An Invitation to the Rulemakers — Strike Rule 9(b)

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It is a little rule. "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."[1] Even without the benefit of the new Style Revision Project,[2] Rule 9(b) seems clear. In contrast to notice pleading applicable to all other cases brought in federal court, claims of fraud and mistake — and only fraud and mistake — must be pleaded with particularity. Simple enough, but why do the Federal Rules single out these claims to be treated differently?

Nothing in the Rule's history explains this special treatment. Later rationalizations for the Rule's heightened pleading standard are equally makeweight. At best, Rule 9(b) is an anachronism — harkening back to the abandoned pleading practices of the past that spawned the modern Federal Rules. This dubious pedigree, however, does not warrant its demise. Nor do the courts' troubling divergent standards of particularity dictate the Rule's internment. Nonetheless, Rule 9(b) should go.

Federal procedure could tolerate the deadweight of Rule 9(b) if it were limited to its own short list. But 9(b) is not so benign. Instead, its malignant pleading requirement spreads to other claims that courts deem "fraud-like." Thus, Rule 9(b)'s heightened pleading now infects such "quasi-fraud" claims as statutory civil rights violations, defamation suits, and CERCLA actions.[3] Academic criticism of judicially imposed heightened pleading, however, goes largely unheeded.[4] But we

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[1] FED. R. CIV. P. 9(b).

[2] The Style Revision Project is an ongoing effort by the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure. Its purpose is to rewrite the Federal Rules of Civil Procedure to improve their style, readability, and consistency, while avoiding inadvertent changes in substance. The Standing Committee approved the first phase of the project revising Rules 1-15 in June 2003. However, they delayed the publication of the Rules for public comment until February 2005. Restyled Rule 9(b) is tentatively worded as follows:

> Fraud, Mistake; Conditions of Mind. In averring fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.

Proposed Amendments to the Federal Rules of Civil Procedure: Restyled Rules 1 through 15 26 (May 23, 2003) (unpublished draft, on file with author).

[3] *See infra* Part III.B.

[4] *See* Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002) [hereinafter *Heightened Pleading*]; Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998) [hereinafter *Puzzling*]; Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986) [hereinafter *Revival*]; Carl W. Tobias, *Elevated Pleading in Environmental Litigation*, 27 U.C.

academics are in good company. Twice, the current Supreme Court has tried to rein in this improper use of heightened pleading requirements outside of the narrow context of Rule 9(b) without success.[5] It is time to lend the Court a hand.

The Federal Rules should be amended to eliminate Rule 9(b). Without Rule 9(b), the foundation for heightened pleading disappears. Federal courts will no longer have the pseudo-fraud crutch to lean on when applying heightened pleading. Absent a lifeline in the Federal Rules, judicially imposed heightened pleading should perish. At a minimum, its spread would be contained. What havoc would this modest revision to the Rules reek in the fraud arena? Given the varying standards and inconsistent application inherent in heightened pleading, abolition of Rule 9(b) would replace uncertainty with clarity. In the end, a few more fraud claims might survive to be resolved on the merits, which is precisely what the Federal Rules intend for every other cause of action. Thus, this Essay issues a simple invitation to the Advisory Committee on Civil Rules, the Standing Committee on Rules of Practice and Procedure, and, ultimately, the Judicial Conference of the United States: strike Rule 9(b).

I. THE HISTORY OF HEIGHTENED PLEADING FOR FRAUD

A. *The Common-Law and Code Pleading Experience*

The history of fraud pleading cannot be divorced from the history of pleading in general. Pleadings began as an oral tradition in the English common law courts and were reduced to writing sometime between the fifteenth and sixteenth centuries.[6] This transformation from oral to written pleadings brought with it an increased emphasis on form.[7] The

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DAVIS L. REV. 358 (1994). *But see* Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO ST. L.J. 1753, 1798-1801 (1998) (calling for heightened 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 Federal Rules to require heightened pleading standards for defamation).

[5] *See* Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993).

[6] *See* Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 458 (1943); Michael Moffitt, *Pleading in the Age of Settlement*, 80 IND. L.J. (forthcoming 2005) (manuscript at 37-38, on file with author).

[7] Moffitt, *supra* note 6, at 5-7; Jeff Sovern, *Reconsidering Federal Civil Rule 9(b): Do We Need Particularized Pleading Requirements in Fraud Cases?*, 104 F.R.D. 143, 144 (1985).

ensuing system of specialized allegation bred delay, expense, dissatisfaction, and, ultimately, reform.[8]

How did fraud and mistake fare under the common law pleading system? Prior to the merger of law and equity, fraud and mistake were grounds for equity jurisdiction; they could not be raised as defenses to actions at law.[9] If a party wanted to raise a defense of fraud to a claim, it had to be done in a separate suit to enjoin enforcement of the legal judgment. The then leading treatises on common law pleading note that when fraud is raised in the context of enjoining enforcement of a judgment, it must be pleaded with particularity.[10] When these treatises consider fraud pleading in the legal context, as opposed to the equitable context, there is no mention of the particularity requirement.[11]

In this country, common-law pleading gave way to the reform of the Field Codes in the mid-nineteenth century.[12] The Field Codes replaced common-law pleading's preoccupation with form with an emphasis on detailed factual development.[13] This generated a new set of pleading problems. Courts developed an elaborate classification scheme for types of facts that must be properly pleaded to state a cause of action. Labels such as ultimate fact, evidentiary fact, and conclusion were attached to allegations.[14] Unresolved and conflicting hypertechnical distinctions between these concepts yielded a pleading system just as cumbersome and inefficient as its common law predecessor.[15]

A particularity requirement for fraud pleading under the Codes was not entrenched, even by the end of the nineteenth century. The Field Code of 1848 did not include a particularity requirement for fraud.[16] Nor

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[8] *See* Clark, *supra* note 6, at 458-59; *Heightened Pleading*, *supra* note 4, at 555; Moffitt, *supra* note 6, at 39-40.

[9] William M. Richman et al., *The Pleading of Fraud: Rhymes Without Reason*, 60 S. CAL. L. REV. 959, 966 (1987).

[10] *See, e.g.*, JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS 297 (Edmund H. Bennett ed., Boston, Little, Brown & Co., 5th ed. 1852).

[11] *See* JAMES GOULD, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS (2d ed. 1836); 1 JOSEPH CHITTY, A TREATISE ON PLEADING 136-37, 536, 581-82 (J. C. Perkins ed., Springfield, G. & C. Merriam, 14th Am. ed. 1869).

[12] The Field Code gets its name from the drafter of the New York Code, David Dudley Field. It was quickly adopted in most other American jurisdictions. *See Revival*, *supra* note 4, at 438.

[13] *Heightened Pleading*, *supra* note 4, at 555.

[14] *Id.*; Richman, *supra* note 9, at 970.

[15] *See* Moffitt, *supra* note 6, at 43-44; Richman, *supra* note 9, at 970; David M. Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390, 395 (1980).

[16] As adopted in 1848, section 120 of the New York Code of Procedure merely required for all complaints "[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of

did the pleading treatises of the period state such a requirement.[17] By the 1920s, however, a heightened pleading standard for fraud was well settled: "All the details must be set forth with the fullest particularity."[18] Why?

The explanation is unsettling. Pleading fraud with particularity started as a standard originally limited to equity actions and concerned with protection of judgments.[19] When fraud as an affirmative defense was deemed applicable to actions at law, the particularity requirement traveled with it.[20] Arguably, an underlying judicial reluctance to reopen settled matters justified the extension.[21] After the unification of law and equity, courts simply applied the particularity requirement of the equitable defense of fraud to common-law tort actions for fraud because the word "fraud" was present in both pleadings.[22] This extension ignores the obvious. Concern for the protection of judgments is irrelevant to the tort of fraud. With this pedigree, is there little wonder that modern courts have difficulty articulating a justification for heightened pleading?

B. Fraud Pleading and the Federal Rules

A reflex application of heightened pleading to fraud is not limited to only common-law or Code jurists. The drafters of the Federal Rules behaved similarly. Designed to encourage determination of cases on the merits, the Federal Rules are a reaction to the inefficiencies and

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common understanding to know what is intended." CODE OF PROC. OF THE STATE OF N.Y. 147 (Voorhies 3d ed. 1853).

[17] *See* Richman, *supra* note 9, at 967 (concluding that particularity was not established rule by 1890s because standard treatises on legal pleading excluded it).

[18] CHARLES E. CLARK, CODE PLEADING 213 (1928); *see* Sovern, *supra* note 7, at 145 n.17 (collecting myriad of sources from period stating particularity requirement).

[19] This is because the equitable fraud action was a separate suit to enjoin the enforcement of a law judgment. *See supra* notes 9-10 and accompanying text.

[20] Richman, *supra* note 9, at 967.

