraud in a civil RICO complaint are subject to the heightened pleading standard of Fed. R. Civ. P. 9(b), which requires a plaintiff to plead all averments of fraud with particularity.”); *Murr Plumbing, Inc. v. Scherer Bros. Fin. Servs. Co.*, 48 F.3d 1066, 1069 (8th Cir. 1995) (“The particularity requirements of Rule 9(b) apply to allegations of mail fraud, 18 U.S.C. § 1341, and wire fraud, 18 U.S.C. § 1343, when used as predicate acts for a RICO claim.”); *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1530 (9th Cir. 1995) (applying Rule 9(b) to mail fraud); *Robbins v. Wilkie*, 300 F.3d 1208, 1211 (10th Cir. 2002) (noting Rule 9(b) applies to RICO wire and mail fraud); *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1380–81 (11th Cir. 1997) (requiring under Rule 9(b) allegations of precise statements, the time, place and person responsible for the statement, the content and manner in which the statements misled, and what the defendants gained by the alleged fraud). While Rule 9(b) is applied by every circuit to statutory mail and wire fraud, this is not compelled by the Federal Rules. Because the rules substantially predate RICO, the drafters did not contemplate its inclusion. Another interpretation of Rule 9(b) is to restrict it to common law fraud alone. See Fairman, *supra* note 6, at 598 (distinguishing between common law fraud and statutory securities fraud).

415. *DeMauro v. DeMauro*, No. 99-1589, 2000 WL 231255, at *2 (1st Cir. Feb. 16, 2000) (“Thus, in order to survive a motion to dismiss, the plaintiff must state the time, place, and content of the alleged misrepresentation perpetuating that fraud.”); *Advocacy Org.*, 176 F.3d at 322 (articulating the Sixth Circuit’s rule as requiring time, place and content of the alleged misrepresentation); *Fed. Freeport Transit, Inc. v. McNulty*, 239 F. Supp. 2d 102, 109 (D. Me. 2002) (requiring the time, place, and content of alleged fraudulent statements be alleged with specificity); *Frank E. Basil, Inc. v. Leidesdorf*, 713 F. Supp. 1194, 1198 (N.D. Ill. 1989) (“Read together, the rules require a party to plead the time, place and contents of the fraud, but do not require the party to plead all of his or her evidence.”).

416. See *Lachmund v. ADM Investor Servs., Inc.*, 191 F.3d 777, 784 (7th Cir. 1999) (“The complaint must be specific with respect to the time, place and content of the

applied to the scienter element of mail or wire fraud requiring facts giving rise to a strong inference of intent.⁴¹⁷ Despite the difference in how Rule 9(b) is applied, the heightened pleading is still targeted; it does not apply to all the elements of civil RICO.⁴¹⁸

alleged false representations, the method by which the misrepresentations were communicated, and the identities of the parties to those misrepresentations.”); *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997) (“Pleading fraud with particularity in this circuit requires ‘time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby.’”) (alterations in original); *Nasik Breeding & Research Farm Ltd. v. Merck & Co.*, 165 F. Supp. 2d 514, 537 (S.D.N.Y. 2001) (“In addition to specifying the allegedly fraudulent statements, and the speaker, time, and place of such statements, plaintiffs asserting mail or wire fraud must also ‘identify the purpose of the mailing within the defendant’s fraudulent scheme.’”); *Burke v. Town of E. Hampton*, No. 99-CV-5798, 2001 WL 624821, at *14 (E.D.N.Y. Mar. 16, 2001) (“Allegations of mail fraud, such as those set forth in the complaint, must specify (1) the content of the communication; (2) the parties involved; (3) where and when the communications took place; and (4) why the communications were fraudulent.”).

417. See *S.Q.K.F.C., Inc. v. Bell Atl. Tricon Leasing Corp.*, 84 F.3d 629, 634 (2d Cir. 1996) (requiring RICO mail fraud claim to “allege facts that give rise to a strong inference of fraudulent intent”); *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176 (2d Cir. 1993) (requiring scienter with mail fraud to be pleaded with facts giving rise to a strong inference); *Allen v. New World Coffee, Inc.*, No. 00-CIV-2610 AGS, 2001 WL 293683, at *4 (S.D.N.Y. Mar. 27, 2001) (stating plaintiffs must allege facts that give rise to a strong inference of intent with mail or wire fraud); *Volmar Distribs., Inc. v. New York Post Co.*, 899 F. Supp. 1187 (S.D.N.Y. 1995) (dismissing RICO claims for failure to allege intent to defraud); *Atl. Gypsum Co. v. Lloyds Int’l Corp.*, 753 F. Supp. 505, 513 (S.D.N.Y. 1990) (requiring pleading “facts that give rise to a strong inference of scienter” as element of mail and wire fraud); *Celpaco, Inc. v. MD Papierfabriken*, 686 F. Supp. 983, 989 (D. Conn. 1988) (requiring facts constituting scienter). This approach, of course, is contrary to Rule 9(b) that allows intent to be averred generally. See FED. R. CIV. P. 9(b) (“Malice, intent, knowledge, and other condition of mind of a person may be averred generally.”). The burden is more onerous because specific facts relating to intent are likely in the hands of the defendant. This is similar to the unfair burden applied to civil rights plaintiffs where they are required to plead subjective intent with particularity. See *supra* notes 264–69 and accompanying text (describing pleading in subjective intent cases); Fairman, *supra* note 6, at 592–93 (arguing heightened pleading is inherently unworkable with subjective intent). However, RICO scienter heightened pleading is potentially harsher because it requires facts giving rise to a *strong inference* of intent.

