

---

---

## Note

### **Particulars of Particularity: Alleging Scienter and the Proper Application of Rule 9(b) to Duty-Based Misrepresentations**

*Morwenna Borden\**

On February 7, 2003, the lives of Thomas, Roberta, and their daughter Tammy Eames were irreversibly changed when all three were injured in a car accident.<sup>1</sup> After their automobile insurance company denied the full coverage to the Eames, they brought a negligent misrepresentation claim in Delaware court, later removed to federal court.<sup>2</sup> The Eames's claim asserted that the language defining coverage limits in the insurer's policy was misleading.<sup>3</sup> The case was dismissed for failure to meet the heightened pleading standard set forth for fraud in Federal Rules of Civil Procedure 9(b).<sup>4</sup> On appeal, the Third Circuit affirmed dismissal,<sup>5</sup> so the Eames family petitioned the United

---

\* J.D. Candidate, University of Minnesota Law School. Special thanks to Professor Prentiss Cox for his invaluable assistance in the writing process and for his mentorship throughout my law school career. Many thanks are also due the editors and staff of *Minnesota Law Review* for the many long hours they have spent poring over the substance and form of my written words. Lastly, but first and foremost among my supporters, eternal gratitude to Brian Younglove for continual encouragement, unwavering devotion, and the oft-delivered hot meal to sustain me throughout the writing process. Copyright © 2014 by Morwenna Borden.

1. *Eames v. Nationwide Mut. Ins. Co.*, 346 F. App'x 859, 860 (3d Cir. 2009).

2. *Id.*

3. The Eames's personal injury protection was termed "full." The fullest protection available through their insurance company was \$100,000 per person. *Eames v. Nationwide Mut. Ins. Co.*, Civ. No. 04-1324-JJF-LPS, 2008 WL 4455743, at \*11–12 (D. Del. Sept. 30, 2008), *aff'd*, 346 F. App'x 859. The actual coverage their "full" personal injury protection coverage provided was \$15,000 per person, the statutory minimum in Delaware. *Id.*; see also DEL. CODE ANN. Tit. 21, § 2118(a)(2)(b) (2012).

4. *Eames v. Nationwide Mut. Ins. Co.*, No. Civ. A. 04-1324-KAJ, 2006 WL 2506640 (D. Del. Aug. 29, 2006), *aff'd*, 346 F. App'x 859.

5. *Eames*, 346 F. App'x at 859.

States Supreme Court for further review.<sup>6</sup> In March 2010, the Supreme Court denied the petition for certiorari, ultimately denying the family the possibility of full recompense for their injuries based on the pleading standard assumed to be required by their claim.<sup>7</sup>

The Eames family's case highlights an emerging split in the federal circuit courts regarding the proper pleading standard for negligent misrepresentation claims.<sup>8</sup> Claims of negligent misrepresentation and fraud by omission are generally held to be derivatives of fraud.<sup>9</sup> Rule 9(b) clearly governs the appropriate pleading standard for fraud claims: they must be alleged with particularity.<sup>10</sup> However, courts are divided over the correct pleading standard for duty-based misrepresentation claims, particularly negligent misrepresentation.<sup>11</sup> Approxi-

---

6. The petition for certiorari was, in part, an effort to resolve a circuit split as to whether the heightened pleading standard applies to claims brought under state consumer protection acts, which are provable on a showing of negligent misrepresentation. Petition for a Writ of Certiorari at 13–16, *Eames v. Nationwide Mut. Ins. Co.* 346 F. App'x 859 (3d Cir. 2009) (No. 09-809).

7. *Eames v. Nationwide Mut. Ins. Co.*, 559 U.S. 1006 (2010).

8. This is not an isolated case. Claims of negligent misrepresentation are routinely dismissed for failure to satisfy Rule 9(b)'s particularity requirements. During a single six-month period from October 2012 to April 2013, there were 126 cases throughout the United States in which the defendant moved to dismiss a negligent misrepresentation claim on Rule 9(b) grounds. *See, e.g.*, *Gardner v. RSM & A Foreclosure Servs., LLC*, No. 12-CV-2666-JAM-AC, 2013 WL 1129392 (E.D. Cal. Mar. 18, 2013) (motion granted); *Chapman v. Abbott Labs.*, 930 F. Supp. 2d 1321 (M.D. Fla. Mar. 14, 2013) (motion granted); *Sovis v. Bank of N.Y. Mellon Corp.*, Civ. No. 12-2027 DWF/LIB, 2013 WL 440215 (D. Minn. Feb. 5, 2013) (motion granted); *Rankine v. Roller Bearing Co. of Am., Inc.*, No. 12-CV-2065-IEG BLM, 2013 WL 55802 (S.D. Cal. Jan. 2, 2013) (motion granted); *Razi v. Razavi*, No. 5:12-CV-80-OC-34PRL, 2012 WL 7801361 (M.D. Fla. Dec. 21, 2012) (motion granted); *Howard v. J.P. Morgan Chase Bank, N.A.*, No. CV12-0952-PHX DGC, 2012 WL 6589330 (D. Ariz. Dec. 17, 2012) (motion granted); *Montes v. Am. Hosp. Ass'n*, Civ. No. 3:12-CV-1999-M-BK, 2012 WL 6625379 (N.D. Tex. Dec. 12, 2012) (motion granted); *Shapouri v. CitiMortgage, Inc.*, No. 3:12-CV-1133-JM JMA, 2012 WL 5285910 (S.D. Cal. Oct. 22, 2012) (motion granted).

9. *See, e.g.*, PETER A. ALEES, *LAW OF FRAUDULENT TRANSACTIONS* § 2:15 (2013) (stating that negligent misrepresentation is a form of fraud); 37 C.J.S. *Fraud* § 33 (2013) ("Fraud by omission is a subcategory of fraud.").

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

11. A fraud-by-omission or fraud-by-concealment claim "can succeed without the same level of [pleading] specificity" a normal fraud claim requires. *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 754 F. Supp. 2d 1145, 1189 (C.D. Cal. 2010); *Baggett v. Hewlett-Packard Co.*, 582 F. Supp. 2d 1261, 1267 (C.D. Cal. 2007); 35A C.J.S. *Federal Civil Procedure* § 307 (2013). *See infra* notes 12–13 and accompanying text.

mately half the circuits hold that Rule 9(b) is applicable to negligent misrepresentation claims,<sup>12</sup> while others hold that Rule 8(a) governs.<sup>13</sup> Rule 8(a) only requires the pleader to include “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>14</sup> In contrast, when claiming fraud, Rule 9(b) requires that “a party must state with particularity the circumstances constituting fraud.”<sup>15</sup>

This Note discusses the similarities and differences between actual fraud and the duty-based misrepresentation family of claims, including negligent misrepresentation and fraud by omission. Part I examines the legal and historical background of pleading generally, and the heightened pleading standard set forth in Rule 9(b). Part I continues with a review of actual fraud and the duty-based claims of negligent misrepresentation and fraud by omission. Part II analyzes the purposes of the heightened pleading standard as they relate to duty-based misrepresentation claims and concludes that the proposed policies that ground heightened pleading for intentional fraud claims do not justify particularized pleading for duty-based misrepresentation claims. Part III discusses the circuit split in relation to the guiding principle that Rule 9(b) is correctly applied where the claim or allegation sounds in fraud. Part III continues with a survey of the current formulations that define when a claim sounds in fraud and concludes that scienter is a required element for an allegation to sound in fraud. This Note proposes that causes of action that include scienter and allegations of an intent to deceive sound in fraud and should be held to the heightened pleading requirement, while

---

12. See *Republic Bank & Trust Co. v. Bear Stearns & Co.*, 683 F.3d 239, 248 (6th Cir. 2012) (Kentucky law); *Trooien v. Mansour*, 608 F.3d 1020, 1028 (8th Cir. 2010) (Minnesota law); *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566, 579 (2d Cir. 2005); *Dist. 1199P Health & Welfare Plan v. Janssen, LP*, 784 F. Supp. 2d 508, 532 (D.N.J. 2011) (Third Circuit, New Jersey law); *Sebago, Inc. v. Beazer E., Inc.*, 18 F. Supp. 2d 70, 95 (D. Mass. 1998) (First Circuit).

13. See *Balt. Cnty. v. Cigna Healthcare*, 238 F. App'x 914, 921 (4th Cir. 2007); *Tricontinental Indus., Ltd. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824, 833–34 (7th Cir. 2007) (Illinois law); *Am. Realty Trust, Inc. v. Hamilton Lane Advisors, Inc.*, 115 F. App'x 662, 668 (5th Cir. 2004); *City of Raton v. Ark. River Power Auth.*, 600 F. Supp. 2d 1130, 1143 (D.N.M. 2008) (Tenth Circuit).

14. FED. R. CIV. P. 8(a)(2); see also *infra* notes 20–24 and accompanying text.

15. FED. R. CIV. P. 9(b); see also *infra* notes 45–52 and accompanying text.

causes of action that sound in negligence should simply require a short and plain statement of the claim.

#### I. THE LEGAL HISTORY AND BACKGROUND OF RULE 9(b) AND MISREPRESENTATION TORTS

Analysis of the proper application of Rule 9(b) must be grounded in an understanding of pleading generally, the history of the heightened pleading standard, and the rationale underlying the particularity requirement. This Part provides that background and also examines the elements of fraud, fraud by omission, and negligent misrepresentation claims. In addition, the application of the heightened pleading standard by the courts will be surveyed in relation to each of these causes of action.