[21] *Id.* Even though the affirmative defense of fraud is not brought in a separate action to challenge a judgment as in the equity context, the defense still strikes at the heart of avoiding an obligation from a settled matter.

[22] *Id.* at 967-68. Professor Sovern offers another explanation: fraud was a disfavored action. He relies on two student notes for authority, both of which rely on Wright & Miller. Sovern, *supra* note 7, at 145 n.16. The Wright & Miller treatise in turn explains that "the old cliché that actions or defenses based upon fraud are disfavored and are scrutinized by the courts with great care . . . retains considerable vitality." 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1296, at 581 (2d ed. 1990) [hereinafter WRIGHT & MILLER]. While this is clearly a later judicial justification for retaining particularity, it does not explain the initial common law adoption.

inequities of the previous common law and Code regimes.[23] Adopted in 1938, the Federal Rules de-emphasize the role of pleadings.[24] Instead of the many burdens shouldered by common-law and Code pleading, under the Federal Rules a complaint serves only a notice function.[25] Thus, Rule 8 requires only a "short and plain statement of the claim showing that the pleader is entitled to relief."[26] Simplified pleading under this standard is commonly known as "notice pleading."[27]

Despite Rule 8's notice pleading innovation, the drafters carved out an exception with Rule 9(b): "In all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."[28] Unfortunately, scrutiny into why the drafters retained pleading with particularity for fraud claims leads to uncomfortable similarities with heightened pleading's haphazard extension to fraud under the common-law and Code pleading regimes.

The history of Rule 9(b) is scant. The text of the Rule appears in the first draft of the Federal Rules and remains unchanged in all subsequent

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[23] *See* Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 318-19 (1938) (describing how new rules foster merits determination); *see also Revival*, *supra* note 4, at 439 (stating drafters created system that preferred disposition on merits).

[24] *See* Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 514 (2002) (stating Rule 8 was adopted as part of simplified pleading system to focus litigation on merits); *see also* Richard L. Marcus, *Reining In the American Litigator: The New Role of American Judges*, 27 HASTINGS INT'L & COMP. L. REV. 3, 11 (2003) (describing Rules as greatly relaxing pleading requirements).

[25] Pleadings at common law and under the Codes served multiple functions including: notice, factual development, winnowing issues, and disposing of sham claims. In contrast, pleading under the Federal Rules was designed solely to provide notice. *See* 5 WRIGHT & MILLER, *supra* note 22, § 1202, at 68 (comparing pleading function under Federal Rules with previous systems); Moffitt, *supra* note 6, at 35-36 (describing four traditional roles of pleadings).

[26] FED. R. CIV. P. 8(a)(2).

[27] The Supreme Court first introduced the description in Conley v. Gibson, 355 U.S. 41, 47-48 (1957). Professors Wright and Miller prefer "simplified" pleading over "notice" pleading. 5 WRIGHT & MILLER, *supra* note 22, § 1202, at 72-73. In his recent article, Professor Moffitt, who prefers the label "modern pleading," challenges the traditional notion that pleadings serve only a notice function. Not only does he find multiple and differing notice functions to parties, courts, and the public, but he also contends that pleadings serve an unacknowledged function of defining disputes. *See* Moffitt, *supra* note 6, at 2 n.2, 3-12. My research reflects that in practice "notice pleading" is but one type of pleading on a continuum that includes many variants of fact-based pleading such as "targeted heightened pleading," "9(b)-type pleading," and "hyperpleading." *See* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 998-1011 (2003) [hereinafter *Myth*].

[28] FED. R. CIV. P. 9(b).

drafts.[29] There was no discussion of the Rule in congressional or ABA hearings.[30] The drafters themselves leave us a single cryptic message in the Advisory Committee notes of 1937: "See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r 22."[31] The English rule referred to provides: "Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred."[32] The Annual Practice also states: "Fraud must be distinctly alleged and proved. The acts alleged to be fraudulent must be stated otherwise no evidence in support of them will be received."[33] While we can conclude the drafters modeled Rule 9(b) after former English practice, the Advisory Committee note does little to explain why.

The chief architect of the Federal Rules, Judge Charles E. Clark, provides the best explanation for Rule 9(b): "While useful, this rule probably states only what courts would do anyhow and may not be considered absolutely essential."[34] It is with this lukewarm endorsement that Rule 9(b) retains particularized pleading for fraud, while the Federal Rules embrace notice pleading for everything else.

II. APPLICATIONS AND RATIONALIZATIONS

A. *Application of Rule 9(b)*

If Judge Clark was correct and requiring particularized pleading for fraud is "what courts would do anyhow," how do courts apply Rule 9(b)? First, a word about scope is appropriate. While Rule 9(b) covers allegations of both fraud and mistake, there is a scarcity of mistake cases.[35] Rule 9(b) has become essentially a special rule for fraud.

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[29] Richman, *supra* note 9, at 965.

[30] *Id.*

[31] FED. R. CIV. P. 9(b) advisory committee's note.

[32] Sovern, *supra* note 7, at 146 n.19.

[33] *Id.* Clark also described the first sentence of Rule 9 as derived from Order 19, Rule 6 of the English Rules for the Supreme Court under the Judicature Act of 1937. CHARLES E. CLARK, CODE PLEADING § 48, at 313 n.87 (2d ed. 1947).

[34] Clark, *supra* note 6, at 463-64.

[35] For example, Wright and Miller note that few courts have addressed mistake and devote but a single paragraph to mistake pleading. 5 WRIGHT & MILLER, *supra* note 22, § 1298, at 660. Seventh Circuit Judge Richard Posner also reports that he found only two mistake cases in which the complaint was dismissed on heightened pleading in the last fifty years and there is a dearth of judicial or scholarly discussion of the rationale for

The classic common-law fraud claim involves a business transaction where a seller misrepresents facts to a buyer that are material to the buyer. For example, in order to induce a buyer to purchase a horse, a seller falsely states that a veterinarian had just examined the horse and had pronounced it sound. The buyer then relies on the seller's false statement that the horse was sound and buys it only to discover soon thereafter that the horse was terminally ill.[36] The buyer might bring an equitable action to rescind the deal or raise fraud as an affirmative defense if the seller sues on the contract.

What then would Rule 9(b) require? The elements of fraud include: (1) a false representation of material fact, (2) defendant's knowledge that the representation is false, (3) an intent to induce reliance, (4) justifiable reliance by plaintiff, and (5) damages.[37] Rule 9(b), however, does not explicitly require the allegation of the elements of a fraud claim.[38] Instead, the text of the rule states that the "circumstances constituting fraud" must be stated with particularity. "Circumstances" means the time, place, and contents of the false representation, the identity of the person making it, and "what he obtained thereby."[39] This requirement has been compared to the who, what, when, where, and how of a newspaper story.[40]

The drafters did not think Rule 9(b) would be excessively burdensome.[41] This expectation was probably reasonable if applied to

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mistake. *See* Bankers Trust Co. v. Old Republic Ins. Co., 959 F.2d 677, 683 (7th Cir. 1992).

[36] RESTATEMENT (SECOND) OF TORTS § 525, illus. 4 (1977).

[37] W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 105, at 728 (5th ed. 1984).

[38] Although, it is probably wise to do so. *See* 5 WRIGHT & MILLER, *supra* note 22, § 1297, at 590.

[39] *See* Abels v. Farmers Commodities Corp., 259 F.3d 910, 920 (8th Cir. 2001) (noting plaintiff meets Rule 9(b) by including time, place, contents of false representations, identity of person making misrepresentation, and what was obtained); Koch v. Koch Indus., Inc., 203 F.3d 1202, 1236 (10th Cir. 2000) ("[T]his court requires 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.'"); Williams v. WMX Tech., 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.'"); 5 WRIGHT & MILLER, *supra* note 22, § 1297, at 590.

[40] *See* Melder v. Morris, 27 F.3d 1097, 1100 n.5 (5th Cir. 1994) (using newspaper analogy); DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir. 1990) (same).

