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9(b) or Not 9(b)? That Is the Question: How To Plead Negligent Misrepresentation in the Post-*Twombly* Era

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9(B) OR NOT 9(B)? THAT IS THE QUESTION: HOW TO PLEAD NEGLIGENT MISREPRESENTATION IN THE POST-*TWOMBLY* ERA

*Andrew Todres**

Perhaps nothing is more important to a litigant bringing an action in federal court than knowing the relevant pleading standard for his or her underlying claims. Ever since the inception of the Federal Rules of Civil Procedure, one of two pleading standards have applied to common law claims: the Rule 8(a)(2) standard, requiring a short and plain statement demonstrating entitlement to relief, or the Rule 9(b) standard, demanding that allegations of fraud or mistake be pled with particularity. At the intersection of these two pleading standards is the common law claim of negligent misrepresentation. Courts across the country have long disagreed over which standard should apply to negligent misrepresentation claims, with divisions present across and within circuits and districts.

In 2007, the U.S. Supreme Court further complicated this issue in the seminal opinion Bell Atlantic Corp. v. Twombly, *which effectively imposed a heightened "plausibility" requirement for claims governed by Rule 8(a)(2). This change has since led some lower courts, but not all, to reconsider which pleading standard to apply to claims of negligent misrepresentation.*

This Note: (1) explores the pleading standards and their evolution with respect to negligent misrepresentation claims; (2) describes the circuit split and intracircuit fractures that have emerged from the different standards; (3) analyzes the significant procedural and substantive problems the competing standards have created, especially in light of Twombly*; and (4) offers a possible resolution comporting with the* Twombly *holding to standardize the pleading of negligent misrepresentation claims across the nation's federal courts.*

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INTRODUCTION

On March 29, 2012, Terrence Hood's life took a dramatic turn for the worse.[1] Hood was flung from his motorcycle during an accident and rushed to Denver Health Medical Center, which he would call home for the next three months.[2] Having sustained life-threatening injuries, Hood underwent numerous surgeries and procedures until his discharge in June.[3] The cost of his treatment totaled approximately $750,000.[4]

Hood reasonably believed that the cost would be covered under his health plan. His domestic partner, Junnapa Intarakamhang, was a full-time, active employee of defendant Beverage Distributors Co. (Beverage Distributors), and a member of its employee health plan.[5] She and Hood had submitted an application for domestic partner coverage for Hood under the plan nearly a year before the accident.[6] Accordingly, during the first two months of Hood's hospital stay, the claims administrator, defendant Principal Life Insurance Co. (Principal), repeatedly preauthorized additional days for Hood to stay at the hospital.[7] These authorizations prompted the hospital to continue to care for Hood without interruption, and they assured the hospital that it did not need to seek alternate funding from a third party.[8] As far as the hospital, Hood, and Intarakamhang were concerned, Hood was adequately covered by insurance.

Beverage Distributors had other ideas. On May 14, 2009, nearly two months into Hood's treatments, the company informed Intarakamhang that coverage for Hood under the health plan had been rescinded because he had been married to another woman when he enrolled in the plan as her domestic partner.[9] This allegation left plaintiff Denver Health and Hospital Authority, to which the claims had been assigned, with responsibility for the medical bills, having never sought alternative payment arrangements through Medicare or a third party because of Principal's representations.[10]

Denver Health and Hospital Authority sued Beverage Distributors and Principal in Colorado federal court, claiming, inter alia, negligent misrepresentation based on their failure to use reasonable care or competence in obtaining and communicating information concerning Hood's eligibility for benefits under the plan.[11] Beverage Distributors and Principal moved to dismiss, claiming that Federal Rule of Civil Procedure 9(b) applied to the negligent misrepresentation claim, a heightened standard

1. *See generally* Denver Health & Hosp. Auth. v. Beverage Distribs. Co., 843 F. Supp. 2d 1171 (D. Colo. 2012).
2. *Id.* at 1174–75.
3. *Id.*
4. *Id.* at 1175.
5. *Id.* at 1174.
6. *Id.*
7. *Id.* at 1175.
8. *Id.*
9. *Id.*
10. *Id.*
11. *See id.* at 1175–78 (quoting FED. R. CIV. P. 8(a)).

that the plaintiff failed to meet.[12] They contended that Federal Rule of Civil Procedure 8(a) did not govern the negligent misrepresentation claim.[13]

In response, the court held that Rule 8(a) applied, noting that "the crux of the claim [was] that Beverage [Distributors] failed to use reasonable care or competence in obtaining and communicating information concerning Hood's eligibility. This rings not of fraud but negligence."[14]

So, which pleading standard should apply in cases of negligent misrepresentation? Although courts cannot agree on a resolution, one thing is quite apparent: in this case and in others, the answer can be a matter of life or death for a civil claim.