##### A. A BRIEF HISTORY OF PLEADING

Understanding the origins of pleading generally informs the discussion of how Rule 9(b) applies to duty-based misrepresentation claims. This Section highlights the philosophy underpinning the Federal Rules of Civil Procedure, the function of pleadings within that system, the reasoning for the low threshold required for pleadings, and the recent refinement of notice pleading in the Supreme Court's rulings in *Bell Atlantic v. Twombly*<sup>16</sup> and *Ashcroft v. Iqbal*.<sup>17</sup>

The philosophy behind the Federal Rules of Civil Procedure is clearly stated in Rule 1: the rules "should be construed to secure the just, speedy, and inexpensive determination of every action."<sup>18</sup>

The primary purposes of the Federal Rules are to promote justice and facilitate adjudication on the merits of the claim.<sup>19</sup> The function of pleadings under Rule 8(a) is to provide notice.<sup>20</sup>

---

16. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

17. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

18. FED. R. CIV. P. 1.

19. FED. R. CIV. P. 8(e) ("Pleadings must be construed so as to do justice."); *see also* *Suowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966) ("The basic purpose of the Federal Rules is to administer justice through fair trials . . . to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court."). *See generally* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1029 (3d ed. 2002) (discussing the policies behind the drafting of the Federal Rules of Civil Procedure).

20. *See generally* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d ed. 2004) ("Historically, pleadings

The notice model requires, in the majority of cases, only that the plaintiff provide a short and plain statement sufficient to notify the defendant of the nature of the claim.<sup>21</sup> The principal draftsman of the Federal Rules commented that what should be expected of the pleading was “a general statement distinguishing the case from all others, so that the manner and form of trial and remedy expected are clear.”<sup>22</sup> The fact that the pleading is the gateway to court access justifies this low threshold. The idea is not to keep litigants out of court, but to let them in.

The Supreme Court has substantially expanded upon the notice model of pleading in recent years. In *Bell Atlantic Corp. v. Twombly*, the Court noted that a plaintiff’s obligation to provide the grounds of his entitlement to relief “requires more than labels and conclusions, and “a formulaic recitation of the elements of a cause of action will not do.”<sup>23</sup> *Ashcroft v. Iqbal* elaborated upon this standard, stating that “a complaint must contain “sufficient factual matter, accepted as true, ‘to state a claim to relief that is plausible on its face,’” and further commented that “[a] claim has facial plausibility when the plaintiff pleads factual content” that allows the court to reasonably infer the defendant’s liability for the alleged misconduct.<sup>24</sup> This plausibility standard tailors modern notice pleading, and underlies the additional requirements of Rule 9(b)’s heightened pleading standard.

---

have served four major functions: (1) giving notice of the nature of a claim or defense; (2) stating the facts each party believes to exist; (3) narrowing the issues that must be litigated; and (4) providing a means for speedy disposition of sham claims and insubstantial defenses.”). *But see* Francis v. Giacomelli, 588 F.3d 186, 192–93 (4th Cir. 2009) (stating that the notice pleading characterization may be too simplistic, belying the countervailing policy that litigation is only open to those plaintiffs whose complaints are justified by both law and fact).

21. FED. R. CIV. P. 8(a). *But cf.* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988–89 (2003) (arguing that notice pleading is a myth based on the broad exceptions to the notice standard in various substantive areas of the law).

22. Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937).

23. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

24. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 547).

## B. PLEADING WITH PARTICULARITY: THE HEIGHTENED PLEADING STANDARD OF RULE 9(b)

An informed analysis of Rule 9(b)'s appropriate application to misrepresentation claims requires an understanding of the history of the particularity requirement. This Section provides the historical background for particularized pleading, the transition from English common law to the American Federal Rules of Civil Procedure, and comments on the gap between the historical rule and the modern application of Rule 9(b) to fraud claims. Post hoc rationalizations for the heightened pleading standard are laid out as possible bases for this exception to notice pleading found in the Federal Rules.

### 1. History of Particularized Pleading

Rule 9(b)'s heightened standard traces back to English common law pleading rules.<sup>25</sup> Before the merger of law and equity, fraud could not be asserted as an equitable defense to an action at law.<sup>26</sup> Because the litigant had to sue at equity to enjoin enforcement of a law court's judgment, equity courts required fraud to be pled with particularity in these cases.<sup>27</sup> During this time period, however, pleading fraud as a cause of action at law did not require the same particularity.<sup>28</sup> At the time, the reasoning for the heightened standard stemmed from the judicial desire to protect judgments settled in courts of law.<sup>29</sup> Though the reasoning ceased to fit its application, the heightened pleading standard came to be applied to fraud claims in the United States around the turn of the twentieth century, shortly before the introduction of the Federal Rules of Civil Procedure.<sup>30</sup>

---

25. 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1296 (3d ed. 2004) ("This specific pleading requirement perpetuates the practice that existed at common law . . .").

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

27. *Id.*

28. *Id.* The treatises commented on explicitly state that certain causes of action did require specificity, such as slander, but not fraud. *See id.*

29. Christopher M. Fairman, *An Invitation to the Rulemakers—Strike Rule 9(b)*, 38 U.C. DAVIS L. REV. 281, 285 (2004).

30. *See, e.g.,* Chamberlain Mach. Works v. United States, 270 U.S. 347, 349 (1926) ("To show a cause of action it was necessary that the petition state distinctly the particular acts of fraud . . ."); *Rice v. Wilson*, 225 F. 159, 163 (D. Del. 1915) ("Fraud must be not only particularly alleged but strictly proved.").

Remarkably, very little explicit reasoning substantiates the heightened pleading standard as it is announced in the Federal Rules. The legislative history on the topic is sparse. The Advisory Committee notes relating to the adoption of Rule 9 are limited to the cryptic message of “[s]ee English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 22.”<sup>31</sup> It is apparent that the heightened standard is based on English procedure, but the Advisory Committee did not provide further justifications for adopting this particular rule. Rule 9(b) appears in the first draft of the Federal Rules and has never been substantively amended.<sup>32</sup>

The history of the particularity requirement for fraud is atypical. There is little connective tissue tying the modern form to its historical roots, and yet almost no explanation is provided for its inclusion in the Federal Rules. In one of the few comments that relates directly to the heightened pleading standard, the chief architect of the Federal Rules, Charles E. Clark, provided a less-than-illuminating commentary on the purpose of the particularity requirement. Regarding Rule 9(b), he stated that “[w]hile useful, this rule probably states only what courts would do anyhow and may not be considered absolutely essential.”<sup>33</sup> Further explanation is needed for this limiting exception to the general notice pleading paradigm.

## 2. Post-Hoc Rationalizations of the Particularity Requirement

Since the adoption of the Federal Rules of Civil Procedure, the particularity requirement for fraud claims has been rationalized on various grounds. Legal scholars and judges alike assert that defendants’ reputations must be protected from lightly made allegations of morally reprehensible acts.<sup>34</sup> Proponents of the heightened pleading standard also argue that defendants must be protected from baseless suits filed for nuisance or settlement value.<sup>35</sup> Another justification for particularized plead-

---

31. FED. R. CIV. P. 9. The English rule referred to provides: “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.” Fairman, *supra* note 29, at 287.

32. Richman et al., *supra* note 26, at 965.

33. Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 463–64 (1943).

34. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1104 (9th Cir. 2003); 4 WRIGHT & MILLER, *supra* note 19, § 1296.

35. Adams v. NVR Homes, Inc., 193 F.R.D. 243, 250 (D. Md. 2000); 5A WRIGHT & MILLER, *supra* note 25, § 1296 (“[U]nfounded fraud claims should be identified and disposed of early.”).

ing stems from the desire for finality in settled transactions—transactions should not be easily reopened for an allegation of fraud.<sup>36</sup> These same scholars claim that to prepare an effective defense to a claim which embraces a wide variety of potential conduct, a defendant must be put on notice of the act they are alleged to have performed.<sup>37</sup> The heightened pleading standard is also defended as a means to deter the filing of suits solely for discovery purposes, in an effort to discover whether unknown wrongs have occurred in the course of a transaction.<sup>38</sup> In the absence of legislative history to indicate the rule's purpose, these post hoc policies underlying the heightened pleading standard stand alone as the foundation for Rule 9(b).

### C. LEGAL BACKGROUND OF FRAUD

Rule 9(b), by its language, clearly applies to claims of actual fraud. This Section discusses the elements of a cause of action for fraud, notes the prominence of scienter as a critical component of the tort of fraud, and reviews the application of Rule 9(b) by various courts to actual fraud claims. Although the *specific* application of heightened pleading is variable, courts consistently require some particularized facts to be alleged in a claim of actual fraud.

A separate cause of action for fraud originated from the independent tort of deceit.<sup>39</sup> This deceit-based history clearly points to scienter, the intent to deceive, as the cornerstone element in an action for fraud.<sup>40</sup> The ordinary elements comprising a fraud claim are: (1) a false material assertion; (2) scienter; (3) the intent to induce reliance on the assertion; (4) justifiable re-

---

36. *In re* Initial Pub. Offering Sec. Litig., 241 F. Supp. 2d 281, 325 (S.D.N.Y. 2003); 4 WRIGHT & MILLER, *supra* note 19, § 1296 (“The utility of promoting stability in economic transactions has considerable force and might be compromised if fraud claims were easy to assert.”).

37. *Cresencia v. Kim*, 878 P.2d 725, 733 (Haw. App. 1994); 5A WRIGHT & MILLER, *supra* note 25, § 1296 (“[A] defendant needs a substantial amount of particularized information about the plaintiff's claim in order to enable him to understand it and effectively prepare a responsive pleading and an overall defense of the actions.”).

38. 5A WRIGHT & MILLER, *supra* note 25, § 1296.