[41] *See* Levenson v. B. & M. Furniture Co., 120 F.2d 1009, 1009 (2d Cir. 1941) (per curiam) (rejecting dismissal of fraud complaint that did not allege fraud "with as much particularity as is desirable" because it was "only a pleading"). Some courts today continue to judge complaints with this minimalist standard. *See, e.g.*, Floorcoverings Int'l, Ltd. v. Swan, No. 00-C-1393, 2000 WL 528480, at *4 (N.D. Ill. Apr. 25, 2000). In

the classic fraud model.[42] Like the sale of the diseased horse, this type of dispute involves direct, personal, face-to-face contact where both parties would possess certain factual information.[43] Consequently, the hypothetical horse buyer above would have little difficulty pleading the circumstances. The same type of minimalist burden is found in Federal Form 13, relating to a fraudulent conveyance.[44]

The only problematic pleading burden for a fraud plaintiff would be particularized pleading of intent or state of mind of the fraudfeasor. Realistically, a plaintiff could not be expected to know the state of mind of a defendant, much less plead it with specificity.[45] Information as to intent would always be under the defendant's control. Recognizing that such a standard would be unfeasible,[46] Rule 9(b) explicitly allows intent to be pleaded generally: "Malice, intent, knowledge, and other condition of mind of a person may be averred generally."[47] With this standard, the

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Floorcoverings, the district court found a complaint sufficient to meet Rule 9(b) that alleged: "Defendants falsely reported Gross Sales to FCI," "Defendants made representations of past or present material fact which were false when made and which Defendants knew were false," "Defendants made these representations to FCI with the intent that FCI rely on them," and "FCI did rely on Defendants' false representations." *Id.*

[42] While this formula may work well for an affirmative misrepresentation that involves a specific statement made to a specific person at a specific time and place by a specific person, fraudulent concealment or fraud by omission is inherently difficult to plead with particularity because it consists of nonaction. Breeden v. Richmond Cmty. Coll., 171 F.R.D. 189, 195 (M.D.N.C. 1997).

[43] *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 744-45 (1975) (describing classic tort of misrepresentation); Richman, *supra* note 9, at 977-78 (describing classic fraud transaction).

[44] Federal Form 13 provides the who (Defendant C.D.), the what (defrauded plaintiff on a promissory note), the when (on or about), and the how (conveying all property to another to hinder collection on the note). *See* Form 13, Appendix of Forms, FED. R. CIV. P. This form complies with the rules. FED. R. CIV. P. 84. Similarly, Federal Form 7 provides a model for a complaint for money paid by mistake. Its single sentence substantive allegation provides little guidance as to what meets the particularity requirement. *See* Form 7, Appendix of Forms, FED. R. CIV. P. ("Defendant owes plaintiff ___ dollars for money paid by plaintiff to defendant by mistake on June 1, 1936, under the following circumstances: [here state the circumstances with particularity — see Rule 9(b).]").

[45] *See* Chill v. Gen. Elec. Co., 101 F.3d 263, 267 (2d Cir. 1996) ("[A] plaintiff realistically cannot be expected to plead a defendant's actual state of mind."); Note, *Pleading Securities Fraud Claims with Particularity Under Rule 9(b)*, 97 HARV. L. REV. 1432, 1438 (1984) [hereinafter *Pleading Securities Fraud Claims*] (discussing difficulty in detailing allegations of defendant's intent).

[46] Vector Research, Inc. v. Howard & Howard Attorneys P.C., 76 F.3d 692, 700 (6th Cir. 1996) (noting difficulty in meeting heightened pleading burden for malice); *see* 5 WRIGHT & MILLER, *supra* note 22, § 1301, at 674-75 (discussing difficulty of pleading state of mind with specificity).

[47] FED. R. CIV. P. 9(b).

Rule avoids an inherently unworkable pleading burden for intent.[48]

B. Rationalizations

Given the history — or lack thereof — of the development of heightened pleading for fraud at common law, under the Codes, and with the Federal Rules, it comes as no surprise that our federal courts struggle to present a convincing explanation for Rule 9(b). However, there are four predominant rationalizations for the particularity requirement imposed in fraud cases: defense of settled transactions, protection of defendants' reputations, deterrence of frivolous or strike suits, and providing adequate notice.[49] None of these rationalizations, however, justify Rule 9(b)'s continued existence.

1. Defense of Settled Transactions

The classic explanation for a heightened pleading burden for fraud is the protection of judgments and settled transactions. Recall the common-law history of heightened pleading. The particularity requirement was first imposed when fraud was raised in a separate action in equity to prevent enforcement of a legal judgment. Reluctant to undo previous judicial orders, a particularity requirement allowed the court to be certain that the allegations were severe enough to warrant the risks of revisiting the judgment.[50] As the particularity requirement migrates from equitable defenses of fraud to common-law actions for fraud, however, the protection of judgments rationale becomes inapplicable.

A corollary justification of protection of settled transactions then develops. Because allegations of fraud are frequently at the core of

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[48] 5 WRIGHT & MILLER, *supra* note 22, § 1301, at 674.

[49] *See* 5 WRIGHT & MILLER, *supra* note 22, § 1296, at 579-82 (describing reasons); *see also* Bly-Magee v. California, 236 F.3d 1014, 1018 (9th Cir. 2001) (describing four reasons for Rule 9(b)); Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999) (describing purposes of Rule 9(b) as ensuring that defendant has sufficient information to defend, protecting against frivolous suits, eliminating actions where facts are learned postdiscovery, and protecting defendant from reputational harm); Acito v. IMCERA Group, Inc., 47 F.3d 47, 52 (2d Cir. 1995) (describing them as providing notice, protecting reputation, and preventing strike suits); Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1067 (5th Cir. 1994) (providing notice, protecting defendant, reducing strike suits, and preventing baseless claims).

[50] *See* Richman, *supra* note 9, at 964-65 (presenting protection of judgments rationale); John P. Villano, Inc. v. CBS, Inc., 176 F.R.D. 130, 131 (S.D.N.Y. 1997) ("The requirement traces back to common law presumptions of *caveat emptor* and to the reluctance of English courts to reopen settled transactions."); *see also supra* notes 7-11 and accompanying text.

attempts to reopen settled transactions, some courts demonstrate the same judicial reluctance to reconsider settled matters without particularized information.[51] Heightened pleading ensures that the allegations are severe enough to warrant the difficulties inherent in re-examination of completed transactions.[52]

The protection of judgments and settled transactions justification has largely faded away. Judicial protection for judgments becomes largely irrelevant as particularity is applied outside of that context. Similarly, contemporary courts generally do not express concern about reopening completed transactions.[53] Presumably, more attractive rationalizations, such as protection of reputations and limiting frivolous actions, have supplanted the historical one.

2. Protection of Reputations

Many courts recite that Rule 9(b)'s purpose is to protect defendants' reputations. Proponents of this view note that it is a serious matter to charge someone with fraud because of the potential damage to a defendant's reputation and the implication of moral turpitude.[54] Consequently, such allegations should be curtailed unless one can go on record as to what specifically constitutes the fraud.[55]

While reputational protection is much cited, its special relationship to fraud and particularized pleading remains under-analyzed. Consider the oft-cited Second Circuit opinion in *Segal v. Gordon*.[56] The court clearly

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[51] *See* 5 WRIGHT & MILLER, *supra* note 22, § 1296, at 580 (describing reluctance of courts to reopen completed transactions).

[52] *See, e.g.*, F. McConnell & Sons, Inc. v. Target Data Sys., Inc., 84 F. Supp. 2d 980, 982 (N.D. Ind. 2000) (requiring Rule 9(b) particularity because fraud charges involve rewriting contracts or disrupting established relationships).

[53] *See Pleading Securities Fraud Claims*, *supra* note 45, at 1439 ("[C]ontemporary courts generally do not even express concern about reopening completed transactions."). *But see* Ackerman v. Northwestern Mut. Life Ins. Co., 172 F.3d 467, 469 (7th Cir. 1999) (claiming purpose of Rule 9(b)'s particularity is that charges of fraud "frequently ask courts in effect to rewrite the parties' contract or otherwise disrupt established relationships").

[54] *See, e.g.*, *Ackerman*, 172 F.3d at 469 ("Greater precomplaint investigation is warranted in fraud cases because public charges of fraud can do great harm to the reputation of a business firm or other enterprise (or individual) . . . ."); Norman v. Apache Corp., 19 F.3d 1017, 1022 (5th Cir. 1994) ("This standard is derived from concerns that unsubstantiated charges of fraud can irreparably damage a defendant's reputation."); Ross v. A.H. Robins, Co., 607 F.2d 545, 557 (2d Cir. 1979) (contending Rule 9(b) stems from desire to protect defendants from harm to their reputations); Breeden v. Richmond Cmty. Coll., 171 F.R.D. 189, 201 n.13 (M.D.N.C. 1997) (stating major reason for particularized pleadings was to protect against charges of immorality).

[55] *See* Richman, *supra* note 9, at 961-62.

[56] 467 F.2d 602 (2d Cir. 1972).

states the rationale: "Rule 9(b)'s specificity requirement stems . . . from the desire to protect defendants from the harm that comes to their reputations or to their goodwill when they are charged with serious wrongdoing."[57] The only explanation offered, however, is that it is a "serious matter to charge a person with fraud."[58] No attempt is made to explain how fraud differs from other equally serious claims or how heightened pleading would deter fraud allegations. When these issues are considered, protection of reputation is an insufficient justification for the Rule's retention.