First, this Note explores both standards and their evolution with respect to negligent misrepresentation claims, and the circuit split and intracircuit fractures that have resulted from the differing standards. Next, it identifies significant procedural and substantive problems that arise from the murky standards and varying requirements, especially in light of the recent seminal U.S. Supreme Court pleading standard cases, *Bell Atlantic Corp. v. Twombly*[15] and *Ashcroft v. Iqbal*.[16] Finally, this Note offers a possible resolution comporting with those cases to standardize the pleading of negligent misrepresentation claims.

I. THE DIFFICULTY WITH PLEADING NEGLIGENT MISREPRESENTATION: AN OVERVIEW OF NEGLIGENT MISREPRESENTATION CLAIMS AND THE EVOLUTION OF FEDERAL PLEADING STANDARDS

Part I of this Note details negligent misrepresentation claims generally and discusses the corresponding federal pleading standards. Part I.A introduces the tort of negligent misrepresentation, describing its origins and elements, showing how it is distinct from, but often confused with, fraud, exploring state law variations in the tort, and tracking differing policy approaches to applying negligent misrepresentation law.[17] Part I.B then turns to the Federal Rules of Civil Procedure, providing a brief primer on the Rules and the reasons for their creation, and analyzing the evolution of Rule 8, the general pleading standard.[18] Part I.C takes a look at Rule 9, the pleading standard requiring particularity, and traces its development alongside Rule 8.[19] Part I.D then examines two recent, leading U.S. Supreme Court cases that effectively heightened the bar for pleading under Rule 8 and the various policy issues and difficulties that courts have faced in light of the current, enhanced pleading standard.[20]

12. *Id.* at 1177.
13. *Id.*
14. *Id.*
15. 550 U.S. 544 (2007).
16. 556 U.S. 662 (2009).
17. *See infra* Part I.A.
18. *See infra* Part I.B.
19. *See infra* Part I.C.
20. *See infra* Part I.D.

A. The Claim of Negligent Misrepresentation

Negligent misrepresentation is a common tort claim, yet, in federal court, the law behind it is applied inconsistently, confused with fraud, and overlooked by courts and practitioners alike.[21] This section explains the complexities of the claim and provide a foundation for the problems that arise in pleading it in the federal courts. Part I.A.1 gives a broad overview of the claim and describes the general elements of it.[22] Part I.A.2 traces some of the early scholarship regarding negligent misrepresentation claims.[23] Part I.A.3 more thoroughly introduces some courts' and practitioners' confusion over negligent misrepresentation claims, especially given their similarity to fraudulent misrepresentation claims.[24] Part I.A.4 examines different policy views on the claim of negligent misrepresentation and how those differences lead certain states to apply the law differently.[25] Finally, Part I.A.5 explores more technical, law-based reasons driving the state law variations in negligent misrepresentation claims.[26]

1. What Is Negligent Misrepresentation?

The law of negligent misrepresentation has, to a large degree, evolved with the law of negligence.[27] The first *Restatement of Torts* tended to focus on negligent misrepresentation in the context of physical bodily harm.[28] It did contain one single section, section 552, regarding the negligent communication of information causing an economic loss, entitled "Information Negligently Supplied for the Guidance of Others,"[29] which created liability for those negligently supplying information in the course of business.

The *Restatement (Second) of Torts* adopted a slightly different version of section 552, essentially allowing for a broader class of potential plaintiffs by adding language that supported liability for a party who supplies information not only in the course of business, but also "in any other transaction in which he has a pecuniary interest."[30] This "pecuniary interest" addition was significant because it clarified that the information negligently supplied need not be in connection with the party's own business or profession.[31]

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21. *See generally* Robert K. Wise & Heather E. Poole, *Negligent Misrepresentation in Texas: The Misunderstood Tort*, 40 TEX. TECH L. REV. 845, 846 (2008).
22. *See infra* Part I.A.1.
23. *See infra* Part I.A.2.
24. *See infra* Part I.A.3.
25. *See infra* Part I.A.4.
26. *See infra* Part I.A.5.
27. *See generally* Seth E. Lipner & Lisa A. Catalano, *The Tort of Giving Negligent Investment Advice*, 39 U. MEM. L. REV. 663, 669–70 (2009).
28. *See id.* at 677–78. This focus reflected an emphasis on the then-burgeoning development of products liability law and negligence. *See id.* at 670.
29. *Id.* at 677–78.
30. RESTATEMENT (SECOND) OF TORTS § 552 (1977).
31. *See* Lipner & Catalano, *supra* note 27, at 682.