39. YOUNG B. SMITH & WILLIAM L. PROSSER, CASES AND MATERIALS ON TORTS (2d ed. 1957), *cited in* V. John Ella, *Common Law Fraud Claims: A Critical Tool for Litigators*, BENCH & B. MINN., Sept. 2006, at 18, 19.

40. *See also*, Frank J. Cavico, *Fraudulent, Negligent, and Innocent Misrepresentation in the Employment Context: The Deceitful, Careless, and Thoughtless Employer*, 20 CAMPBELL L. REV. 1, 34 (1997).



liance; and (5) damages resulting from the reliance.<sup>41</sup> In this context, scienter is defined as the intention “to deceive, manipulate, or defraud.”<sup>42</sup> The element of scienter differentiates fraud from all other misrepresentations.<sup>43</sup> Scienter cannot be inferred from facts which prove only a materially false or misleading statement; rather, there must be a relation of factual falsity to a deceptive state of mind.<sup>44</sup>

When applicable, Rule 9(b) trumps Rule 8(a). Therefore, it is Rule 9(b)’s heightened pleading standard that applies to claims of fraud, not the bare notice pleading set forth in Rule 8(a).<sup>45</sup> When fraud is alleged, Rule 8(a) is supplemented with the requirement that the circumstances be pled with particularity.<sup>46</sup> Although courts vary in their precise application of the heightened pleading standard to claims of fraud<sup>47</sup>, a plaintiff generally satisfies the particularity requirement by stating *who* made the representation, *what* was represented, *where* and *when* the representation was made, and *how* it was fraudulent.<sup>48</sup> The complaint need not enumerate all the evidence or plea with such a degree of particularity that general discovery methods would be replaced.<sup>49</sup> In addition, Rule 9(b) allows intent and other conditions of a person’s mind to be alleged gen-

---

41. See RESTATEMENT (SECOND) OF TORTS §§ 526, 531, 537, 549 (1999).

42. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976).

43. RESTATEMENT (SECOND) OF TORTS § 526 (1999). Scienter is designated as the condition under which a misrepresentation is fraudulent. See *id.*

44. Merck & Co. v. Reynolds, 130 S. Ct. 1784, 1797 (2010).

45. Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (explaining that unless fraud or mistake are alleged, Rule 8(a) notice pleading is the governing standard).

46. 5A WRIGHT & MILLER, *supra* note 25, § 1297 (“[T]he rule is a special pleading requirement and contrary to the general approach of the ‘short and plain,’ simplified pleading . . .”).

47. Compare *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 921 (8th Cir. 2001) (holding that it is only fair to allow discovery before requiring the plaintiff to plead facts that remain within the defendant’s knowledge), and *Corley v. Rosewood Care Ctr., Inc. of Peoria*, 142 F.3d 1041, 1051 (7th Cir. 1998) (“[T]he particularity requirement of Rule 9(b) must be relaxed where the plaintiff lacks access to all the facts necessary to detail his claim . . .”), with *Hayduk v. Lanna*, 775 F.2d 441, 444 (1st Cir. 1985) (The particularity requirements must be met, “even when the fraud relates to matters peculiarly within the knowledge of the opposing party.” (quoting *Wayne Inv., Inc. v. Gulf Oil Corp.*, 739 F.2d 11, 13 (1st Cir. 1984))).

48. See *United States ex rel. Costner v. United States*, 317 F.3d 883, 888 (8th Cir. 2003).

49. *Graphic Techs., Inc. v. Pitney Bowes Inc.*, 998 F. Supp. 1174, 1178 (D. Kan. 1998).

erally<sup>50</sup>—scienter need not be pled with specificity.<sup>51</sup> However, courts have held that the plaintiff must set forth specific facts that make it reasonable to believe that the defendants knew the statements were false or misleading.<sup>52</sup>

Courts have found numerous ways for a fraud claim to meet the particularity requirement. The First Circuit allowed a fraud claim to proceed where the complaint did not describe the frauds with sufficient particularity, but the plaintiffs' opposition to the motion for summary judgment and related discovery material cited gave sufficient notice of the fraudulent acts alleged . . . ."<sup>53</sup>

The Third Circuit also carved out an exception to the particularity requirement, holding that the date, place, and time of the fraud need not be alleged, as long as the plaintiff uses "an 'alternative means of injecting precision and some measure of substantiation into their allegations of fraud.'"<sup>54</sup>

Courts are equally creative when dismissing a complaint on particularity grounds. One court dismissed a complaint, despite the fact it described a speaker's statements with particularity, holding that "January, 1996" does not allege the *time* of the statement in a sufficiently particular manner.<sup>55</sup> Others have held that the complaint must contain specific identification of documents comprising the false statements.<sup>56</sup> These variations in procedure lead to frustration for parties, judges, and legal scholars alike.<sup>57</sup> Yet, these relatively minor difficulties in applying heightened pleading to actual fraud claims are magnified when it comes to pleading related, yet distinct, causes of

---

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

51. *Id.*

52. *In re Segue Software, Inc. Sec. Litig.*, 106 F. Supp. 2d 161, 165 (D. Mass. 2000).

53. *Bonilla v. Trebol Motors Corp.*, 150 F.3d 77, 81 (1st Cir. 1998).

54. *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 658 (3d Cir. 1998) (quoting *Seville Indus. Mach. v. Southmost Mach.*, 742 F.2d 786, 791 (3d Cir. 1984)).

55. *Learning Express, Inc. v. Ray-Matt Enters.*, 74 F. Supp. 2d 79, 85 (D. Mass. 1999).

56. *Elster v. Alexander*, 75 F.R.D. 458, 461–62 (N.D. Ga. 1977).

57. *E.g.*, *In re Commonwealth Oil/Tesoro Petroleum Corp. Sec. Litig.*, 467 F. Supp. 227, 250 (W.D. Tex. 1979) ("No court has enunciated a [particularity] test which casts light beyond the facts before it."); Jeff Sovern, *Reconsidering Federal Civil Rule 9(b): Do We Need Particularized Pleading Requirements in Fraud Cases?*, 104 F.R.D. 143, 179 (1985) ("Rule 9(b) should be eliminated from the federal civil rules. . . . Too often, Rule 9(b) motions are just another obstacle to the speedy resolution of a case.").

action that are not enumerated in the text of Rule 9(b), and at their heart are grounded in duty rather than scienter.

D. DUTY-BASED MISREPRESENTATION: A PRIMER ON FRAUD BY OMISSION AND NEGLIGENT MISREPRESENTATIONS

American jurisprudence recognizes a continuum for claims of misrepresentation. At one end is actual fraud, based in scienter.<sup>58</sup> At the opposite end of the spectrum are innocent misrepresentation claims that do not require either knowledge that the misrepresentation was false or intent to induce reliance on the misrepresentation.<sup>59</sup> Roughly in the center of the continuum are misrepresentations that are based in duty, such as fraud by omission and negligent misrepresentation.<sup>60</sup> This Section discusses both fraud by omission and negligent misrepresentation claims, focusing on the elements of each tort and the courts' application of Rule 9(b) to each cause of action.

1. Fraud by Omission

Unlike actual fraud, which hinges on an affirmative misstatement, a fraud by omission claim is grounded in an unfulfilled duty to disclose.<sup>61</sup> To prevail on a fraud by omission claim, the plaintiff must prove that (1) the defendant had a duty to disclose the material fact at issue; (2) the defendant failed to disclose the fact; (3) the defendant's failure to disclose the material fact induced the plaintiff to act; and (4) the plaintiff suffered actual damages as a result of the nondisclosure.<sup>62</sup> Fraud by omission is sometimes conflated with fraudulent concealment.<sup>63</sup> However, fraudulent concealment requires the additional element of scienter, which is not an element of fraud by omission.<sup>64</sup> The two claims are neither equivalent nor interchangeable.

The duty to disclose arises in a variety of situations. There are at least three types of relationships which can give rise to a

58. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 107, 741 (5th ed. 1984).

59. *Id.* at 748-49.

60. Addressing the proper pleading standard for innocent misrepresentations is beyond the scope of this paper.

61. See RESTATEMENT (SECOND) OF TORTS § 525 (1999).

62. *Id.* § 551.

63. See *Breeden v. Richmond Cmty. Coll.*, 171 F.R.D. 189, 194 (M.D.N.C. 1997) (using fraud by omission and fraudulent concealment interchangeably).

64. *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566, 582 (2d Cir. 2005).

duty to disclose material facts. The first is a formal fiduciary relationship,<sup>65</sup> the second is a confidential relationship,<sup>66</sup> and the third is a trilogy created in arm's length transactions.<sup>67</sup>

In contrast to affirmative representations, fraud by omission can be very difficult to plead with particularity. By its very nature, it is a claim of non-action. It is puzzling to explain how a plaintiff can plead who, what, where, how, and when a non-action occurred. No courts have completely abrogated the necessity for pleading with particularity, but a fraud by omission claim can succeed without the same degree of specificity that an actual fraud claim requires.<sup>68</sup>

The pleading standard required in a fraud by omission claim is varied. Some courts require that a plaintiff claiming fraud by omission need only allege the facts that were not disclosed and the source of the duty to speak with particularity.<sup>69</sup> Other courts require the complaint to reasonably allege what the omission entailed, the person responsible for the failure to disclose, the context of the omissions and the manner in which they misled the plaintiff, and what the defendant obtained through the omission.<sup>70</sup> One court has expanded this requirement to include particularity regarding the relationship giving rise to the duty to speak, the reason for the materiality of the omission, and why reliance on the omission was both reasona-

---

65. *Id.*; D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1412 (2002) ("Formal fiduciary relationships are those well-settled cases—such as trustee-beneficiary, guardian-ward, partner-partner, director-shareholder, and attorney-client—where fiduciary duties apply as a matter of course.")