If the goal is to protect defendants' reputations, Rule 9(b) fails. First, it singles out only a small subset of claims where reputational injury is at risk. Whatever opprobrium may come from a fraud allegation, certainly claims for professional malpractice bring an even greater risk of reputational damage. Nonetheless, particularized pleading does not apply to such claims. Nor does heightened pleading attach to other intentional torts such as assault or battery.[59] Similarly, there is no particularity requirement for wrongful death claims, which certainly have a significant risk of tarnish to one's reputation. The limitation of Rule 9(b) to fraud allegations is woefully underinclusive if the real concern is reputation.[60] Indeed, the inclusion of mistake in Rule 9(b) — where no possible reputational damage could be at issue — spotlights the inherent weakness of the rationale.[61]

Even assuming fraud poses a sufficient risk to reputation to warrant specialized treatment, the particularity requirement of Rule 9(b) offers

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[57] *Segal*, 467 F.2d at 607.

[58] *Id.* (citing Barron & Holtzoff procedure treatise). Despite the weak analysis, *Segal*'s impact was great as courts drew on its rationale in resolving Rule 9(b) objections. *See* Richard G. Himelrick, *Pleading Securities Fraud*, 43 MD. L. REV. 342, 349 (1984).

[59] *See* Burnett v. Al Baraka Inv. Corp., 274 F. Supp. 2d 86, 103 (D.D.C. 2003) (rejecting use of heightened pleading for intentional torts).

[60] *See* Richman, *supra* note 9, at 962; Sovern, *supra* note 7, at 173. Judge Robertson's opinion in *Burnett* illustrates the underinclusiveness. Families of victims of September 11 sued those who were alleged to have financed al Qaeda for intentional infliction of emotional distress. *Burnett*, 274 F. Supp. 2d at 91. Judge Robertson refused to apply heightened pleading requirements to the claim stating: "It is difficult to imagine uglier or more serious charges than those the plaintiffs have leveled at these defendants. . . . [T]o publicly label someone an accomplice of terrorists can cause incalculable reputational damage." *Id.* at 103. Even though the district court stressed that Rule 9(b)'s purpose is to protect reputations, the court refused to require heightened pleading despite the extreme nature of the charge. *Id.*

[61] One court sees a common thread between fraud and mistake. "Both claims derive from a party's own subjective misperception, misapprehension or misunderstanding and subsequent reliance." Breeden v. Richmond Cmty. Coll., 171 F.R.D. 189, 202 (M.D.N.C. 1997).

little protection. The lack of uniformity on pleading standards under the Rule creates uncertainty.[62] Given this uncertainty, it is unlikely that potential plaintiffs are deterred from raising fraud allegations.[63] Of course, nothing in Rule 9(b) bars the filing of a fraud claim. Once the fraud claim is filed, the reputational damage is largely done. Moreover, the procedural instrument to challenge such claims is a motion to dismiss.[64] Rather than shielding one's reputation, the motion practice surrounding dismissal adds costs, delay, and attention to the fraud claim.[65] Even if the claim is deemed deficient under the Rule, the remedy is seldom dismissal with prejudice; the plaintiff lives on to replead.[66]

While it is hard to quibble with protecting reputations as a worthwhile goal, the rationale is insufficient to justify heightened pleading under Rule 9(b). Fraud is singled out when other claims present similar, if not greater, risk of reputational damage. Even as applied to fraud, heightened pleading is an ineffective means to curb risk to reputation.[67] Consequently, some other justification for Rule 9(b) is necessary.

3. Deterring Frivolous Claims

Another rationale for Rule 9(b)'s particularity requirement is deterrence of frivolous claims and strike suits.[68] When courts speak of

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[62] *See infra* notes 90-101 and accompanying text.

[63] *See* E. A. Lees, *Rule 9(b) — Who Needs It?*, 3 J. CONTEMP. L. 105, 106 (1976); Sovern, *supra* note 7, at 171-72.

[64] *See* FED. R. CIV. P. 12(b).

[65] *See* Sovern, *supra* note 7, at 172. This is not to say that that Rule 9(b) has no effect. Potentially, it could lead to dismissal prior to trial and the associated savings in cost and adverse publicity. However, as Professor Sovern points out, victory on a motion to dismiss based on Rule 9(b) could be viewed as a technicality depriving the defendant of vindication on the merits. *Id.* at 173.

[66] *See* Nix v. Welch & White, P.A., No. 01-3186, 2003 WL 57936 (3d Cir. Jan. 8, 2003) (noting court has consistently held that complaint dismissed for lack of factual specificity should be given leave to amend); United States *ex rel.* Lee v. Smith Kline Beecham, Inc., 245 F.3d 1048, 1052 (9th Cir. 2001) (holding failure to meet Rule 9(b) was not grounds for dismissal, and stating that "leave to amend should be granted unless district court 'determines that the pleading could not possibly be cured by the allegation of other facts'"); Wight v. BankAmerica Corp., 219 F.3d 79, 91 (2d Cir. 2000) (noting complaints dismissed under Rule 9(b) are almost always dismissed with leave to amend).

[67] At least one commentator even suggests that if protection of reputation is the justification, serious questions as to the validity of Rule 9(b) exist because a rule designed to protect the defendant's reputation may "abridge, enlarge, or modify" a substantive right thereby running afoul of the Rules Enabling Act. *See* Sovern, *supra* note 7, at 165-72 (arguing that Rule 9(b) as applied to fraud, based on protection of reputations rationale, exceeds rulemaking authority under REA).

[68] A "strike suit" is a securities fraud suit or shareholder derivative action brought without a good faith belief in prevailing on the merits and advanced only for settlement

deterrence, however, two different issues surface. One is a concern for deterrence of future filings. The second is an interest in an efficient means of clearing their dockets of meritless claims. This is an example of what Professor Lawrence Solum describes as the accuracy model of procedure, where the focus of the rule is on reaching a substantively correct outcome — in this case, dismissal of a nonmeritorious claim.[69] According to proponents, particularized pleading under Rule 9(b) addresses both issues. It deters future frivolous filings[70] and shortens the life and nuisance value of already-filed frivolous fraud lawsuits.[71]

Once again, a seemingly beneficial objective — controlling frivolous litigation — does not justify Rule 9(b). As a threshold matter, unless fraud claims are significantly more likely to be frivolous than other claims or a significant number of frivolous fraud claims are filed, an alternative way of processing these claims cannot be justified. Yet, no support is offered for the idea that either fraud claims are more likely to be meritless or that significant frivolous fraud claims exist.[72]

Indeed, the perception that court dockets are filled with frivolous lawsuits — fraud or otherwise — lacks foundation. Professor Arthur Miller recently put it best: "[T]he supposed litigation crisis is the product of assumption."[73] Those touting the view that frivolous lawsuits are being filed rely mainly on anecdotes of seemingly silly lawsuits.[74] Oversimplification by the media may contribute to the perception by creating poster children for frivolousness, such as the infamous

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value. *See* Greebel v. FTP Software, Inc., 194 F.3d 185, 191 n.5 (1st Cir. 1999) (defining "strike suit").

[69] *See* Lawrence B. Solum, *Procedural Justice*, at 55-63, *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=508282 (Feb. 23, 2004) (forthcoming Southern California Law Review) (describing accuracy model of procedure).

[70] *See, e.g.*, Campaniello Imports, Ltd. v. Saporiti Italia, S.p.A., 117 F.3d 655, 663 (2d Cir. 1997) (identifying prevention of strike suits as one of Rule 9(b)'s purposes); Vicom, Inc. v. Harbridge Merchant Servs., Inc., 20 F.3d 771, 777 (7th Cir. 1994) (same).

[71] *See, e.g., In re* GlenFed, Inc., Sec. Litig., 11 F.3d 843, 847 (9th Cir. 1993) ("Rule 9(b) also serves to deter suits pursued for their settlement value, rather than their merits."), *vacated on other grounds*, 42 F.3d 1541 (9th Cir. 1994) (en banc); Ross v. A.H. Robins Co., 607 F.2d 545, 557 (2d Cir. 1979) (highlighting that Rule 9 serves to reduce *in terrorem* value of lawsuit).

[72] *See* Richman, *supra* note 9, at 963. For example, see Judge Richard Posner's statement in *Ackerman*. Ackerman v. Northwestern Mut. Life Ins. Co., 172 F.3d 467, 469 (7th Cir. 1999) (commenting that "fraud is frequently charged irresponsibly by people who have suffered a loss and want to find someone to blame for it").

[73] 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, 996 (2003).

[74] *See* Miller, *supra* note 73, at 987-88.