It is also worth noting that the official comment to section 552 in the *Restatement (Second)* stressed that the law "applies not only to information given as to the existence of facts but also to an opinion given upon facts equally well known to both the supplier and the recipient."[32] Thus, it is possible that even a negligently given opinion can form the basis of a cause of action.[33]

The duty under the *Restatement* to "exercise reasonable care or competence in obtaining or communicating the information"[34] is not necessarily fixed and can change depending on the circumstances.[35] The factors that courts consider range from the character of the informant to the sophistication of the person receiving the supplied information.[36] It is possible for a party to be liable for negligent misrepresentation even when the person making the statement is not aware that it is untrue.[37] The hallmark of negligent misrepresentation is precisely that it does not require an intent to defraud, or scienter.[38]

In addition to sophistication, the experience of the person receiving information can also affect the liability of the informant in the context of *reliance*: where the potential plaintiff has significant experience in the area in which he is relying on the potential defendant, his chance of succeeding on a negligent misrepresentation claim might be diminished.[39]

Finally, in certain circumstances, as the *Restatement (Second)* highlights, a party can be liable for negligent misrepresentation if he has a duty to disclose information, and fails to do so.[40] However, given the reliance element, an omission alone is not actionable—the plaintiff must have justifiably relied on the omission underlying the misrepresentation claim.[41]

The overwhelming majority of state courts have adopted, in one form or another, the approach in section 552 of the *Restatement (Second)*.[42]

2. Early Scholarship Regarding Negligent Misrepresentation and Development Thereof

Given the contours of the claim, determining liability for negligent misrepresentation invariably requires fact-intensive inquiries made on a case-by-case basis. Such inquiries must uncover the extent and justifiability of a potential plaintiff's reliance on those representations, as well the

32. RESTATEMENT (SECOND) OF TORTS § 552 cmt. b.
33. Lipner & Catalano, *supra* note 27, at 690–91.
34. RESTATEMENT (SECOND) OF TORTS § 552.
35. *See* Lipner & Catalano, *supra* note 27, at 692–93.
36. *See id.* at 693.
37. *See, e.g.*, Galloway v. Afco Dev. Corp., 777 P.2d 506, 509 (Utah Ct. App. 1989).
38. *See id.* (collecting cases).
39. *See* Lipner & Catalano, *supra* note 27, at 695.
40. RESTATEMENT (SECOND) OF TORTS § 552 (1977); *see also* Moore v. Smith, 158 P.3d 562, 573 n.12 (Utah Ct. App. 2007).
41. *See* Ross v. Kirner, 172 P.3d 701, 704 (Wash. 2007) ("An omission alone cannot constitute negligent misrepresentation, since the plaintiff must justifiably rely on a misrepresentation.").
42. *See* Lipner & Catalano, *supra* note 27, at 680.

appropriateness of a potential defendant's and potential plaintiff's due diligence under the circumstances.[43] Courts have traditionally approached claims for negligent misrepresentation with caution.[44]

At the heart of these inquiries are the reasonable expectations, or lack thereof, of the potential plaintiff acting on the guidance received.[45] As Fowler V. Harper and Mary Coate McNeely astutely noted in an article observing early trends and policy concerns surrounding negligent misrepresentation claims, "[t]he propriety of the plaintiff's expectation involves the business ethics and mores and those general canons of fairness and decency which affect that standard of judgment which, for want of a better name, we call common sense."[46] Scholars and courts from the outset also grappled with the fine-tuned distinction between honesty and deceit in the context of negligent misrepresentation claims.[47]

Historically, in order to be liable for a misrepresentation tort, some sort of scienter or blatant dishonesty was required.[48] In a leading English case, *Palsey v. Freeman*,[49] the court wrote that the defendant misrepresentor would not be liable for damages unless it could be proven that he was a liar.[50]