66. Smith, *supra* note 65, at 1412–14 ("Informal fiduciary relationships—often referred to as 'confidential relationships'—are those in which the court imposes fiduciary duties based on a qualitative evaluation of the relationship . . . . [T]he common elements are quite simple: (1) 'trust' or 'confidence' reposed by one person in another; and (2) the resulting 'domination,' 'superiority,' or 'undue influence' of the other.")

67. "(1) When one voluntarily discloses information, he has a duty to disclose the whole truth; (2) when one makes a representation, he has a duty to disclose new information when he is aware the new information makes the earlier representation misleading or untrue; and (3) when one makes a partial disclosure and conveys a false impression, he has a duty to speak." *Four Bros. Boat Works, Inc. v. Tesoro Petroleum Co.*, 217 S.W.3d 653, 670–71 (Tex. App. 2006).

68. *Falk v. Gen. Motors Corp.*, 496 F. Supp. 2d 1088, 1099 (N.D. Cal. 2007).

69. 27 FED. PROC., L. ED. § 62:146 (2008).

70. *Weaver v. Chrysler Corp.*, 172 F.R.D. 96, 101 (S.D.N.Y. 1997); *Adler v. Berg Harmon Assocs.*, 816 F. Supp. 919, 924 (S.D.N.Y. 1993).

ble and detrimental.<sup>71</sup> Still other courts hold that “relaxed Rule 9(b) analysis” applies to claims of fraud by omission.<sup>72</sup>

## 2. Negligent Misrepresentation

Negligent misrepresentation claims are governed by the principles of negligence: reasonableness, duty, breach, and damages. Negligent misrepresentation does not contain the requirement of an intent to deceive and is “therefore technically not fraud.”<sup>73</sup> It is also unlike fraud by omission in that the duty owed arises only in a transactional context, rather than from a special relationship between the parties.<sup>74</sup>

The archetypal elements of negligent misrepresentation are: (1) the misrepresentation must be made in the course of business, profession, or employment, or another transaction in which the speaker has a pecuniary interest; (2) the representation must supply false information; (3) there must have been justifiable reliance on the false information supplied; and (4) the party accused of the misrepresentation must have failed to exercise reasonable care or competence in obtaining or communicating the information.<sup>75</sup> The scope of negligent misrepresentation is narrow because it is premised on the reasonable expectations of a foreseeable user of information supplied in a transactional context.<sup>76</sup>

The Circuit Courts have vastly divergent views over the appropriate pleading standard for negligent misrepresentation claims. The different pleading standards arise from a fundamental philosophical difference in the way the Circuits view negligent misrepresentation. Those that apply Rule 9(b) hold that negligent misrepresentation claims are claims of fraud, or

---

71. *Breeden v. Richmond Cmty. Coll.*, 171 F.R.D. 189, 195 (M.D.N.C. 1997).

72. *Robinson v. Fountainhead Title Grp. Corp.*, 447 F. Supp. 2d 478, 490 (D. Md. 2006).

73. R. Joseph Barton, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 WM. & MARY L. REV. 1789, 1820 (2000) (distinguishing negligent misrepresentation from fraud based on the lack of a “concomitant element of an *actual intent to deceive*”); V. John Ella, *Common Law Fraud Claims: A Critical Tool for Litigators*, BENCH & B. MINN., Sept. 2006, at 18, 20. *But see* 37 C.J.S. *Fraud* § 74 (2013) (“An action for negligent misrepresentation is an action for fraud.”).

74. RESTATEMENT (SECOND) OF TORTS § 552 (1999).

75. *Id.*

76. *Id.* at cmt. a.

sound in fraud; those who apply Rule 8(a) hold that they are claims of negligence, not grounded in fraud.<sup>77</sup>

In holding that the heightened pleading standard does not apply to claims of negligent misrepresentation, courts have argued that negligent misrepresentation “does not contain an essential showing of fraud”;<sup>78</sup> “is *not* governed by . . . Rule 9(b)”;<sup>79</sup> is not enumerated in Rule 9(b);<sup>80</sup> and “as its name suggests, [is] grounded in negligence rather than fraud.”<sup>81</sup> By comparison, in holding that the heightened pleading standard does apply to negligent misrepresentation, courts have argued that an allegation of negligent misrepresentation is simply an allegation of fraud<sup>82</sup> or that an action for negligent misrepresentation sounds in fraud rather than negligence.<sup>83</sup>

The Sixth Circuit and Ninth Circuits are exceptions to these general rules.<sup>84</sup> In an anomalous combination of philosophies, the Sixth Circuit acknowledges that Kentucky law suggests that negligent misrepresentation is not an allegation of fraud, yet still holds that the heightened pleading standard applies because such an allegation implicates Rule 9(b)’s purpose.<sup>85</sup> The Ninth Circuit relies primarily on the conduct alleged, rather than the nature of the claim to determine whether heightened pleading is necessary. Allegations “of fraudulent conduct must satisfy the heightened pleading requirements of Rule 9(b). Allegations of non-fraudulent conduct need satisfy only the ordinary notice pleading standards of Rule 8(a).”<sup>86</sup>

The history of the heightened pleading standard and the justifications surrounding its adoption into the Federal Rules do not provide much guidance for courts applying Rule 9(b) to misrepresentation claims. The historical basis for Rule 9(b)

---

77. See *infra* notes 78–83 and accompanying text.

78. *Baltimore Cnty. v. Cigna Healthcare*, 238 F. App’x 914, 921 (4th Cir. 2007).

79. *Tricontinental Indus., Ltd. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824, 833 (7th Cir. 2007).

80. *Am. Realty Trust, Inc. v. Hamilton Lane Advisors, Inc.*, 115 F. App’x 662, 668 (5th Cir. 2004).

81. *City of Raton v. Ark. River Power Auth.*, 600 F. Supp. 2d 1130, 1143 (D.N.M. 2008).

82. *Trooien v. Mansour*, 608 F.3d 1020, 1028 (8th Cir. 2010).

83. *Souran v. Travelers Ins. Co.*, 982 F.2d 1497, 1511 (11th Cir. 1993).

84. See *infra* notes 85–86 and accompanying text.

85. *Republic Bank & Trust Co. v. Bear Stearns & Co.*, 683 F.3d 239, 247–48 (6th Cir. 2012).

86. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003).

heightened pleading in fraud claims is uncertain.<sup>87</sup> With this backdrop of historical and post-hoc heightened pleading rationales, federal courts apply Rule 9(b) differently for fraud, fraud by omission, and negligent misrepresentation. For fraud by omission and negligent misrepresentation, courts are split on whether to apply notice pleading or Rule 9(b). A clear standard is needed to apprise plaintiffs of the requirements for their pleading and to guide courts in their determination of the appropriate pleading standard.

## II. ANALYSIS OF THE APPLICATION OF THE PARTICULARITY REQUIREMENT TO DUTY-BASED MISREPRESENTATION CLAIMS

Shaping a workable pleading standard for duty-based misrepresentation claims entails an analysis of the claims' elements and how the elements relate to the purposes of the heightened pleading standard set forth in Rule 9(b). Courts have clearly determined that the making of a false statement is not per se a matter that Rule 9(b) requires to be specially pleaded.<sup>88</sup> Thus the pleading standard for each type of misrepresentation claim must be determined by reference to the element in each that differentiates it from the others. The critical component of a fraud claim is scienter.<sup>89</sup> The crux of a fraud by omission claim is the special relationship between the parties that gives rise to a duty to disclose.<sup>90</sup> The root of a negligent misrepresentation claim is that the defendant failed to exercise reasonable care in obtaining and communicating information in a transactional context.<sup>91</sup>

The following sections analyze the four most oft-repeated policy arguments for the heightened pleading standard in light of the key components of fraud, fraud by omission, and negligent misrepresentation. This Part argues that the Circuit split belies general adherence to a vague standard used to fix the pleading standard. The principle underpinning the apparent split holds that allegations that sound in fraud are properly

---

87. *See supra* Part I.B.

88. *John P. Villano Inc. v. CBS, Inc.*, 176 F.R.D. 130, 131 (S.D.N.Y. 1997) (“[N]othing in the language or history of Rule 9(b) suggests that it is intended to apply, willy-nilly, to every . . . tort that includes an element of false statement.”).

89. *See supra* Part I.C.

90. *See supra* Part I.D.1.

91. *See supra* Part I.D.2.

governed by Rule 9(b) while allegations that are grounded in negligence only need to satisfy Rule 8(a).

A. FINALITY OF SETTLED TRANSACTIONS DICTATES THAT THEY SHOULD NOT BE LIGHTLY REOPENED FOR AN ALLEGATION OF FRAUD

The historic explanation for the heightened pleading requirement for fraud claims is to protect judgments and settled transactions.<sup>92</sup> Protecting settled transactions is not a persuasive reason to require heightened pleading for duty-based claims. Legal scholars have noted that Rule 9(b) “probably originated in equity pleading and reflected a reluctance to upset or investigate judgments, settled accounts and other completed transactions.”<sup>93</sup> This policy has its roots in the historical rationale for heightened pleading in the English jurisprudential separation between courts of equity and courts of law.<sup>94</sup> Since the merger of the two, fraud is no longer raised as defense to the judgment of a court of law in a separate court of equity, so the historical rationale is inapplicable.<sup>95</sup>

A modern corollary justification has been asserted for the historical heightened pleading policy. Charges of fraud frequently request courts to rewrite the parties’ contract or otherwise disrupt established contractual relationships.<sup>96</sup> Since “[t]he utility of promoting stability in economic transactions has considerable force and might be compromised if fraud claims were easy to assert,”<sup>97</sup> some courts are reluctant to reopen settled transactions without particularized pleading for fraud cases.<sup>98</sup>

This justification takes for granted that stability in economic transactions would be undermined by the mere pleading of fraud. Even though stability in economic transactions could be undermined by the setting aside of numerous transactions

---

92. *John P. Villano*, 176 F.R.D. at 131.