McDonald's coffee case[75] and its newer sibling, *Pelman v. McDonald's Corp.*,[76] the McDonald's child-obesity class action.[77] Consequently, despite the lack of support, belief in a litigation crisis fueled by frivolous lawsuits persists.[78]

Notwithstanding this persistent yet spurious belief, Rule 9(b) cannot deter future frivolous fraud filings if they do not exist in the first place. In fact, it is hard to imagine any deterrent effect. The unscrupulous plaintiff — the type who would file such a frivolous lawsuit in the first place — surely is undaunted by a mere pleading requirement. One determined to advance frivolous litigation need only cast the claim in terms of negligence, breach of contract, or fiduciary duty to avoid the pleading burden.[79]

Rule 9(b)'s usefulness as an accuracy tool to dispose of frivolous cases already on the docket is also limited. If the district court dismisses the fraud complaint with leave to amend — as most do — more, not less, judicial resources are consumed.[80] Alternatively, if the fraud claim is dismissed with prejudice, a different danger exists — premature dismissal of meritorious claims.[81] Clearly, the use of heightened pleading increases the risk of erroneous dismissal of valid claims.[82]

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[75] *See* Edmund M. Brady, Jr., *The U.S. Chamber's Attack on Trial Lawyers*, 77 MICH. B.J. 380, 382 (1998) (chronicling facts of case, including McDonald's superheating practice, remittitur to $480,000, and postverdict settlement); Liane E. Leshne, *Shedding New Light*, TRIAL, Oct. 1998, at 32, 34 (noting that plaintiff required eights days hospitalization for her burns and her rejected offer to settle for $20,000).

[76] 237 F. Supp. 2d 512 (S.D.N.Y. 2003).

[77] *See Myth*, *supra* note 27, at 1049-51; Christopher M. Fairman, *No McJustice for the Fat Kids*, LEGAL TIMES, Feb. 17, 2003, at 42.

[78] Even if there were a flood of frivolous cases flowing toward the courthouse, Rule 9(b)'s particularity requirement could not stop it. Rule 9(b) imposes a special pleading burden on fraud-based strike suits, but not other forms of nuisance litigation. Because it does not apply, Rule 9(b) obviously has no deterrent effect on strike suits premised on nonfraud allegations.

[79] These claims would not normally be subject to Rule 9(b) heightened pleading requirements.

[80] 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, 1040 (1989) (describing ineffectiveness of dismissal with leave to amend on deterrence).

[81] *See* Richman, *supra* note 9, at 983; *Pleading Securities Fraud Claims*, *supra* note 45, at 1442.

[82] *See* ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 155 (2003) ("[A] strict pleading rule is virtually certain to increase false positives, expected process costs, or both."); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, J. LEGAL STUD. 399, 437 (1973) (stating that notice pleading rules probably decrease number of meritorious claims that are dismissed); *cf. Developments in the Law: The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1821 (2000) (noting PSLRA makes

Given the Federal Rules guiding principle of merits determination[83] and the availability of alternative procedural remedies to frivolous filings,[84] even a greater risk of erroneous dismissal outweighs any residual advantage of Rule 9(b).

4. Heightened Notice

The final reason supporting the use of Rule 9(b) for fraud is notice. The purpose of Rule 9(b) is to give the defendant fair notice of the fraud allegations.[85] Because of fraud's intrinsic amorphousness, greater pleading specificity is necessary to let the defendant know precisely what conduct the plaintiff believes constitutes a fraud.[86] The need for particularized pleading is enhanced if fraud claims reach back to cover actions of years before.[87]

We have now come full circle. If the justification for Rule 9(b) is to provide notice, what does it add to Rule 8 and notice pleading? Nothing. Particularized pleading is unnecessary. A complaint alleging fraud must comport with the notice pleading standard. If the fraud allegations are too vague to respond to, a motion for a more definite statement or

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it harder for meritorious claims to survive); Hillary A. Sale, *Judging Heuristics*, 35 U.C. DAVIS L. REV. 903, 950-51 (2002) (describing likely dismissal of cases where fraud actually occurred under PSLRA's heightened pleading).

[83] *See supra* notes 23-24 and accompanying text.

[84] Rule 11 provides a better, broad-based procedural tool to address frivolous litigation. *See* Richman, *supra* note 9, at 983; Sovern, *supra* note 7, at 175-76; Louis, *supra* note 80, at 1041. Summary judgment under Rule 56 is another alternative. *See* Louis, *supra* note 80, at 1041; *Pleading Securities Fraud Claims*, *supra* note 45, at 1443.

[85] *See, e.g.*, Koch v. Koch Indus., Inc., 203 F.3d 1202, 1236 (10th Cir. 2000) (stating that purpose of Rule 9(b) is "to afford defendant fair notice of plaintiff's claims and the factual ground upon which [they] are based"); Hart v. Bayer Corp., 199 F.3d 239, 248 n.6 (5th Cir. 2000) (same); United States *ex rel* Barrett v. Columbia/HCA Healthcare Corp., 251 F. Supp. 2d 28, 34 (D.D.C. 2003) ("The main purpose of Rule 9(b) is to ensure that defendants have notice of the charges against them adequate to prepare a defense.").

[86] *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 and 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."); Miller v. Merrill, Lynch, Pierce, Fenner & Smith, 572 F. Supp. 1180, 1184 (N.D. Ga. 1983) (requiring greater particularity under Rule 9(b) due to amorphousness of fraud claim). *But see* Ackerman v. Northwestern Mut. Life Ins. Co., 172 F.3d 467, 469 (7th Cir. 1999) (Posner, J.) (opining that pleading fraud with particularity is not to give defendant enough information to prepare defense because a "charge of fraud is no more opaque than any other charge").

[87] *See* Richman, *supra* note 9, at 964.

dismissal for failure to state a claim are still available remedies.[88] Otherwise, details can be developed through the regular course of discovery.[89] Nothing surrounding the notice standard warrants specialized treatment of fraud claims. Indeed, it is ironic that a notice rationale — designed to create ease of entry into the courthouse — would be used as a justification to dismiss claims.

In sum, none of the four predominant justifications for Rule 9(b) provide an adequate explanation for why fraud claims should be treated differently. What then would happen to the universe of fraud litigation if Rule 9(b) went away? Very little. If the Rule is designed to restrict the filing of fraud claims, either to protect reputations or prevent frivolous lawsuits, it currently fails. Rule 9(b) does not stop such filings at all. At best, it inserts another level of motion practice, especially where the remedy for failure to comply with the rule is amendment, not dismissal. If the Rule is designed to provide notice, it merely duplicates an obligation already explicit in Rule 8. At bottom, Rule 9(b) fails to achieve any of the purposes attributed to it while duplicating a pre-existing obligation.

III. THE CASE AGAINST RULE 9(B)

A. *The Unnecessary Rule 9(b)*

Rule 9(b) is an historic relic that retains the fact-based pleading practice of the Codes for fraud claims. The results are predictable. Modern courts have no greater facility for defining or measuring the particularity necessary than their judicial ancestors. Decades of inconsistent treatment by the federal bench now obscure whatever the drafters thought was the proper way to apply the Rule. Uniformity is an illusory goal.

Many courts follow the "circumstances" approach rooted in the language of the Rule and interpreted as the newspaper questions.[90]

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[88] *See* FED. R. CIV. P. 12(b)(6), 12(e).

[89] *See* FED. R. CIV. P. 26-37 (discovery rules); *see also* Sovern, *supra* note 7, at 178-79 (describing applicability of normal discovery process to fraud claims).

[90] *See supra* notes 38-40 and accompanying text (discussing "circumstances" approach and newspaper analogy); *see also* 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 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 specific statement or omission, what makes it false, when it was made, who was responsible). *But see* McHale v. NuEnergy Group, No. CIV. A. 01-4111, 2002 WL 321797, at

Conversely, some courts actually require pleading the elements of fraud.[91] Other courts require the particularity of Rule 9(b) to be simple, brief, and designed to give the defendant fair notice of the fraud claim.[92] Still other courts vary the pleading standard according to the case, with more complex cases being held to a higher standard.[93] There are courts requiring exacting details, such as identification of specific documents with misrepresentations, the specific false statements, and where they appear in the documents; others accept the mere identification of categories of documents.[94] Thus, the lamentation of one district court punctuates the frustration: "No court has enunciated a test that casts light beyond the facts before it."[95]

Fellow proceduralists also search for a cohesive rule — largely in vain. "There is no uniformity of opinion about what Rule 9(b) really requires," exclaims one.[96] Another concludes: "[D]eterminations under Rule 9(b) necessarily turn on the facts of each case."[97] While agreeing that "cases can be cited in support of almost any colorable interpretation and approach," Professor Martin Louis offers some guidance.[98] His survey of fraud cases uncovers two different judicial approaches — one lenient

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*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."); *In re* Fruehauf Trailer Corp., 250 B.R. 168, 198 (Bankr. D. Del. 2000) ("[A] complaint need not plead the 'date, place or time' of the fraud, so long as it uses an 'alternative means of injecting precision and some measure of substantiation into their allegations of fraud.'").

[91] *See* Mutual Life Ins. Co. of N.Y. v. Krejci, 123 F.2d 594 (7th Cir. 1941); Gotlieb v. Sandia Am. Corp., 35 F.R.D. 223 (E.D. Pa. 1964); 5 WRIGHT & MILLER, *supra* note 22, § 1297, at 590.