418. See *Freeport*, 239 F. Supp. 2d at 109 (stating Rule 9(b) applies to RICO claims premised on mail or wire fraud, but only to the fraud allegations not every element of the RICO claim).

Those courts requiring Rule 9(b) particularity often temper it.⁴¹⁹ For example, if there is sufficient factual pleading of the fraudulent scheme, as opposed to the misrepresentations themselves, the rule can be met.⁴²⁰ The Eighth Circuit uses a precise version of this standard. First, the court of appeals stresses that routine business communications may suffice to make a scheme of mail or wire fraud, instead of the commonly-noted misrepresentations of fact.⁴²¹ If the communications alleged are ordinary business letters and phone calls, Rule 9(b) is relaxed. Noting that “the drafters of Rule 9(b) most likely did not intend to require specific pleading of such facts”⁴²² and that there “is no risk of damage to a defendant’s reputation”⁴²³ from routine communications, Rule 9(b) should be applied to promote the liberality of notice pleading.⁴²⁴

The burden of heightened pleading can also be tempered by availability of discovery. Noting a “special gloss” to Rule 9(b) in the RICO context,⁴²⁵ the First Circuit uses a “second determination” approach. If a complaint alleging mail or wire fraud fails to meet the Rule 9(b) standard, and the information is in the hands of the defendant, a second determination is made by the district court as to whether discovery should be allowed.⁴²⁶ While the First Circuit notes that facts

419. See *id.* at 118 (dismissing RICO claim based on wire fraud that satisfied notice under *Swierkiewicz* but failed to meet Rule 9(b)’s heightened pleading requirement, but allowing 60 days focused discovery on time, place, content); *A-Valey Eng’rs, Inc. v. Bd. of Chosen Freeholders*, 106 F. Supp. 2d 711, 715 (D.N.J. 2000) (noting that while date, place, and time allegations satisfy Rule 9(b), such allegations are not required); *Colonial Penn Ins. Co. v. Value Rent-A-Car Inc.*, 814 F. Supp. 1084, 1092 (S.D. Fla. 1992) (stating allegations of date, time, and place satisfy Rule 9(b), but alternative means are also available); *Towers Fin. Corp. v. Solomon*, 126 F.R.D. 531, 535 (N.D. Ill. 1989) (“However, plaintiffs are not expected to specify the exact time and particular place of each misrepresentation or omission.”).

420. See *Warden v. McLelland*, 288 F.3d 105, 114–15 (3d Cir. 2002) (applying Rule 9(b) to wire fraud, noting complaint does not state how the communications were misleading, but noting there was an overall picture of what has been alleged warranting reexamination by district court of previous dismissal); *In re Sumitomo Copper Litig.*, 995 F. Supp. 451, 456 (S.D.N.Y. 1998) (finding that if specific mailings were fraudulent, plaintiff must specify fraud, parties, when, and where, but if the mail was only used in plan to defraud then only detailed description of scheme and connection with mail meets 9(b)); *Spira v. Nick*, 876 F. Supp. 553, 559 (S.D.N.Y. 1995) (holding Rule 9(b) does not require mail and wire communications as elements of predicate acts to be alleged with particularity if they are not false and misleading).

421. *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 918 (8th Cir. 2001).

422. *Id.* at 920.

423. *Id.*

424. *Id.* at 921. Consequently, in a case of mail or wire fraud that does not involve a misrepresentation of fact, the Rule 9(b) “circumstances” would consist of four elements: (1) a scheme to defraud; (2) intent to defraud; (3) reasonable foreseeability that the mails or wires would be used; and (4) use of the mails or wires in furtherance of the scheme. *Murr Plumbing, Inc. v. Scherer Bros. Fin. Servs. Co.*, 48 F.3d 1066, 1070 n.6 (8th Cir. 1995); *Davies v. Genesis Med. Ctr.*, 994 F. Supp. 1078, 1089–90 (S.D. Iowa 1998).