93. *Richman et al.*, *supra* note 26, at 967.

94. *John P. Villano*, 176 F.R.D. at 131. (“The requirement traces back to common law presumptions of *caveat emptor* and to the reluctance of English courts to reopen settled transactions.”).

95. *See supra* Part I.B.

96. *Ackerman v. Nw. Mut. Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir. 1999).

97. 5 *WRIGHT & MILLER*, *supra* note 20, at § 1296.

98. *See, e.g.*, *Stearns v. Page*, 48 U.S. 819, 829 (1849). Particularity is required for fraud claims that seek to reopen a settled transaction “so that the court may rectify it with a feeling of certainty that they are not committing another, and perhaps greater, mistake.” *See id.*



based on fraudulent conduct, this would tend to deter parties from transacting in a fraudulent manner, a respectable result. For duty-based misrepresentations, it is even more difficult to assess how pleading the claim alone could destabilize economic transactions. Additionally, modern courts are much more willing to reopen settled transactions than they once were, especially in the context of misrepresentations.<sup>99</sup> Therefore, further justification of the heightened pleading requirement is necessary for its application to duty-based misrepresentation claims.

**B. THE DEFENDANTS' REPUTATION MUST BE PROTECTED FROM CLAIMS THAT MORALLY REPREHENSIBLE ACTS HAVE BEEN COMMITTED**

The most consistently recited purpose of Rule 9(b) is to protect the defendant's reputation.<sup>100</sup> The necessity of protecting a defendant's reputation is recognized in cases of actual fraud. Claiming that a defendant intended to deceive, manipulate, or mislead a plaintiff is a weighty allegation that could cause serious harm to a defendant's reputation and goodwill. It would be prejudicial to allow plaintiffs to allege unfounded claims of fraud where the allegation alone could harm the defendant's reputation or business.<sup>101</sup>

Although this policy plainly applies to fraud claims, its application to duty-based misrepresentation claims is less clear since, by their nature, they lack the same level of moral reprehensibility. In addition, Rule 9(b) does not deter plaintiffs from filing complaints due to its unpredictable application.<sup>102</sup> Moreover, dismissal on Rule 9(b) grounds may not vindicate a defendant's reputation, as the dismissal is likely to be viewed as dismissal on a technicality, rather than on the merits.<sup>103</sup>

---

99. Note, *Pleading Securities Fraud Claims with Particularity Under Rule 9(b)*, 97 HARV. L. REV. 1432, 1439 (1984) (“[C]ontemporary courts generally do not even express concern about reopening completed transactions.”).

100. *E.g.*, *Rombach v. Chang*, 355 F.3d 164, 171 (2d Cir. 2004); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1104 (9th Cir. 2003); *S2 Automation LLC v. Micron Tech., Inc.*, 281 F.R.D. 487, 494 (D.N.M. 2012).

101. Richard G. Himelrick, *Pleading Securities Fraud*, 43 MD. L. REV. 342, 368–69 (1984) (“Suggestions of fraud tarnish reputations and denigrate the goodwill of businesses. Professionals are particularly vulnerable to these charges. Irreparable loss of standing and prestige may befall [one] who is linked with a fraudulent scheme through attenuated allegations that may take years to disprove.”).

102. *See* *Sovern*, *supra* note 57, at 171–72.

103. *Id.* at 173 (arguing that reputational protection is not a sufficient policy on which to base heightened pleading in fraud cases).

In addition, Rule 9(b) may not protect the reputations and goodwill of defendants because the unpredictability of the Rule's application does not deter plaintiffs from filing complaints. Arguably, once the complaint has been filed, the harm has been done. But Rule 9(b) will not function as an effective deterrent if it is not applied effectively and uniformly.<sup>104</sup> Rule 9(b)'s application is unpredictable at best, not only for claims of negligent misrepresentation and fraud by omission, but even in claims of actual fraud.<sup>105</sup> Because of the lack of a clear standard by which to measure an allegation of negligent misrepresentation or fraud by omission, a plaintiff will often be unable to determine whether the complaint will satisfy the particularity requirements. Thus, application of the heightened pleading standard to duty-based misrepresentation claims is unlikely to deter plaintiffs from filing claims based on these causes of action.

Most significantly, the derogation of a duty does not carry the moral opprobrium associated with an explicit intent to deceive, regardless of whether the setting is purely transactional, as in a negligent misrepresentation claim, or the setting is defined by a confidential or fiduciary relationship, in a fraud by omission claim. Even if defendants counter that these duty-based claims do carry some reputational damage, torts such as battery and intentional infliction of severe emotional distress carry far more moral reprehensibility, yet a heightened pleading standard is not applied to those claims.<sup>106</sup> Although this policy may justify heightened pleading in cases of actual fraud, reputational harm alone is not a sufficient justification for requiring particularized pleading for duty-based misrepresentation claims.

### C. DEFENDANTS MUST BE PROTECTED FROM BASELESS SUITS FILED FOR NUISANCE OR SETTLEMENT VALUE

Numerous courts have asserted that a principal aim of Rule 9(b) is to preclude the use of groundless fraud claims as a

---

104. *Id.* at 171–72.

105. *See supra* Parts I.C–I.D.

106. Intentional infliction of severe emotional distress claims require that the conduct “must be so extreme in degree and so outrageous in character as to go beyond all possible bounds of decency, and be regarded as atrocious and utterly intolerable in a civilized community.” *Williamson v. Am. Nat’l. Ins. Co.*, 695 F. Supp. 2d 431, 456 (S.D. Tex. 2010). Heightened pleading is required only for claims of fraud and mistake. FED. R. CIV. P. 9(b).

pretext to discovering a wrong or as a strike suit.<sup>107</sup> Courts contend that “Rule 9[(b)] operates to diminish the possibility that a plaintiff with a largely groundless claim will be able to simply take up the time of [defendants] . . . with the right to do so representing an *in terrorem* increment of the settlement value . . . .”<sup>108</sup> Defendants should be protected from strike suits; however, protecting the defendant from baseless suits is not the business of Rule 9(b).<sup>109</sup>

Courts are most lenient with the particularity requirement in those precise instances where this policy presupposes they should be most rigid, where information is uniquely within the possession of the alleged misrepresenter.<sup>110</sup> Additionally, as this justification relates to fraud by omission, the key element is the duty to disclose due to a special relationship.<sup>111</sup> Discovery is not likely to yield this information where it is not already available to the complaining party.<sup>112</sup> Therefore, this policy does not substantiate particularized pleading for claims of fraud by omission. For negligent misrepresentation claims, the critical element to be alleged is dereliction of a duty in comparison to a

---

107. *E.g.*, *New Eng. Data Servs., Inc. v. Becher*, 829 F.2d 286, 289 (1st Cir. 1987); *Driscoll v. Landmark Bank for Sav.*, 758 F. Supp. 48, 52 (D. Mass. 1991). A “strike suit” is an action making largely groundless claims to justify conducting extensive and costly discovery with the hope of forcing the defendant to settle at a premium to avoid the costs of the discovery. *See* BLACK’S LAW DICTIONARY 1572 (9th ed. 2009) (defining a strike suit as one “based on no valid claim, brought either for nuisance value or as leverage to obtain a favorable or inflated settlement”).

108. *Wayne Inv., Inc. v. Gulf Oil Corp.*, 739 F.2d 11, 13 (1st Cir. 1984) (quoting *Ross v. A.H. Robins Co.*, 607 F.2d 545 (2d Cir.1979)).

109. Rule 12(b)(6) is specifically suited to this purpose. Yoichiro Hamabe, *Functions of Rule 12(b)(6) in the Federal Rules of Civil Procedure: A Categorization Approach*, 15 CAMPBELL L. REV. 119, 127–28 (1993) (stating that the purpose of Rule 12(b)(6) is to test the legal sufficiency of the complaint, achieve early resolution of cases on the merits, and resolve and screen out unmeritorious cases at the pleading stage).

110. *Peters v. Amoco Oil Co.*, 57 F. Supp. 2d 1268, 1280 (M.D. Ala. 1999) (holding that the heightened pleading requirement of Rule 9(b) “may be relaxed somewhat if the defendant controls information required for proper pleading” (quoting *United States ex rel. Sanders v. E. Ala. Healthcare Auth.*, 953 F. Supp. 1404, 1413 (M.D. Ala. 1996))); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Ga., Inc.*, 755 F. Supp. 1040, 1052 (S.D. Ga. 1990) (noting that the particularity requirement of Rule 9(b) “is relaxed somewhat” when the factual information is “peculiarly within the defendant’s knowledge or control”).

111. RESTATEMENT (SECOND) OF TORTS § 551 (1999).

112. *Cf. Falk v. Gen. Motors Corp.*, 496 F. Supp. 2d 1088, 1098–99 (N.D. Cal. 2007) (noting that pleading fraud by omission will be more difficult because of the nature of the claim).

standard of reasonableness in a transactional setting.<sup>113</sup> Again, discovery will not magically generate this duty if the plaintiff cannot first establish it.