[92] *See* Ross v. A.H. Robins Co., 607 F.2d 545, 557 n.20 (2d Cir. 1979) (pointing out that particularity must be harmonized with Rule 8); Denny v. Barber, 576 F.2d 465, 467 (2d Cir. 1978) (recognizing need to reconcile Rule 9(b) and Rule 8).

[93] *See* Heart Disease Research Found. v. Gen. Motors Corp., 463 F.2d 98, 100 (2d Cir. 1972).

[94] *Compare* Elster v. Alexander, 75 F.R.D. 458, 461-62 (N.D. Ga. 1977) (requiring specific identification of documents, false statements within them, in what respects statements were false, when documents were issued, and by which defendants), *with* Gilbert v. Bagley, 492 F. Supp. 714, 726 (M.D.N.C. 1980) (agreeing that Rule 9(b) allows for identification of documents by categories).

[95] *In re* Commonwealth Oil/Tesoro Petroleum Corp., 467 F. Supp. 227, 250 (W.D. Tex. 1979). Judge Patrick Higginbotham continued his gift for turning a phrase where heightened pleading is concerned in *Schultea v. Wood*. Writing for the majority of the court sitting en banc, he described the circuit's use of heightened pleading as "the age-old dance of procedure and substance, here with the music of qualified immunity." Schultea v. Wood, 47 F.3d 1427, 1430 (5th Cir. 1995).

[96] Lees, *supra* note 63, at 109.

[97] Sovern, *supra* note 7, at 156.

[98] Louis, *supra* note 80, at 1039.

and one strict. The lenient approach finds Rules 9(b) and 8(a) working in tandem to ensure notice. If negligence in operating a car could be alleged generally under Rule 8 without specifying that the driver was speeding or drunk,[99] the same standard would permit an allegation for fraud in the sale of a house without specifying the misrepresentation. Therefore, Rule 9(b)'s heightened notice requires pleading that the fraudulent sale was due to the false misrepresentation that the house was free of termites.[100] This type of requirement imposes a minimal burden on the plaintiff. In contrast, the strict approach demands a higher level of factual particularity, functionally equivalent to a prima facie demonstration of the factual validity of the claim.[101]

The various approaches taken by the courts appear to be largely influenced by the rationalizations they embrace for the Rule. The result is a jumble of inconsistent standards and uncertainty as to what is necessary to meet the required level of particularity. If Rule 9(b) vanished, the contemporary notice pleading standard would fill the void.

To fully assess the effect of eliminating Rule 9(b), a subset of cases warrants special mention — statutory securities fraud claims under the Securities Act of 1933[102] and the Securities Exchange Act of 1934.[103] While there once was division over the application of Rule 9(b) to these statutory claims,[104] this issue is moot. Congress now requires pleading particularity via the Private Securities Litigation Reform Act of 1995.[105]

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[99] *See* Form 9, Appendix of Forms, FED. R. CIV. P.

[100] *See* Louis, *supra* note 80, at 1039-40 (detailing lenient class). Courts in the Third Circuit fall in this category. *See In re* Fruehauf Trailer Corp., 250 B.R. 168, 198 (Bankr. D. Del. 2000) ("The Third Circuit courts take a 'lenient approach' to application of Rule 9(b)."); *accord* Kronfeld v. First Jersey Bank, 638 F. Supp. 1454, 1462 (D.N.J. 1986).

[101] *See* Louis, *supra* note 80, at 1040 (describing strict approach). When Professor Louis moves from description to prescription, his view on the correct approach is not in doubt:

> "Nothing in the language or history of rule 9(b) requires this strict approach, which is so offensive to the general philosophy of the Federal Rules and so redolent of the dark ages of Code pleading. Consequently, I agree with those who have concluded that the lenient interpretation of rule 9(b) is the correct one."

Id. at 1041.

[102] 15 U.S.C. §§ 77a-77bbbb (2004).

[103] 15 U.S.C. §§ 78a-78mm (2004).

[104] *Compare* Segal v. Gordon, 467 F.2d 602, 605 n.2, 608 (2d Cir. 1972) (using demanding application of Rule 9(b)), *with* Stevens v. Vowell, 343 F.2d 374, 379 n.3 (10th Cir. 1965) (refusing to apply Rule 9(b) to statutory 10b-5 claim).

[105] Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.) [hereafter PSLRA].

Indeed, the PSLRA goes well beyond the levels of particularity demanded by Rule 9(b).[106] A gusher of ink has already spewed forth on the merits of the PSLRA and its heightened pleading requirements by both courts[107] and commentators[108] — myself included. I believe that the PSLRA's heightened pleading requirements are not only inherently unworkable, but they also further the transsubstantive erosion of the Federal Rules.[109] However, there is no need to revisit this controversy now. With or without Rule 9(b), statutory securities fraud claims will continue to be subject to heightened pleading under the PSLRA.[110] Consequently, arguments in favor of heightened pleading in the securities context need not be resurrected, nor can they serve as a basis

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[106] *See* Solum, *supra* note 69, at 33. The PSLRA imposes more demanding particularity in several ways. It imposes it on the scienter requirement of securities fraud where Rule 9(b) excludes particularity for conditions of mind. *Compare* 15 U.S.C.A. § 78u-4(b)(2) (West 2001) (requiring particularity of facts that defendant acted with requisite state of mind), *with* FED. R. CIV. P. 9(b) (allowing condition of mind to be averred generally). The PSLRA further requires facts to be pleaded giving rise to "a strong inference" of scienter. *See* 15 U.S.C.A. § 78u-4(b)(2) (2001).

[107] *See, e.g., In re* Cabletron Sys., Inc., 311 F.3d 11 (1st Cir. 2002); ABC Arbitrage Plaintiffs Group v. Tchuruk, 291 F.3d 336 (5th Cir. 2002); Helwig v. Vencor, Inc., 251 F.3d 540, 544 (6th Cir. 2001) (en banc); Novak v. Kasaks, 216 F.3d 300, 313-14 (2d Cir. 2000); *In re* Silicon Graphics Inc. Sec. Litig., 183 F.3d 970 (9th Cir. 1999).

[108] *See, e.g.*, 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, 677-80 (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); Michael A. Perino, *Did the Private Securities Litigation Act Work?*, 2003 U. ILL. L. REV. 913 (2003); Adam C. Pritchard, *Should Congress Repeal Securities Class Action Reform?*, CATO POLICY ANALYSIS NO. 471, Feb. 27, 2003, at 9, *available at* http://www.cato.org/pubs/pas/pa-471es.html; Sale, *supra* note 82, at 944-50 (2002); 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 & 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).

[109] *Heightened Pleading*, *supra* note 4, at 607-10, 622-23.

[110] Indeed, even without the PSLRA, securities cases would continue to face heightened pleading burdens according to a recent empirical review of securities litigation and the fraud by hindsight doctrine. In an attempt to better understand judicial behavior, Georgetown law professors Mitu Gulati and Donald Langevoort, joined by Cornell's Jeffrey Rachlinski, conducted a study exploring the fraud by hindsight doctrine using a data set consisting of all published opinions on securities class actions from 1978 through 2002. *See* Mitu Gulati et al., *Fraud by Hindsight*, 98 NW. U. L. REV. 773, 802 (2004). Among their many discoveries is that "fraud by hindsight" is really synonymous with heightened pleading — in other words, a case management technique that judges created by themselves to dismiss certain types of cases they deem presumptively frivolous at the pleading stage. *Id.* at 818-25.

for retention of Rule 9(b).

As for the run-of-the-mill common-law fraud claim, the absence of Rule 9(b) will add clarity as to the appropriate notice pleading standard and uniformity in application. If this means a few more fraud cases will withstand motions to dismiss, so be it. After all, adjudication on the merits — as opposed to the pleadings — is the goal of modern federal procedure.

B. The Mischievous Rule 9(b)

Given my prediction of little impact on fraud litigation from Rule 9(b)'s eradication, I expect yawns of bored indifference at this point. Why should you care about this minutia of civil procedure? The antidote for this narcolepsy is twofold. First, the mischievous Rule 9(b) does not stay put. Rather, its heightened pleading standard is imported into other areas of substantive law deemed "fraud-like" by federal courts. This application signals a second reason for alarm — ad hoc judicial rulemaking.

Rule 9(b) is contagious. It infects other substantive areas with its heightened pleading standard. There are three identifiable strains. One type manifests itself when fraud is a component of a larger claim.[111] For example, under RICO,[112] fraud-based predicate acts are often subject to particularized pleading.[113] The reason given for application of Rule 9(b) is typically a hybrid of the protection of reputations and prevention of frivolous filings rationalizations.[114] Similarly, a claim for conspiracy to

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[111] *See* Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1104 (9th Cir. 2003) ("Fraud allegations may damage a defendant's reputation regardless of the cause of action in which they appear, and they are therefore properly subject to Rule 9(b) in every case."). When fraud is a component of a claim and subject to pleading particularity, it illustrates "targeted heightened pleading." *See Myth, supra* note 27, at 1002-04 (discussing this variant of heightened pleading).