425. *Ahmed v. Rosenblatt*, 118 F.3d 886, 889–90 (1st Cir. 1997).

426. See *New England Data Servs., Inc. v. Becher*, 829 F.2d 286, 290 (1st Cir. 1987) (holding that dismissal in mail/wire fraud RICO should not be automatic if Rule 9(b)

being peculiarly in defendants' hands is likely with mail fraud,⁴²⁷ the second determination is not automatic.⁴²⁸ Rather, the plaintiff must be specific as to what is in the defendants' possession and aggressively pursue discovery.⁴²⁹ Other jurisdictions similarly allow discovery if the information needed to meet Rule 9(b) is within the defendant's control.⁴³⁰

While mail and wire fraud present the most active areas of targeted heightened pleading, other areas also exist. Consider conspiracy.⁴³¹ Civil RICO also provides a cause of action based on conspiracy.⁴³² Some jurisdictions apply heightened pleading to these conspiracy claims.⁴³³ Others, however, require only simplified notice pleading.⁴³⁴ Even so, some notice-pleading courts still use

not met, but if specific information is in hands of defendants, a second determination should be made as to whether discovery should be allowed).

427. See *id.* at 291 ("However, it seems more likely that the facts would be peculiarly within the defendants' control in the context of RICO mail and wire fraud rather than in general securities fraud. The specifics required for the latter are much less demanding in the sense that they merely require a showing that fraud was actually committed. In RICO, the plaintiff must go beyond a showing of fraud and state the time, place and content of the alleged mail and wire communication perpetuating that fraud. Discovery is warranted to a greater extent in mail and wire fraud.").

428. See *Ahmed*, 118 F.3d at 890 ("We must stress again that the application of the *Becher* second determination is neither automatic, nor of right, for every plaintiff.").

429. See *N. Bridge Assocs., Inc. v. Boldt*, 274 F.3d 38, 43–44 (1st Cir. 2001) (applying *Becher* and concluding the district court did not abuse its discretion by dismissing without discovery because plaintiff did not seek opportunity and allegations were not specific as to episodes whose details could be expected to be in the hands of the defendants).

430. See *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 921 (8th Cir. 2001) ("We think it only fair to give them that benefit [discovery] before requiring them to plead facts that remain within the defendant's knowledge."); *Corley v. Rosewood Care Ctr., Inc. of Peoria*, 142 F.3d 1041, 1051 (7th Cir. 1998) ("We have noted on a number of occasions that the particularity requirement of Rule 9(b) must be relaxed where the plaintiff lacks access to all facts necessary to detail his claim"); *Emery v. Am. Gen. Fin., Inc.*, 134 F.3d 1321, 1323 (7th Cir. 1998) (accord); *Arenson v. Whitehall Convalescent & Nursing Home, Inc.*, 880 F. Supp. 1202, 1208 (N.D. Ill. 1995) ("However, Rule 9(b)'s requirement that fraud be alleged with particularity is relaxed where facts that the plaintiff would otherwise be required to plead are in the exclusive possession of the defendants.").

431. See *supra* subpart IV.D (conspiracy).

432. 18 U.S.C. § 1962(d) (2000).

433. See *Gubitosi v. Zegeye*, 946 F. Supp. 339, 346 (E.D. Pa. 1996) ("Plaintiffs are required to give defendants some detail about the conspiracy alleged, for example, the time period in which the actions allegedly took place, the object of the conspiracy, the actions taken in furtherance of the scheme, facts evidencing an agreement among the conspirators, and facts showing that defendants knew their actions constituted racketeering."); *Frymire v. Peat, Marwick, Mitchell & Co.*, 657 F. Supp. 889, 896 (N.D. Ill. 1987) (alleging a conspiracy to violate RICO requires particularity); *Moravian Dev. Corp. v. Dow Chem. Co.*, 651 F. Supp. 144, 148 (E.D. Pa. 1986) (requiring a RICO conspiracy to be pleaded with specificity to inform defendants of the facts forming the basis of the conspiracy and delineate among the defendants as to their participation).

434. See *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 600 (7th Cir. 2001) (applying notice pleading to conspiracy allegation); *Venzor v. Gonzalez*, No. 96 C

rhetoric implying fact-based requirements.⁴³⁵ Additionally, while the Supreme Court appears to foreclose heightened pleading for RICO damages,⁴³⁶ heightened pleading is sometimes applied to proximate cause.⁴³⁷

The application of heightened pleading to RICO is complex indeed. The mix of multiple substantive areas already imposing heightened pleading—such as common law fraud,⁴³⁸ conspiracy,⁴³⁹ and securities fraud⁴⁴⁰—with RICO