There are other, more effective means of protecting defendants from baseless suits, such as Rules 11, 12(b)(6), 12(c), and 56. Rule 11 requires that the parties and/or attorneys certify that the pleading is not being presented for any improper purpose, thus regulating the filing of strike suits by imposing sanctions, which may include attorney's fees, on parties who file for improper purposes.<sup>114</sup> Under Rule 12(b)(6), dismissal is appropriate where the plaintiff has failed to state a legitimate claim upon which relief can be granted.<sup>115</sup> Rule 12(c) allows for a judgment on the pleadings, requiring, much like Rule 12(b)(6), that the complaint "contain[s] factual allegations that raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true."<sup>116</sup> Summary judgment is also available to deal with strike suits under Rule 56, where discovery does not uncover sufficient evidence upon which to base the claim.<sup>117</sup>

The numerous avenues for protecting defendants from nuisance suits diminish the potency of this policy's requirement for heightened pleading. It may be argued that there is purposeful overlap in the functions of the Federal Rules; just because there are other Rules that protect against strike suits does not mean that Rule 9(b) cannot also be used.<sup>118</sup> Similar to the need to protect a defendant's reputation, strike suits are an issue not only for fraud claims, but for a wide variety of claims.<sup>119</sup> Basing the particularity requirement on the desire to limit strike suits in this specific context goes beyond the suitable scope of Rule 9(b), since limiting strike suits is comprehensively dealt with in oth-

---

113. See *supra* notes 74–76 and accompanying text.

114. FED. R. CIV. P. 11(b). The improper purposes enumerated in the Rule include harassment, "caus[ing] unnecessary delay, or needlessly increas[ing] the cost of litigation." *Id.* These improper purposes are not exhaustive, rather they are illustrative. *Id.* Filing for settlement value would likely fit within the scope of this Rule.

115. FED. R. CIV. P. 12(b)(6).

116. FED. R. CIV. P. 12(c). See *Pérez-Acevedo v. Rivero-Cubano*, 520 F.3d 26, 29 (1st Cir. 2008) (internal quotation marks omitted).

117. FED. R. CIV. P. 56.

118. See *Sovern*, *supra* note 57, at 176 ("[I]f Rule 11 is only partially effective in preventing strike suits, as is likely to be the case, Rule 9(b) may still be thought to have a role to play.").

119. *Richman*, *supra* note 26, at 962–63.

er Rules.<sup>120</sup> The complications in relying on this justification for application of the heightened pleading standard to fraud claims are exponentially increased in the context of duty-based misrepresentation claims, as they are not specifically enumerated in the Rule. A more persuasive justification is needed to firmly ground Rule 9(b)'s application to duty-based misrepresentation claims.

#### D. DEFENDANTS REQUIRE SUFFICIENT NOTICE OF THE WRONG ALLEGEDLY COMMITTED

Given that notice is the singular policy underlying pleading generally, it is unsurprising that notice has been relied on as a justification for the heightened pleading standard in Rule 9(b). Courts have framed this purpose in various ways. Some state that the defendant must be given enough information to prepare an effective response<sup>121</sup> or must be advised of the specific claim that it must meet.<sup>122</sup> Others frame the issue such that the allegations must sufficiently apprise the defendants of the transactions upon which the claim is based.<sup>123</sup>

Historically, pleadings fulfill “several overlapping purposes”: pure notice of the claim, narrowing the issues “so that litigants can ascertain what matters are actually in dispute,” serving as a “permanent record” and “basis for *res judicata*,” providing for the “speedy disposition of frivolous claims and defenses,” and “to permit disposition of cases without trial where the facts are not in issue.”<sup>124</sup> But, under American notice pleading, the pleading is only intended to provide enough information so that the opposing party is alerted to the nature of the claim.<sup>125</sup> The other functions are performed through motion practice and discovery.<sup>126</sup>

*Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* have precluded plaintiffs from moving forward with suits that fail to sufficiently give notice of the claim, for all causes of action, not

---

120. See, e.g., *supra* note 109 and accompanying text (arguing that Rule 12(b)(6) is an effective way to prevent strike suits).

121. *Ross v. A. H. Robins Co.*, 607 F.2d 545, 557–58 (2d Cir. 1979).

122. *United States v. Gill*, 156 F. Supp. 955, 957 (W.D. Pa. 1957).

123. *B & B Inv. Club v. Kleinert's, Inc.*, 391 F. Supp. 720, 727 (E.D. Pa. 1975).

124. *Sovern*, *supra* note 57, at 147–48.

125. See *supra* Part I.A.

126. *Sovern*, *supra* note 57, at 147–48.

just in misrepresentation claims.<sup>127</sup> This is achieved by requiring a pleading to contain more than a formulaic recitation of the elements of the cause of action, and to allege sufficient factual matter that allows the court to reasonably infer the defendant's liability.<sup>128</sup> Therefore, relying on the notice justification for the heightened pleadings standard is unnecessary for duty-based misrepresentation claims. The tailoring of notice pleading has raised the bar for the notice requirements such that any allegation of duty-based misrepresentation would, by meeting the current pleading standard governed by *Twombly* and *Iqbal*, give the defendant sufficient information on which to fashion a defense.<sup>129</sup> Some courts have already agreed that the purpose of Rule 9(b) is not to give the defendant enough information to prepare his defense, "[a] charge of fraud is no more opaque than any other charge."<sup>130</sup>

In fact, justifying heightened pleading by the same policy as notice pleading takes the wind out of the sails of heightened pleading. If pure notice pleading adequately serves the desired function, there is no need for heightened pleading at all, not for intentional fraud, and certainly not for negligent misrepresentation or fraud by omission. Indeed, there is some irony that the notice rationale, designed as it was to facilitate entry to the courts, would be used as a justification to dismiss claims before they can even be heard.<sup>131</sup>

#### E. ALLEGATIONS THAT SOUND IN FRAUD

The Circuit split regarding the appropriate pleading standard for negligent misrepresentation claims is not as wide as the contrary decisions lead one to believe. There are a few courts that baldly assert that Rule 9(b) applies to both negligent misrepresentation claims and fraud by omission claims in every circumstance, relying purely on the similarities between duty-based misrepresentation and intentional misrepresentations.<sup>132</sup> However, the majority of courts rely on a central prin-

---

127. See *infra* note 128.

128. See FED. R. CIV. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

129. See *supra* notes 23–24 and accompanying text.

130. *Ackerman v. Nw. Mut. Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir. 1999) (“The defendant can get all the information he needs to meet it by filing a contention interrogatory.”).

131. Fairman, *supra* note 29, at 297.

132. See *Breeden v. Richmond Cmty. Coll.*, 171 F.R.D. 189, 202 (M.D.N.C. 1997) (holding that Rule 9(b) applies to negligent misrepresentation because

ciple in issuing their inconsistent opinions. The principle underlying these decisions states that if a complaint alleges a claim that sounds in fraud, then Rule 9(b)'s particularity requirements obtain; if a complaint alleges a claim that sounds in negligence, then Rule 8(a)'s lower threshold applies.<sup>133</sup> This Section argues that the underlying principle relied on, sounding in fraud, is so vague that it has become meaningless. The lack of meaning underlying the phrase "sounding in fraud" results in inconsistencies within and among both the circuits and state courts.

There are two techniques for determining whether an allegation sounds in fraud. The Eleventh Circuit determined that when the facts underlying a negligence claim are also "part of a fraud claim," the negligence claim sounds in fraud.<sup>134</sup> This position holds that when fraud and negligent misrepresentation are alleged side by side and there is an overlap of supporting facts, both claims must be pled with particularity.<sup>135</sup> However, it seems incorrect to determine the appropriate pleading standard of one claim by reference to separately alleged claims in the complaint. Duty-based misrepresentation claims "do not become subject to heightened pleading simply because they are based on the same set of operative facts as corresponding fraud claims."<sup>136</sup> The Ninth Circuit holds that when a plaintiff alleges a "unified course of fraudulent conduct . . . as the basis of the claim," the claim sounds in fraud.<sup>137</sup> This second method of determining when a claim sounds in fraud can hardly be wrong, but the circularity of reasoning gives it no meaningful force. It is self-evident that when you allege fraud, the allegation sounds in fraud.

---

"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." (internal quotation marks omitted)).

133. *E.g.*, *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1104 (9th Cir. 2003).

134. *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1278 (11th Cir. 2006).

135. *Id.*

136. *Am. Realty Trust, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 362 F. Supp. 2d 744, 749 (N.D. Tex. 2005).

137. *Vess*, 317 F.3d at 1103.

The difficulties in determining whether a claim sounds in fraud are undeniable.<sup>138</sup> Given the unhelpful articulations presented by the courts, there is need for a clear determining standard for what it means for an allegation to sound in fraud. Especially in the case of negligent misrepresentation claims, which are closely related, yet distinct from fraud, without a clear standard the plaintiff is left to guess whether particularity will be required for the claim. The current formulations result only in added confusion.

The foregoing analysis demonstrates that the asserted justifications for the heightened pleading requirement are an insufficient basis for its application to duty-based misrepresentation claims.<sup>139</sup> The modern equivalent of the historical justification, desire for finality in settled transactions, does not support applying the heightened pleading requirement to duty-based claims.<sup>140</sup> The primary policy underlying the heightened pleading standard, protecting a defendant's reputation and goodwill, is likewise an insufficient basis.<sup>141</sup> Unlike claims of fraud, the dereliction of a duty does not carry the moral reprehensibility associated with an explicit intent to deceive; therefore this policy does not require particularized pleading for duty-based claims. Protecting defendants from meritless suits filed for nuisance or settlement value is properly handled by other Federal Rules, and to add that purpose to Rules governing pleading is not only redundant, but beyond the scope of Rule 9(b).<sup>142</sup> Finally, this analysis demonstrated that grounding the particularity requirement of Rule 9(b) on the desire for sufficient notice of the nature of the claim is unnecessary, as Rule 8(a)'s short and plain statement of the claim provides notice to the defendant of the nature of the claim.<sup>143</sup>

Although this analysis clearly leans away from requiring particularized pleading for duty-based misrepresentation claims, this Note does not propose that allegations of negligent misrepresentation and fraud by omission are completely excluded from Rule 9(b). Many courts have spoken decisively on

---

138. See Fairman, *supra* note 29, at 301–05 (“Rule 9(b) is contagious. It infects other substantive areas with its heightened pleading standard.”).