[112] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1964 (2000).

[113] *See, e.g.*, DeMauro v. DeMauro, No. 99-1589, 215 F.3d 1311, 2000 WL 231255, at *2 (1st Cir. Feb. 16, 2000) (unpublished) ("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, No. CIV.A.92-B-409, 1993 WL 331001, at *2 (D. Colo. June 28, 1993) (applying Rule 9(b) to RICO claim).

[114] *See* Nasik Breeding & Research Farm Ltd. v. Merck & Co., 165 F. Supp. 2d 514, 537 (S.D.N.Y. 2001) (stressing that courts should "flush out" frivolous RICO claims because of stigmatizing effect on defendants); Brooks v. Bank of Boulder, 891 F. Supp. 1469, 1476 (D. Col. 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 threats of strike suits and discovery abuse).

defraud may be treated the same way.[115]

A second strain of Rule 9(b) infection arises when the rationalizations for Rule 9(b) are used to justify the application of heightened pleading to non-fraud areas. Civil rights litigation is the classic example where courts have routinely used the protection of reputations and prevention of frivolous litigation rationalizations to justify the improper use of heightened pleading.[116] The same misapplication of fraud rationales was used to impose Rule 9(b) heightened pleading on CERCLA actions.[117] Courts also apply heightened pleading to *qui tam*[118] actions arising under the False Claims Act (FCA),[119] even though FCA liability can attach for false, as opposed to fraudulent, claims.[120] Similarly, some federal courts apply Rule 9(b) particularity to state deceptive trade practices statutes.[121]

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[115] *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 particularity: (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.").

[116] The very first court to impose heightened pleading in the civil rights context based its application on a presumption of frivolousness and need to protect defendants. *See* Valley v. Maule, 297 F. Supp. 958, 960 (D. Conn. 1968). Heightened pleading based upon Rule 9(b)'s misapplied rationalizations proliferated throughout the circuits. For complete treatment of this issue see *Heightened Pleading*, *supra* note 4, at 575-82.

[117] *See* Cash Energy, Inc. v. Weiner, 768 F. Supp. 892, 897-900 (D. Mass. 1991). *Cash Energy* initially alarmed commentators. *See, e.g.*, Carl W. Tobias, *Elevated Pleading in Environmental Litigation*, 27 U.C. DAVIS L. REV. 358 (1994); Carl Tobias, *Letter to Editor*, 22 ENVTL. L. 412 (1992) (discussing *Cash* and heightened pleading and noting risks to litigants). However, with CERCLA cases the federal courts actually heeded the guidance of *Leatherman*. *See* Carl Tobias, *Clear the Air: A Millennial Update on Procedural Issues in Environmental Litigation*, 30 ENVTL. L. 227, 229 (2000) (noting declining requests for dismissals based on heightened pleading and increasing rejection of such requests).

[118] Taken literally, the term *qui tam pro domino rege quam pro seipso* ("*qui tam*" for the sake of brevity) is translated as "he who as much for the king as for himself." United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 647 n.1 (D.C. Cir. 1994).

[119] 31 U.S.C. §§ 3729-3733 (2000).

[120] *See* United States *ex rel.* Totten v. Bombardier Corp., 286 F.3d 542, 551 (D.C. Cir. 2002) (applying Rule 9(b) to claim under FCA even though statute allows liability for false claims without intent to defraud); United States *ex rel.* Lee v. SmithKline Beecham, Inc., 245 F.3d 1048, 1051 (9th Cir. 2001) ("Complaints brought under the FCA must fulfill the requirements of Rule 9(b)."); United States *ex rel.* Ortega v. Columbia Healthcare, Inc., 240 F. Supp. 2d 8, 18 (D.D.C. 2003) (following *Totten* and applying Rule 9(b) to *qui tam* action).

[121] *See* Stires v. Carnival Corp., 243 F. Supp. 2d 1313 (M.D. Fla. 2002) (requiring heightened pleading for claim under Florida Deceptive and Unfair Trade Practices Act); Patel v. Holiday Hospitality Franchising, Inc., 172 F. Supp. 2d 821, 825 (N.D. Tex. 2001) ("Claims alleging violations of the [Texas] DTPA are subject to the requirements of Rule 9(b)."); Frith v. Guardian Life Ins. Co. of Am., 9 F. Supp. 2d 734, 742 (S.D. Tex. 1998) (holding Texas DTPA and Texas Insurance Code claims are subject to requirements of Rule 9(b) because rule applies "where the gravamen of the claim is fraud even though the theory

The contamination of heightened pleading is not limited to statutory claims. Courts directly apply Rule 9(b) to defamation actions.[122] Even negligence — used as the model for notice pleading[123] — has been targeted for heightened pleading based on Rule 9(b).[124] This misuse of Rule 9(b) continues even after *Leatherman* and *Swierkiewicz* denounced judicial attempts to extend heightened pleading.[125]

The third form of contamination is even more difficult to explain — legal misnomers. Where certain types of defenses unfortunately have the word "fraud" in their general label, courts often assume that Rule 9(b) must follow. Consider "fraudulent concealment" as a defense to limitations in antitrust cases.[126] While federal antitrust cases are typically subject to a four-year limitations period, the period extends if the defendant engaged in fraudulent concealment.[127] To use the doctrine of

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supporting the claim is not technically termed fraud"). *But see* Publ'ns Int'l, Ltd. v. Leapfrog Enters., Inc., No. 01-C-3876, 2002 WL 31426651, at *5-6 (N.D. Ill. Oct. 29, 2002) (holding that claim under Illinois Consumer Fraud and Deceptive Business Practices Act is not subject to Rule 9(b) because Act covers several types of conduct in addition to fraud).

[122] *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."). The fact that this case was post-*Leatherman* is especially telling.

[123] *See* Form 9, Appendix of Forms, FED. R. CIV. P. (modeling four-sentence negligence complaint).

[124] *See* Pelman v. McDonald's Corp., 237 F. Supp. 2d 512, 518 (S.D.N.Y. 2003) (stressing fear of future frivolous "McLawsuits" in dismissing class action on heightened pleading grounds); Breeden v. Richmond Cmty. Coll., 171 F.R.D. 189, 202 (M.D.N.C. 1997) ("[A] claim for negligent misrepresentation falls within Rule 9(b)."); *see also Myth, supra* note 27, at 1047-51 (describing recent extension of heightened pleading to negligence area).

[125] Amazingly, in the civil rights context heightened pleading continues despite *Leatherman* and *Swierkiewicz*. *See Myth, supra* note 27, at 1030 & n.276 (listing cases). For example, the Eleventh Circuit maintains that "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). The *Gonzalez* panel makes no mention of *Leatherman* or *Swierkiewicz*. Even so-called *Monell* actions (claims of unconstitutional official municipal policies) that were immunized against heightened pleading by the Supreme Court in *Leatherman* are at risk of reinfection. *See* Spiller v. City of Texas City, 130 F.3d 162, 167 (5th Cir. 1997) (stating that *Monell* complaint "must contain specific facts" and "satisfy the heightened pleading requirements of municipal liability cases"). In fact, a district judge in the Northern District of Texas — the same judge responsible for *Leatherman* — recently dismissed a series of *Monell* complaints relying on *Spiller* and using a heightened pleading standard. *See, e.g.*, Drake v. City of Haltom City, No. CIV.A.4:02-CV-0733-A, 2003 WL 21138929, at *2 (N.D. Tex. May 14, 2003) (McBryde, J.), *rev'd in part*, 2004 WL 1777144 (5th Cir. Aug. 10, 2004) (unpublished).

[126] *See generally* Edward Cavanagh, *Pleading Rules in Antitrust Cases: A Return to Fact Pleading?*, 21 REV. LIT. 1, 10 (2002); Guido Saveri & Lisa Saveri, Note, *Pleading Fraudulent Concealment in an Antitrust Price Fixing Case: Rule 9(b) v. Rule 8*, 17 U.S.F. L. REV. 631 (1983).

[127] 15 U.S.C. § 15(b) (1994).

fraudulent concealment, a plaintiff must 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 the claim within the limitations period; and (3) plaintiff's due diligence until the discovery of the facts.[128] It is easy to see that the elements of this limitations defense are a far cry from common-law fraud.[129] Moreover, heightened pleading for this defense fosters none of Rule 9(b)'s rationalizations.[130] Nonetheless, courts often apply particularized pleading relying on Rule 9(b).[131]

Another unfortunate victim of judicial misnomer is the defense to patent infringement based upon inequitable conduct — "fraud on the Patent Office."[132] Inequitable conduct as a defense to infringement requires proof by the defendant that (1) there was material information, (2) withheld or misrepresented by someone substantively involved in the patent prosecution, (3) with an intent to deceive the Patent Office.[133] Again, the elements of the defense are substantively different from common-law fraud.[134] Likewise, none of Rule 9(b)'s rationales have force in this context.[135] Yet, district courts routinely apply Rule 9(b) to this affirmative defense.[136]

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[128] Berkson v. Del Monte Corp., 743 F.2d 53, 55 (1st Cir. 1984).