413, 1997 WL 102538, at *5 n.12 (N.D. Ill. Mar. 5, 1997) (“[I]mposing a heightened pleading requirement for RICO conspiracy claims is unlikely to be supportable after *Leatherman*.”); *Am. Buying Ins. Servs., Inc., v. S. Kornreich & Sons, Inc.*, 944 F. Supp. 240, 247, (S.D.N.Y. 1996) (“It is well-settled in this Circuit that the heightened pleading requirements of Fed. R. Civ. P. 9(b) do not apply to the averment of conspiracy under Section 1962(d).”); *D’Orange v. Feely*, 877 F. Supp. 152, 159 (S.D.N.Y. 1995) (same); *Spira v. Nick*, 876 F. Supp. 553, 561 (S.D.N.Y. 1995) (same); *United States v. Gigante*, 737 F. Supp. 292, 298 (D.N.J. 1990) (applying Rule 8 to conspiracy allegation).

435. See *A-Valey Eng’rs, Inc. v. Bd. of Chosen Freeholders*, 106 F. Supp. 2d 711, 718 (D.N.J. 2000) (stating RICO conspiracy is not subject to Rule 9, but plaintiff still must allege “facts constituting the conspiracy, its object and accomplishments” (quoting *Black & Yates, Inc. v. Mahogany Ass’n, Inc.*, 129 F.2d 227, 232 (3d Cir. 1941))).

436. Plaintiffs who bring civil RICO claims under 18 U.S.C. § 1962 must show damage to their business or property as a result of defendant’s conduct to have standing. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). In *NOW v. Scheidler*, 510 U.S. 249 (1994), the Court held “that at the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice.” *Id.* at 256. Accordingly, “[n]othing more is needed to confer standing” than an allegation that the RICO conspiracy had injured the plaintiff’s business and/or property interests. *Id.* The courts of appeals fall in line. See *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1168 (9th Cir. 2002) (stating that at the pleading stage, general factual allegations of injury suffice citing *NOW*); *Robbins v. Wilkie*, 300 F.3d 1208, 1211 (10th Cir. 2002) (“[W]e hold that at the pleading stage of civil RICO actions, a plaintiff must plead damages to business or property in a manner consistent with Rule 8 to show standing and is not required to plead with the particularity required by Rule 9(b).”).

437. See *Browning v. Clinton*, 292 F.3d 235, 249 (D.C. Cir. 2002) (dismissing RICO claim where plaintiff “pleads no facts suggesting some direct relation between the injury asserted and the injurious conduct alleged—in other words proximate causation”).

438. See FED. R. CIV. P. 9(b); *supra* notes 21–25 and accompanying text (describing Rule 9(b) and fraud).

439. See *supra* subpart IV.D (analyzing conspiracy pleading).

440. Heightened pleading was originally judicially-imposed in securities fraud cases. See *Fairman*, *supra* note 6, at 597–600 (detailing court-imposed heightened pleading in securities litigation). In 1995, particularity requirements were codified in the PSLRA. 15 U.S.C.A. § 78u-4(b) (West 2002). At the same time, securities fraud was dropped from the list of RICO predicate acts. See *Cyber Media Group, Inc. v. Island Mortgage Network, Inc.*, 183 F. Supp. 2d 559, 578–79 (E.D.N.Y. 2002) (noting PSLRA removed securities fraud as a predicate offense in civil RICO). Undoubtedly, securities fraud heightened pleading had already left a mark. This is clearly seen in the Second Circuit’s requirement of mail/wire fraud scienter being pleaded with facts giving rise to a strong inference of intent. See *supra* note 417 and accompanying text. This is exactly the same standard once used by the Second Circuit in securities fraud and now codified in the PSLRA. Compare *In re Time Warner Sec. Litig.*, 9 F.3d 259, 268 (2d Cir. 1993) (requiring “facts alleged in the complaint ‘give rise to a “strong inference” of fraudulent intent’”), with 15 U.S.C.A. § 78u-4(b)(2)

undoubtedly contributes to its use. Still, much of the macro pleading model presents itself. Broad, conclusory allegations are rejected.⁴⁴¹ Simplified notice pleading exists. However, the presence of targeted heightened pleading approaching the full of Rule 9(b) also thrives. Some jurisdictions even exceed Rule 9 with scienter heightened pleading. The ameliorative efforts of some courts notwithstanding, RICO is riddled with various degrees of fact-based requirements.

V. THE DISCONNECT BETWEEN MYTH AND MODEL

Analysis of the substance specific areas produces a pleading model at odds with the rhetoric of notice pleading. Many factors undoubtedly lead to this disconnect. The perceptions of federal court judges about frivolous cases, protection of defendants, and need for docket control obviously contribute to their search for quick alternatives. Why courts then choose fact-based pleading variants is another issue. Part of the explanation is the pre-existing presence of heightened pleading in other areas. These experiences bleed into other substantive areas. All the while, the Supreme Court espouses notice pleading, but misdirects district courts to consider heightened pleading alternatives.