139. See *supra* Parts II.A–D.

140. See *supra* Part II.A.

141. See *supra* Part II.B.

142. See *supra* Part II.C.

143. See *supra* Part II.D.



this matter<sup>144</sup> and they are not all mistaken. However, the Circuit split regarding the correct pleading standard for negligent misrepresentation claims and the inconsistencies in the required particulars for fraud by omission claims point to the lack of a clear standard by which these claims should be judged.<sup>145</sup> Part III takes up this discussion and proposes a clear standard for courts to use in applying heightened pleading to duty-based misrepresentation claims.

### III. SCIENTER IS REQUIRED FOR A CLAIM OR ALLEGATION TO SOUND IN FRAUD

The growing divergence of authority over the proper pleading standard for duty-based misrepresentation claims leaves the door open for the emergence of a clear pleading standard that is broadly applicable. This Part critiques the formulations of the standard used to determine that a claim sounds in fraud, analyzes how it breeds inconsistencies in application, and ultimately concludes that inclusion of an allegation of scienter is the correct determinant for whether a claim sounds in fraud.

#### A. SCIENTER: WHAT IT REALLY MEANS TO SOUND IN FRAUD

An articulable test is needed to differentiate those claims that sound in fraud from those that do not. The best source of guidance in structuring that test is analyzing the essential attributes of a fraud claim. Courts have made it clear that fraud and other forms of misrepresentation are not co-extensive, either in scope, liability, or pleading standard.<sup>146</sup> As a result, that feature which sets fraud apart from other misrepresentations must be the determinant of fraud.<sup>147</sup> The defining characteristic of a fraud claim is scienter, the one element that sets fraud apart from every other misrepresentation.<sup>148</sup> An allegation that sounds in fraud is an allegation of scienter concerning the misrepresentation. Scienter allegations are sufficiently particular if supported by facts giving rise to a strong inference of fraudu-

---

144. See *supra* notes 68–72, 79–86, and accompanying text.

145. See *supra* notes 68–72, 79–86, and accompanying text.

146. See *supra* Part I.

147. *Reno v. Bull*, 124 N.E. 144, 145 (N.Y. 1919) (“Fraud presupposes a willful purpose resorted to with intent to deprive another of his legal rights . . . . Fraud always has its origin in a purpose, but negligence is an omission of duty minus the purpose.” (citations omitted)).

148. See *supra* Part I.C.

lent intent.<sup>149</sup>

This new standard is discordant in some respects with the current constructions in practice.<sup>150</sup> However, given the lack of guidance inherent in the current formulations, that does not reflect poorly on the new standard, quite the opposite. That the facts supporting a fraud claim also support a negligence claim should not determine whether the negligence claim sounds in fraud unless the facts that support the claim implicate intent to deceive, manipulate, or mislead.<sup>151</sup> The Ninth Circuit's assessment is closer to accurate, however tautological. When a plaintiff alleges a unified course of fraudulent conduct, which by its terms requires scienter, the claim will sound in fraud.<sup>152</sup>

#### B. ALLEGATIONS OF DUTY-BASED MISREPRESENTATION CLAIMS SOMETIMES SOUND IN FRAUD

Neither negligent misrepresentation nor fraud by omission contains an element of scienter,<sup>153</sup> therefore, alleging that scienter is necessary for a claim to sound in fraud carries ramifications for the application of Rule 9(b) to these claims. It is deceptively simple to conclude that fraud by omission is completely within the scope of Rule 9(b) because the claim bears the name fraud, and the cases applying some form of particularity are numerous.<sup>154</sup> Though fraud by omission carries the magic word—fraud—it does not carry the critical element, scienter.<sup>155</sup> When applying this test, a fraud by omission claim does not, by its terms, sound in fraud.<sup>156</sup> Similarly, although negligent misrepresentation is related to a fraud claim, as both are based on misrepresentations, it does not, by its terms, sound in fraud, as no showing of scienter is necessary to prevail on the claim.<sup>157</sup> Claims that do not in and of themselves require a showing of scienter do not sound in fraud.<sup>158</sup>

This is not to say that an allegation of negligent misrepre-

---

149. *Icebox-Scoops v. Finanz St. Honoré, B.V.*, 676 F. Supp. 2d 100, 110 (E.D.N.Y. 2009).

150. *See supra* Part II.E (explaining the current techniques used to determine whether an allegation sounds in fraud).

151. *See supra* Part II.E.

152. *See supra* Part II.E.

153. *See supra* Parts I.D.1–2.

154. *See, e.g., supra* notes 69–72 and accompanying text.

155. *See* RESTATEMENT (SECOND) OF TORTS § 551 (1999).

156. *See supra* Part I.D.1.

157. *See supra* Part I.D.2.

158. *See supra* Part III.A.

sentation or fraud by omission should never be held to a heightened pleading standard. However, the application must be tailored by the specific allegations in the case at hand. The language of Rule 9(b) is “cast in terms of the conduct alleged, and is not limited to allegations styled or denominated as fraud.”<sup>159</sup> While a plaintiff need allege no more than negligence to proceed under a negligent misrepresentation claim, claims that do rely upon averments of fraud, specifically scienter, are subject to the test of Rule 9(b).<sup>160</sup> Similarly, though an allegation of fraud by omission does not require pleading scienter, if the allegations that form the basis of the claim include scienter, heightened pleading is the correct standard for those allegations.<sup>161</sup> Nevertheless, when a claim includes allegations of both fraudulent and non-fraudulent conduct, Rule 9(b)’s heightened pleading standard applies only to allegations of fraud, not to the complaint as a whole.<sup>162</sup>

This standard comports with the Fifth Circuit’s determination that “[w]here averments of fraud are made in a claim in which fraud is not an element, an inadequate averment of fraud does not mean that no claim has been stated,” rather the inadequate averments of fraud should be stricken from the claim and the claim should be evaluated under the liberal notice pleading standards of Rule 8(a).<sup>163</sup> The combination of this principle with the requirement that a claim that sounds in fraud requires scienter gives plaintiffs at least two good options in pleading duty-based misrepresentation claims. The plaintiff can either allege intent to deceive and plead with particularity or simply plead to satisfy the elements of the duty-based claim, and bare notice pleading will apply. Given this understanding, plaintiffs that allege a duty-based misrepresentation alongside an actual fraud claim would be well-advised to plead conduct in the alternative. Instead of basing the claims on the same set of operative facts, they should plead separate facts for each claim, especially as the conduct relates to the required state of mind for each claim. This is recommended because where an inadequate fraud claim is so intertwined with a duty-based misrep-

---

159. *Rombach v. Chang*, 355 F.3d 164, 171 (2d Cir. 2004).

160. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003) (“Fraud can be averred by specifically alleging fraud, or by alleging facts that necessarily constitute fraud (even if the word ‘fraud’ is not used).”).

161. *Id.* at 1107.

162. *Siegel v. Shell Oil Co.*, 480 F. Supp. 2d 1034, 1039 (N.D. Ill. 2007).

163. *Lone Star Ladies Inv. Club v. Schlotzsky’s Inc.*, 238 F.3d 363, 368 (5th Cir. 2001).

resentation claim, a redaction that removes the allegations of the fraud claim may leave behind no other viable claim.<sup>164</sup>

### C. FURTHER JUSTIFICATIONS FOR THE NECESSITY OF SCIENTER FOR A CLAIM TO SOUND IN FRAUD

The following discussion of the statutory interpretation of Rule 9(b) gives further credence to the proposition that an allegation requires scienter for it to sound in fraud. This Section argues that the plain meaning of the statute applies only to allegations that are fraudulent at their core, requiring scienter. In addition, the canon of construction, *expressio unius est exclusio alterius* will be explored and applied to the two exceptions to the American liberal notice pleading system. The purpose of the Federal Rules as a whole will also be examined in conjunction with heightened pleading and the requirement for scienter if an allegation is to sound in fraud. Additional practical considerations that weigh in favor of an articulable standard for what it means to sound in fraud will also be set forth.

#### 1. The Statutory Interpretation of Rule 9(b) Requires a Precise Standard by Which Allegations Can Be Determined to Sound in Fraud

By its own terms, Rule 9(b) applies only to allegations of fraud and mistake.<sup>165</sup> The plain meaning of the text of statutes should be dispositive.<sup>166</sup> Although the language at issue in this case is a federal rule of procedure, such rules “have the force and effect of a statute.”<sup>167</sup> “[I]n interpreting a statute a court should always turn to one cardinal canon before all others . . . courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”<sup>168</sup> Since only fraud and mistake are enumerated in the text,<sup>169</sup> only allegations of fraud and mistake should be held to particularized pleading. A claim that sounds in fraud will be held to the heightened pleading standard. But, in a cause of action where a

164. *Am. Realty Trust, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 362 F. Supp. 2d 744, 749 (N.D. Tex. 2005).

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

166. *Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004) (“We should prefer the plain meaning since that approach respects the words of Congress.”).

167. *Rumsey v. George E. Failing Co.*, 333 F.2d 960, 962 (10th Cir. 1964); *see also United States v. St. Paul Mercury Ins. Co.*, 361 F.2d 838, 839 (5th Cir. 1966).

168. *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992).