[129] *See supra* note 37 and accompanying text (listing elements of common law fraud).

[130] 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.

[131] *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 and 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) (stating Rule 9(b) applies to fraudulent concealment); Saveri & Saveri, *supra* note 126, 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.").

[132] *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); Michael A. Weidinger, Note, *Inequitable Pleading: Defendants' Particular Burden in Patent Infringement Suits*, 62 GEO. WASH. L. REV. 1178, 1195 (1994).

[133] *See* Molins PLC v. Textron, Inc., 48 F.3d 1172, 1178 (Fed. Cir. 1995).

[134] *See supra* note 37 and accompanying text (listing elements of common law fraud); Weidinger, *supra* note 132, at 1197-99 (distinguishing between inequitable conduct and common law fraud).

[135] *See* Hricik, *supra* note 132, at 920-34; Weidinger, *supra* note 132, at 1201-06.

[136] *See Donahue*, 633 F. Supp. at 1443 ("Courts furthermore require particularity in pleading fraudulent concealment."); *see also Rutledge*, 576 F.2d at 250 (stating plaintiff invoking fraudulent concealment must allege facts showing affirmative conduct); *Dayco*

These pleading aberrations may be mere itches that practitioners in the respective areas can scratch. The cumulative effect, however, warrants inoculation. This is especially so given the ad hoc nature of the application of Rule 9(b) by the federal courts. Despite the Supreme Court's clear admonition that the Federal Rules cannot be changed by judicial fiat, but only through the rulemaking process,[137] the district courts — often aided by the circuit courts — still embrace Rule 9(b) heightened pleading outside of common-law fraud cases.[138] One never knows when and where judicial extension may occur next, as its recent application to negligence illustrates. There is, however, a cure.

C. *The Simple Solution*

The easiest fix is to strike Rule 9(b) altogether and renumber the rest of the Rule. An equally acceptable revision is to strike only the first sentence of the Rule, leaving the following:

> Rule 9. Pleading Special Matters.
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> * * *
>
> (b). ~~Fraud, Mistake,~~ Condition of the Mind. ~~In all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity~~. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

This revision has the convenience of not having to renumber the remainder of Rule 9. It also serves as a reminder that the removal of pleading particularity for fraud and mistake does not alter the notice standard already in place for condition of the mind.

A third option would recast the Rule in terms of a prohibition on heightened pleading in fraud or mistake cases:

> (b). Fraud, Mistake, Condition of the Mind. In ~~all~~ no averments of fraud or mistake, shall the circumstances constituting the fraud or mistake ~~shall~~ be required to be stated with particularity. Fraud or mistake may be averred generally. Malice, intent, knowledge, and

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Corp., 523 F.2d at 394 (applying pleading with particularity to fraudulent concealment).

[137] *See* Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 515 (2002) (quoting *Leatherman*); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993).

[138] For additional discussion of the breadth of Rule 9(b) heightened pleading applied to nonfraud claims, see *Myth*, *supra* note 27, at 1005-07.

other condition of mind of a person may be averred generally.

This option provides the most forceful renunciation of heightened pleading. It not only provides for general allegations of fraud, but also affirmatively prohibits particularity.

Having lived with Rule 9(b) for over sixty-five years, why should the rulemakers act now? This is not the first call for change.[139] Indeed, it is precisely because these earlier pleas went unheeded that action is required. For half of its life, Rule 9(b) operated in relative obscurity — then came *Segal* in 1972, applying Rule 9(b) to a shareholder derivative action to protect defendants' reputations and prevent strike suits.[140] The peculiarities of fraud pleading eventually caught the attention of scholars as the federal courts struggled for the next two decades to give meaning to Rule 9(b) in the face of the expansion of securities fraud litigation.[141]

The Rule's inadequacies were exposed by the troubling questions of what Rule 9(b) requires, the quantum of facts necessary to meet the requirement, and whether the Rule even applies to such statutory actions in the first place.[142] The conflicting judicial answers to these questions further highlight what is problematic about this Rule. The rulemakers did not react; Congress did.[143] The congressional attempt at uniformity

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[139] E. A. Lees offered the first critical look at Rule 9(b) in 1976 with the aptly titled, *Rule 9(b) — Who Needs It?* *See supra* note 63.

[140] *See supra* notes 56-58 and accompanying text (describing *Segal*). *Segal* was also the target of the earliest criticism of Rule 9(b) misapplication. *See* Lees, *supra* note 63, at 106; Michael D. Fishbein, Recent Developments, *Pleading a Securities Cause of Action Under Rule 9(b)*, 22 VILL. L. REV. 1222, 1231-37 (1976).

[141] It is often tensions in the underlying substantive law that breed procedural quick-fixes. Unsettled issues of qualified immunity contributed to the spread of heightened pleading in civil rights cases. Similarly, uncertainty as to the proper pleading standard for scienter led courts to variants of heightened pleading in securities fraud lawsuits. *See Heightened Pleading*, *supra* note 4, at 618-22 (describing procedural-substantive dichotomy in civil rights and securities litigation). New research now shows that the "fraud by hindsight" doctrine is another example of an ad hoc judicial solution to the growth of securities class actions. *See* Gulati et al., *supra* note 110, at 820-25. However, all of these procedural solutions come at a price — one paid by the plaintiffs whose cases are disfavored.

[142] A spurt of scholarly examination into Rule 9(b) and its application to securities fraud came in the mid to late 1980s. *See generally* Himelrick, *supra* note 58; Valerie L. Litwin, *Pleading Constructive Fraud in Securities Litigation — Avoiding Dismissal for Failure to Plead Fraud with Particularity*, 33 EMORY L.J. 517 (1984); Richman, *supra* note 9; *Pleading Securities Fraud Claims*, *supra* note 45.

[143] When the rulemakers did consider heightened pleading, they leaned *toward* particularized pleading. *See* Minutes of the Advisory Committee on Civil Rules (Oct. 21-23, 1993), *available at* http://www.uscourts.gov/rules/Minutes/civ10-21.htm (discussing amendments to Rules 8 and 9 to restore heightened pleading post-*Leatherman*); Minutes of

in pleading securities fraud contained in the PSLRA, however, only generated more uncertainty.[144] At the same time, this congressional interference with pleading practice in securities fraud cases diverted attention from what Rule 9(b) requires to what the PSLRA requires. In the meantime, Rule 9(b)'s influence silently spread.

Left unchallenged, Rule 9(b) continues to contaminate other substantive areas of the law. This spread of heightened pleading based on Rule 9(b) to non-fraud claims is wrong. It imposes a procedural burden that is contrary to the Federal Rules. It does so in an impermissible manner by ad hoc judicial fiat. Collectively, the heightened pleading burdens contribute to the erosion of the transsubstantive nature of the Federal Rules.[145] Amendment is necessary now because the scope of the problem has grown — and grows larger.

This is all happening in the face of explicit Supreme Court direction to stop. This strain of heightened pleading based on Rule 9(b) has become resistant to the Court's review. As a practical matter, the Court cannot review the myriad of cases where improper fact-based pleading is imposed.[146] Given the lower courts' willingness to ignore the Supreme Court's instruction when it does address heightened pleading, the prognosis for the future is bleak. There is a cure for this ill.

Strike Rule 9(b).

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the Advisory Committee on Civil Rules (Apr. 20, 1995), *available at* http://www.uscourts.gov/rules/Minutes/min-cv4.htm (discussing restoration of particularized pleading but declining as premature); *see also Puzzling*, *supra* note 4, at 1751 (noting that Advisory Committee on Civil Rules considered "fortifying pleading requirements" after *Leatherman*).

[144] While Congress strived for uniformity with the PSLRA, the result is a tripartite circuit split concerning the appropriate heightened scienter requirement compounded by intracircuit confusion. *See Heightened Pleading*, *supra* note 4, at 603-08.

[145] The Federal Rules were designed as a single, uniform system applicable to all cases regardless of the substantive claim raised. This transsubstantivity is undermined when Rule 9(b)'s pleading standard is used in other substantive areas. At risk is the uniformity and certainty of notice pleading practice and the broader social justice benefit of access to the courts and merits determination. *See Heightened Pleading*, *supra* note 4, at 622-23.

[146] Granting certiorari in a scant 150 cases per year, the Supreme Court is not equipped to reverse the extension of Rule 9(b) to the many substantive areas now subjected to it.

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