A. Judicial Perceptions and Docket Realities

Of the many similarities in the application of non-notice pleading, none is more prevalent than the perception of frivolousness.⁴⁴² Rooted in the rationale of common law fraud,⁴⁴³ quickly putting an end to meritless strike suits is used as a basis of heightened pleading in such varied substantive areas as CERCLA, civil rights, conspiracy, defamation, negligence, and RICO.⁴⁴⁴ This belief in categories of cases being presumptively frivolous, in itself a commonality, also fosters deviation from notice pleading.

(requiring complaint to “state with particularity facts giving rise to a strong inference that the defendant acted with the requisite state of mind”).

441. See *De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir. 1996) (stating conclusory allegations fails liberal standards of the Rules).

442. While many types of claims get labeled “frivolous,” the term is most often used without any attempt to define what precisely is a frivolous lawsuit. See Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 520, 529 (1997) (describing the lack of a commonly accepted definition of a frivolous suit). Because this discussion focuses on judicial perceptions, a precise definition is unnecessary.

443. See *supra* note 23 (describing frivolousness justification in fraud cases).

444. See *supra* notes 219, 233 and accompanying text (highlighting dismissal of frivolous CERCLA claims as motivation for heightened pleading); 258 and accompanying text (describing frivolousness rationale in civil rights heightened pleading); 287 and accompanying text (describing sham case rationale of conspiracy heightened pleading); 360–61 and accompanying text (discussing disfavored status of defamation claims); 391–92 and accompanying text (discussing frivolousness fears in negligence suits); 410 and accompanying text (noting use of heightened pleading to flush out frivolous RICO claims); see also ROBERT G. BONE, *CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE* 127–28 (2003) (commenting that strict pleading is designed “to give the defendant notice and screen frivolous suits”).

For example, this presumption correlates to a protection-of-defendants rationale that manifests in two distinct ways. One is protection from abusive discovery. While all discovery is potentially burdensome, the combination of a claim that is easy to allege yet risks voluminous discovery—such as antitrust and civil RICO—often justifies particularity.⁴⁴⁵ Potential damage to reputation is a second justification for defendant protection. This is also magnified by substantive areas where defendants might be especially susceptible to reputational damage such as in fraud or racketeering allegations in civil RICO.⁴⁴⁶ The perception of large numbers of potentially meritless claims clogging judicial dockets is also a familiar theme.⁴⁴⁷ Consequently, it is not surprising that in many areas courts offer docket control as another justification.⁴⁴⁸

This combined perception of large numbers of potentially frivolous cases damaging defendants' reputations and subjecting them to unnecessary discovery is just that—a judicial perception. Even though it manifests in many opinions, this judicial belief lacks foundation, except purely anecdotal comments.⁴⁴⁹ While frivolousness may have little support, a growing body of literature directly challenges the value of heightened pleading to improve adjudication because of the cost of improper dismissal of potentially meritorious cases.⁴⁵⁰ Nonetheless, a

445. See *supra* notes 177 and accompanying text (noting discovery fears contributing to heightened pleading in the antitrust context); 410 and accompanying text (demonstrating discovery pressure as justification for RICO heightened pleading).

446. See *supra* note 411 and accompanying text (noting reputational damage in RICO cases); see also *supra* notes 264, 270 and accompanying text (justifying civil rights heightened pleading on protection of defendant grounds); 288 and accompanying text (describing protection of defendant as goal in conspiracy heightened pleading).

447. See BONE, *supra* note 444, at 18 (“There is widespread belief that frivolous suits are responsible for many of the court system’s most serious problems, including huge case backlogs, long trial delays, high litigation costs, and excessive liability chills innovation and impedes vigorous competition.”); Grundfest & Pritchard, *supra* note 7, at 680 (describing in securities fraud how judges with the most active dockets are more skeptical of plaintiffs’ claims). Few would gainsay that federal courts have crowded dockets. See Hillary A. Sale, *Judging Heuristics*, 35 U.C. DAVIS L. REV. 903, 905, 945 (2002) (describing docket crisis).

448. See *supra* notes 226–27 and accompanying text (describing docket control as motivation for CERCLA heightened pleading); 401–02 and accompanying text (describing RICO heightened pleading as a docket control device); cf Sale, *supra* note 447, at 945 (arguing that in statutory securities fraud cases PSLRA heightened pleading decisions reflect frustration with crowded dockets).

449. See BONE, *supra* note 444, at 18–19 (noting the widespread belief in frivolous litigation, but general absence of any empirical basis); Miller, *supra* note 406, at 996 (“The foregoing shows that the supposed litigation crisis is the product of assumption; that reliable empirical data is in short supply; and that data exist that support any proposition.”); cf Sale, *supra* note 447, at 950 (noting the impossibility of knowing whether suit is a strike suit or not); Charles M. Yablon, *A Dangerous Supplement? Longshot Claims and the Private Securities Litigation*, 94 NW. U. L. REV. 567, 572 (2000) (describing the impossibility of empirically showing frivolous securities cases).