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

showing of scienter is not an element of the claim, the allegation sounds in fraud only where the intent to deceive, manipulate, or mislead are among the allegations.<sup>170</sup> Actual fraud clearly contains the scienter component, it is an element of the claim;<sup>171</sup> fraudulent concealment does as well. Negligent misrepresentation and fraud by omission do not carry the scienter requirement.<sup>172</sup> These duty-based claims do not, on their face, sound in fraud.<sup>173</sup>

Courts are not permitted to add new requirements to Rule 9(b) simply because they like the effects of doing so; that is “a job for Congress, or for the various legislative, judicial, and advisory bodies involved in the process of amending the Federal Rules.”<sup>174</sup> The plain meaning of the text clearly dictates that the particularity requirement applies only to allegations of actual fraud and mistake, no further justification is needed in light of the statutory language for these causes of action.<sup>175</sup> Just as clearly, courts are not authorized to interpret Rule 9(b) to apply to all duty-based misrepresentations in a manner that is inconsistent with the language of the Rule. Because Rule 9(b) does not deal with “claims of fraud,” but rather with “allegations of fraud,” a precise understanding of what an allegation of fraud entails is necessary.<sup>176</sup> Scienter fills the role of determining when an allegation sounds in fraud.<sup>177</sup> Therefore, an allegation of scienter is required to necessitate particularity.

Although the plain meaning of the text appears clear, past interpretation by the courts which expanded the particularity requirement to duty-based misrepresentations created ambiguity over what it means for a claim to sound in fraud.<sup>178</sup> The test proposed by this Note requires an allegation of scienter for the claim to sound in fraud. This test is in harmony with the Supreme Court’s holding that Rule 9(b) imposes a particularity requirement in exactly “two specific instances,” fraud or mistake, but not to unenumerated claims.<sup>179</sup> “*Expressio unius est*

---

170. See *supra* notes 146–49 and accompanying text.

171. See *supra* notes 40–43 and accompanying text.

172. See *supra* Parts I.D.1–2.

173. See *supra* Part III.B.

174. *Decker v. GlenFed, Inc.*, 42 F.3d 1541, 1546 (9th Cir. 1994) (en banc).

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

176. See *id.*

177. See *supra* Part III.A.

178. See *supra* notes 134–37 and accompanying text.

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

*exclusio alterius*.”<sup>180</sup> The expression of these two items leaves other associated allegations excluded from the heightened pleading standard.

On the other hand, it has been argued that “the canon that expressing one item of a commonly associated group or series excludes another left unmentioned is only a guide, whose fallibility can be shown by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives.”<sup>181</sup> However, the adoption of Rule 9(b) is itself an exception to a more general rule; that all other claims may be made with a short and plain statement of the claim that is plausible on its face.<sup>182</sup> Express exceptions are to be narrowly construed, and no other exceptions are to be implied from the existence of one exception.<sup>183</sup>

When interpreting the Federal Rules, the focus should be on the legislature’s purpose in enacting them.<sup>184</sup> The purpose was to eliminate the fact-based pleading requirements and the inherent booby traps within the previous pleading system.<sup>185</sup> The overall purpose was to allow more meritorious claims to be heard in court.<sup>186</sup> Since the purpose was to eliminate difficulties to entry of the judicial system, courts should interpret Rule 9(b) in a ways that will produce that result.

Strict statutory interpretation is called for here because the Rule is not ambiguous, and even if it were, the ambiguous language should be given its least inclusive reading because the purpose of the Federal Rules is remedial.<sup>187</sup> The notice pleading

---

180. *Id.* The expression of one thing is the exclusion of another. “As the maxim [*expressio unius est exclusio alterius*] is applied to statutory interpretation, where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions.” 2A SUTHERLAND’S STATUTES AND STATUTORY CONSTRUCTION § 47:23 (Norman J. Singer & J.D. Shambie Singer eds., 7th ed. 2007).

181. *United States v. Vonn*, 535 U.S. 55, 65 (2002).

182. *Compare* FED. R. CIV. P. 8(a) (requiring pleadings to provide a “short and plain statement of the claim”), *with* FED. R. CIV. P. 9(b) (creating a heightened pleading standard for allegations of fraud and mistake).

183. *United States v. California*, 504 F.2d 750, 754 (Temp. Emer. Ct. App. 1974).

184. *Rubin v. United States*, 449 U.S. 424, 430 (1981) (holding that where the purpose of the law is consistent with the text, the text cannot be held to be ambiguous).

185. *See supra* note 19.

186. *See supra* Part I.A.

187. *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (stating that remedial statutes are to be liberally construed to achieve their remedial purpose).

standard should be liberally construed to achieve the remedial purpose, thereby narrowing the application of Rule 9(b), which deters otherwise meritorious claims from passing the gateway of pleading into the judicial system.

## 2. Practical Considerations Favor Precisely Defining What It Means for an Allegation to Sound in Fraud

A precise definition of what it means to sound in fraud prevents the practical problems of litigation delays, dismissal of meritorious claims, and uncertainty over the proper pleading standard for allegations of misrepresentation. Supposed Rule 9(b) violations breed litigation delays because additional time is required to amend the complaint.<sup>188</sup> When an allegation does not truly sound in fraud, but the presumed pleading standard demands particularity, warranted claims will feasibly be dismissed.<sup>189</sup>

Courts should adopt this standard because avoidable amendments of complaints impose unnecessary costs and inefficiencies on both the courts and party opponents.<sup>190</sup> Litigation delays are par for the course when a defendant asserts a Rule 9(b) violation. Where a pleading does not satisfy the heightened requirements of Rule 9(b), the court should freely grant leave to amend.<sup>191</sup> Rule 15 advises that even after a party amends a complaint once as a matter of course, leave to amend should be freely granted where justice requires.<sup>192</sup> The Supreme Court has held that leave to amend should be freely granted where there is an absence of any apparent prejudicial motive “such as undue delay, bad faith, or dilatory motive on the part of the

---

188. *Cf. Caputo v. Pfizer, Inc.*, 267 F.3d 181, 191 (2d Cir. 2001) (“[T]he failure to grant leave to amend is an abuse of discretion unless the plaintiff has acted in bad faith or the amendment would be futile.”); *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (“We consistently have held that [when dismissing for failure to comply with Rule 9(b)] leave to amend should be granted unless the district court determines that the pleading could not possibly be cured by the allegation of other facts.” (internal quotation marks omitted)).

189. Fairman, *supra* note 29, at 295.

190. *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 57 (1st Cir. 2008) (“Such a practice would dramatically undermine the ordinary rules governing the finality of judicial decisions, and should not be sanctioned in the absence of compelling circumstances.” (quoting *James v. Watt*, 716 F.2d 71, 78 (1st Cir. 1983))).

191. *See Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) (recognizing that courts almost always grant leave to amend to cure deficiencies in pleading fraud).

192. FED. R. CIV. P. 15.

movant.”<sup>193</sup> Regardless of the motive, however, the ensuing amendment of the complaint results in both delays to the litigation and additional costs to the parties. Adopting this standard eliminates the requisite grant of leave to amend.

The application of Rule 9(b) to duty-based fraud claims that do not ultimately sound in fraud also results in the dismissal of meritorious claims. Where the heightened pleading standard requires more information than the plaintiff is able to allege, dismissal results.<sup>194</sup> In these cases, the plaintiff is required to make the case before discovery, which can be an impossible task.<sup>195</sup> Though courts are generally more amenable to a relaxed pleading standard where information required to plead with particularity is uniquely within the control of the defendant, they are not always so accommodating.<sup>196</sup> Uncertainty reigns when particularity is applied arbitrarily, without reference to an allegation sounding in fraud, or a clear definition for what it means to sound in fraud,<sup>197</sup> as exemplified by the *Eames* case. Uncertainty results in increased litigation, litigation delays, and forum shopping.<sup>198</sup> A clear standard defining what it means to sound in fraud reduces these practical difficulties, while harmonizing with the majority of precedent concerning misrepresentation claims generally, and negligent misrepresentation claims in particular.

### CONCLUSION

Courts are split over the proper pleading standard applicable to duty-based misrepresentation claims. This split demonstrates the courts’ failure to flesh out the meaning of sounding in fraud. A claim that sounds in fraud requires particularized pleading, while a claim that sounds in negligence may survive without heightened pleading. The divergence over the proper standard can be resolved by precisely defining what it means for a claim or an allegation to sound in fraud. This Note pro-

---

193. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

194. *See, e.g.*, *Eames v. Nationwide Mut. Ins. Co.*, No. Civ. A. 04-1324-KAJ, 2006 WL 2506640 (D. Del. Aug. 29, 2006), *aff’d*, 346 F. App’x 859 (3d Cir. 2009).

195. *See, e.g.*, *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 921 (8th Cir. 2001) (holding that a plaintiff should be allowed discovery before having to meet the particularity requirements of Rule 9(b)).

196. *See supra* note 47.

197. *See Fairman, supra* note 29, at 297–99 (arguing that the application of Rule 9(b) is inconsistent and uncertain).

198. *See Sovern, supra* note 57, at 164.



poses that that definition centers on the requirement of scienter, the defining feature of an intentional fraud claim. Given the varying standards and inconsistent application inherent in current heightened pleading, adopting the requirement of scienter for a claim or allegation to sound in fraud would replace uncertainty with clarity. Ultimately, more duty-based misrepresentation claims might survive to be adjudicated on the merits, which is precisely what the Federal Rules intend. This new standard does not require courts to change the way they analyze misrepresentation claims for pleading purposes, just the precision with which they do so. It also provides a clear standard for plaintiffs, and finally settles the pleading standard for all duty-based misrepresentation claims.