450. See BONE, *supra* note 444, at 155 (concluding “a strict pleading rule is virtually certain to increase false positives, expected process costs, or both”); Bone, *supra* note 442, at 589 (concluding that the case for strict pleading is “much weaker than

perception of frivolousness is a binding tie that connects many of the non-notice standards of pleading prevalent today.

B. Pleading Cross-Pollination

When courts look to impose fact-based requirements, they freely borrow from other substantive areas. This pleading cross-pollination undoubtedly contributes to the spread of non-notice standards. Fraud is the seed.⁴⁵¹ Rule 9(b) particularity in fraud leads to the proliferation of heightened pleading in two distinct ways. First, the rationales for fraud heightened pleading are incorporated as justifications in other substantive areas. This manifests in such diverse areas as CERCLA, civil rights, and defamation.⁴⁵² Second, claims with fraud as a component, such as conspiracy to defraud or fraud-based RICO predicate acts, import fraud particularity.⁴⁵³ Heightened pleading under Rule 9(b) for fraud continues to cast a long shadow over pleading practice.

The “inequitable conduct” defense to patent infringement is a classic example of the overreaching influence of Rule 9(b) fraud on heightened pleading in nonfraud areas.⁴⁵⁴ The inequitable conduct affirmative defense arises where someone withholds or misrepresents material information with the intent to deceive or mislead the Patent Office.⁴⁵⁵ Unfortunately for pleading practice, this defense is routinely referred to as “fraud on the Patent Office.”⁴⁵⁶ As such, courts

commonly supposed” and that the “benefits are probably limited and the costs potentially quite high”); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 437 (1973) (contending that notice pleading rules probably decrease the number of meritorious claims that are dismissed). Much of the scholarship challenging the value of heightened pleading is in the securities fraud context. See *Developments in the Law: The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1806 (2000) (noting the effect of the PSLRA is to make it harder for meritorious claims to survive); Sale, *supra* note 447, at 950–51 (describing the likely dismissal of cases where fraud actually occurred under heightened pleading in the PSLRA); Yablon, *supra* note 449, at 593–95 (criticizing use of heightened pleading to deter longshot securities claims).

451. See *supra* notes 117–22 and accompanying text (describing Rule 9(b) and particularity).

452. See *supra* notes 238 and accompanying text (CERCLA and fraud); 359 and accompanying text (defamation and Rule 9(b)); see also Fairman, *supra* note 6, at 575–76 (describing parallels between fraud and civil rights rationales).

453. See *supra* notes 300 and accompanying text (conspiracy to defraud); 412–17 (applying Rule 9(b) to RICO predicate acts based on fraud); see also *supra* note 205 and accompanying text (noting heightened pleading for fraudulent concealment in antitrust cases).

454. For complete treatment of the heightened pleading issues involved with the inequitable conduct defense, see generally David Hricik, *Wrong About Everything: The Application by the District Courts of Rule 9(b) to Inequitable Conduct*, 86 MARQ. L. REV. 895 (2003).

455. *Fiskars, Inc. v. Hunt Mfg. Co.*, 221 F.3d 1318, 1326 (Fed. Cir. 2000).

456. See Hricik, *supra* note 454, at 913 (“It is ‘deceptively simple’ to conclude that inequitable conduct is within the scope of Rule 9(b) because inequitable conduct has long been referred to as fraud on the Patent Office, and the cases referring to inequitable conduct as such are legion.”).

just as routinely apply Rule 9(b) particularity⁴⁵⁷ even though the affirmative defense is both substantively different from fraud⁴⁵⁸ and the fraud rationales seem inapplicable.⁴⁵⁹

Fraud may be the seed, but there is a crop of criss-crossing claims borrowing from each other when applying heightened pleading. Antitrust cases borrow from conspiracy when that element is targeted for heightened pleading.⁴⁶⁰ CERCLA is linked to civil rights, securities fraud, RICO, and antitrust.⁴⁶¹ The interrelationship between conspiracy and antitrust, civil rights, and RICO is also clear.⁴⁶² Civil RICO, in turn, not only relates to conspiracy and fraud, but also to securities fraud.⁴⁶³ These interrelationships offer some insight into the rejection of notice pleading. Judges facilitate the spread of non-notice standards because of their familiarity in other contexts.

C. Supreme Court (Mis)Guidance

Even though the Supreme Court appears to consistently trumpet a notice pleading standard, the high court is partially responsible for the disconnect between pleading rhetoric and practice. In all of the recent pleading cases, the Court leaves a lifeline for fact-based pleading, even while denouncing it. This language is seized upon by lower courts unwilling to relinquish heightened pleading standards.

Start with *Siegert v. Gilley*.⁴⁶⁴ The Court originally granted certiorari to decide whether a heightened pleading standard in a *Bivens* action precluded limited discovery.⁴⁶⁵ However, Rehnquist's majority opinion recast the grounds for granting review and disposed of the case at "an analytically earlier stage."⁴⁶⁶ Completely dodging the issue upon which certiorari was granted by itself probably contributed to heightened pleading's vitality, at least in the civil rights context. Justice Kennedy's outright endorsement in his concurrence energized the doctrine.⁴⁶⁷ Justice Marshall, joined by Blackmun and Stevens, dissented finding

457. See *id.* at 905 & n.42 (listing the "long line of district courts" so holding).

458. See *id.* at 913 (describing substantive differences between common law fraud and inequitable conduct).

459. See *id.* at 920–34 (outlining policy differences between fraud particularity and inequitable conduct).

460. See *supra* notes 182–86, 204 and accompanying text (discussing the application of targeted heightened pleading to the conspiracy element in antitrust actions).

461. See *supra* notes 234–40 and accompanying text (applying heightened pleading for CERCLA based on parallels to other substantive areas).

462. See *supra* note 302 and accompanying text (discussing the link between conspiracy and other areas).

463. See *supra* note 433 and accompanying text.

464. 500 U.S. 226 (1991).

465. *Siegert*, 500 U.S. at 237 (Marshall, J., dissenting).

466. *Id.* at 227.

467. Kennedy called the use of heightened pleading in the context of official immunity a workable solution to avoid disruptive discovery. *Id.* at 235–36 (Kennedy, J., concurring). Indeed, Kennedy's language would later serve as a justification for use of

“no warrant for such a rule as a matter of precedent or common sense.”⁴⁶⁸ Thus, the Court’s uncertainty left heightened pleading intact.

On the heels of *Siegert* came *Leatherman*. Unfortunately, its holding is narrow—applying solely to heightened pleading in § 1983 cases against municipalities.⁴⁶⁹ However, the rhetoric of *Leatherman* is sweeping focusing on the system of pleading created by the Federal Rules and the preference for resolving cases on the merits.⁴⁷⁰ Even so, the Court explicitly left open a huge door: “We thus have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials.”⁴⁷¹ This became the reservation upon which courts of appeals anchored the retention of heightened pleading in civil rights cases.⁴⁷²

When the Supreme Court took aim at the heightened burden of proof used by the D.C. Circuit in civil rights cases involving subjective intent, it also created confusion for pleading practice.⁴⁷³ The rhetoric of *Crawford-El* certainly reinforces the importance of the Federal Rules and explains the need for rule-based solutions for meritless cases.⁴⁷⁴ However, by resurrecting the pro-heightened pleading language of Justice Kennedy in *Siegert*,⁴⁷⁵ the Court provided another out for circuits enamored with fact-pleading.⁴⁷⁶

Even *Swierkiewicz* leaves some room to maneuver. While its main thrust reinforces all the premises of notice pleading,⁴⁷⁷ the heightened pleading gate remains cracked. For example, the unanimous Court said: “Rule 8(a)’s simplified pleading standard applies to all civil actions, *with limited exceptions*.”⁴⁷⁸ Again, the Court notes the possibility of heightened pleading: “Thus, complaints in these

heightened pleading. Kennedy’s critical quote is: “Upon the assertion of a qualified immunity defense the plaintiff must put forward specific, nonconclusory factual allegations which establish malice or face dismissal.” *Id.* at 236.

468. *Id.* at 246 (Marshall, J., dissenting).

469. *See supra* subpart II.B (discussing *Leatherman*).

470. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

471. *Id.* at 166–67.

472. *See supra* notes 264–67 and accompanying text (highlighting heightened pleading in immunity context).

473. *Crawford-El v. Britton*, 523 U.S. 574 (1998); *see supra* note 67 (discussing *Crawford-El*).

474. *Crawford-El*, 523 U.S. at 594–98.

475. “Thus, the court may insist that the plaintiff ‘put forward specific, nonconclusory factual allegations’ that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment.” *Id.* at 598 (quoting Kennedy’s concurrence in *Siegert* that endorsed the use of heightened pleading).

476. *See infra* note 264 (noting courts imposing and rejecting heightened pleading on this same language).

477. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512–15 (2002).

478. *Id.* at 513 (emphasis added).

cases, *as in most others*, must satisfy only the simple requirements of Rule 8(a).⁴⁷⁹ Even as announcing the rule, the Court anticipates exceptions.

Parsing the Supreme Court's language affects heightened pleading's resilience. This is most clearly seen in the civil rights area as courts look for loopholes to keep fact-based pleading that is inconsistent with simplified notice pleading. If heightened pleading continues in civil rights cases—after the litany of recent Supreme Court cases—its presence in other areas is not surprising. Indeed, the Court's deliberate focus on civil rights heightened pleading, to the exclusion of other substantive areas, creates an environment that allows for non-notice standards to flourish.

In addition to what the Court says and does not say about civil rights pleading, stray judicial comments can also create heightened pleading results. Recall *Associated General*. The Court's footnote dicta alluded to the power of district courts to demand specificity in pleadings in antitrust cases.⁴⁸⁰ This footnote is a springboard for the spread of variations of heightened pleading in the antitrust area.⁴⁸¹ It is even used as a justification for the extension of heightened pleading to CERCLA.⁴⁸² By both its silence and its words, the Supreme Court contributes to the use of non-notice standards of pleading.

VI. CONCLUSION

A uniform pleading standard with notice as the touchstone remains illusory. Yet the intentions of the drafters are clear. Their handiwork—the Federal Rules—also speaks with clarity. In the main, the Supreme Court reinforces notice pleading as the only choice. Even the rhetoric of pleading among the lower courts centers on notice. Still, the reality of what federal practice requires yields a different picture. When compared across jurisdictions and substantive areas, federal pleading practice emerges as a spectrum from the fact-less conclusory allegation to the fact-laden prolix complaint. In between these extremes lies simplified notice pleading, as well as distinct variations of heightened pleading—targeted, Rule 9(b)-type, and hyperpleading. These categories reflect not only the vitality of fact-based pleading requirements, but a richness in the categories themselves and their application unrecognized in the literature. Taken as a whole,

479. *Id.* (emphasis added). The Court may well be thinking of Rule 9(b), but in this particular area greater care in use of language is necessary.

480. *Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983) (“Certainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”).

481. *See supra* notes 177–78 and accompanying text.

482. *See Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468, 1475 (D. Colo. 1991) (noting greater specificity is warranted in CERCLA action and relying on *Associated General*). This is just another example of the cross-pollination that is so prevalent with non-notice pleading standards.

the micro-analysis yields a macro-model of pleading more sophisticated than a simple binary Rule 8(a) or Rule 9(b) *expressio unius* vision.⁴⁸³

What leads federal courts on their quest for the “phantom of pleading certainty?”⁴⁸⁴ Undoubtedly a combination of factors contributes. However, the similar resonating themes of meritless cases, voluminous discovery, victimized defendants, and crowded dockets are easy to glean from judicial opinions. These perceptions—while common—are just that: perceptions. Yet they are perceptions by decisionmakers that deal with litigation dynamics daily. Complete compliance with the Supreme Court’s edict that greater specificity for particular claims “must be obtained by the process of amending the Federal Rules, and not by judicial interpretation”⁴⁸⁵ is therefore unlikely. The same pressures pushing district courts to use fact-based pleading lead to the use of other procedural devices. Case management orders requiring factual specificity is a way to make plaintiffs state the facts supporting their claims at an early stage.⁴⁸⁶ The resurrection of moribund rules such as a Rule 7(a) reply or a Rule 12(e) motion for a more definite statement represent other procedural gyrations around notice pleading’s restrictions.⁴⁸⁷ These other mechanisms at least have some sense of procedural legitimacy that heightened pleading lacks—although that is probably of little comfort to plaintiffs forced to comply. Still, given the current state of pleading practice, compliance with a legitimate procedure may well be more palatable than trying to meet a myth.

483. In striking down heightened pleading in *Monell* actions, the Court in *Leatherman* painted a simple picture of Rule 8 for all claims except for fraud and mistake explicitly carved out in Rule 9(b). The Court invoked the principle of *expressio unius est exclusio alterius*: the expression of one thing is the exclusion of the other. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

484. Clark, *supra* note 35, at 52.

485. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 515 (2002) (quoting *Leatherman*, 507 U.S. at 168).

486. See *supra* note 406 (discussing RICO case statements); see also Marcus, *Puzzling*, *supra* note 5, at 1776 (discussing use of case statements as an alternative to achieve specificity); *Feliciano v. DuBois*, 846 F. Supp. 1033, 1047 (D. Mass. 1994) (using case statements in prisoner litigation).

487. See *Schultea v. Wood*, 47 F.3d 1427, 1432–34 (5th Cir. 1995) (en banc) (requiring heightened pleading in a Rule 7(a) reply in qualified immunity cases); *supra* note 336 and accompanying text (describing use of Rule 12(e) in copyright cases). The Supreme Court appears to endorse these practices. See *Swierkiewicz*, 534 U.S. at 514 (“If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding.”); *Crawford-El v. Britton*, 523 U.S. 574, 597–98 (1998) (discussing use of Rule 7(a) and Rule 12(e) in dicta).

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