But over time, U.S. courts, still using English law as a guide, started departing from traditional notions of dishonesty as a necessary condition for actionable misrepresentation claims.[51] American courts began to recognize words as "acts," as opposed to "mere words,"[52] which can form the basis for actionable wrongs, even when not obviously malintentioned.[53] In essence, people could now be held accountable for carelessly spoken words that injure others in the same way that they could be held accountable for carelessly dropping a sack of flour onto someone and injuring him. For instance, the famous opinion of Justice Benjamin Cardozo in *Ultramares Corp. v. Touche*[54] concluded that defendants could not escape liability for

43. *See generally* Fowler V. Harper & Mary Coate McNeely, *A Synthesis of the Law of Misrepresentation*, 22 MINN. L. REV. 939 (1938).

44. *See id.* at 941 ("Legal liability is normally imposed only when the interests of one party are so invaded that good social engineering requires governmental protection.").

45. *See id.* at 941–42.

46. *See id.* at 942.

47. *See* W. Page Keeton, *Actionable Misrepresentation: Legal Fault As a Requirement I. Some General Observations*, 1 OKLA. L. REV. 21, 23–25 (1948); *see also* Harper & McNeely, *supra* note 43, at 959.

48. *See* Keeton, *supra* note 47, at 24.

49. (1789) 100 Eng. Rep. 450 (K.B.).

50. *See* Keeton, *supra* note 47, at 24.

51. *See id.* at 25–27.

52. Jeremiah Smith, *Liability for Negligent Language*, 14 HARV. L. REV. 184, 189–90 (1901).

53. *See id.* at 190. In this chestnut of an article, Jeremiah Smith proved to be at the forefront of the law of negligence before the topic had started to garner the widespread attention of the courts that it would ultimately receive. "It is undeniable that the making of erroneous statements without reasonable grounds is liable under some circumstances to cause damage. . . . Why not then impose in certain cases a duty to use reasonable care to refrain from making erroneous statements?" *Id.*

54. 174 N.E. 441 (N.Y. 1931).

misrepresentation merely because they believed their statements to be true.[55]

The impetus for this shift in the law seems related to the question of justifiable reliance and parties' expectations. As case law developed at the turn of the twentieth century, courts established a general presumption that parties to a transaction may normally expect honesty from each other.[56] As such, the cause of action of negligent misrepresentation allowed plaintiffs to hold accountable defendants who, despite honest behavior, were still negligent in communicating material information.[57]

Further, when likening negligent misrepresentation to legal principles of warranty and estoppel, courts and scholars started to recognize that the old English rule was illogical.[58] In considering the entire body of misrepresentation law as it developed in American courts, a rule exonerating defendants who made an honest but false statement that induced a plaintiff to act to his detriment simply did not make sense in light of the principle of warranty law, which established legal liability for honest and morally innocent acts causing injury or damage.[59] Further, such a rule would be unjust to potential plaintiffs.[60]

3. Negligent Misrepresentation Versus Fraudulent Misrepresentation: Examining the Similarities and Differences and the Inconsistent Treatment by Courts

As misrepresentation law developed alongside negligence law, courts were faced with a lingering issue: how should negligent misrepresentation be treated in comparison to fraudulent misrepresentation?[61]

As a purely legal matter, there must be some difference between negligent misrepresentation and fraudulent misrepresentation; otherwise, the former cause of action would not exist. To this end, the official comment to section 552 of the *Restatement* draws a distinction between negligent and fraudulent misrepresentation by placing the latter more squarely in the category of deceit.[62]

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55. *See* Keeton, *supra* note 47, at 26.

56. Harper & McNeely, *supra* note 43, at 959.

57. *See* Keeton, *supra* note 47, at 29.

58. *See* Samuel Williston, *Liability for Honest Misrepresentation*, 24 HARV. L. REV. 415, 434 (1911).

59. *See id.* at 435.

60. *See id.* ("However honest his state of mind, he has induced another to act, and damage has been thereby caused. If it be added that the plaintiff had just reason to attribute to the defendant accurate knowledge of what he was talking about, and the statement related to a matter of business in regard to which action was to be expected, every moral reason exists for holding the defendant liable.").

61. This question is especially significant because it would come to inform the debate over which federal pleading standard should apply to negligent misrepresentation claims. For more discussion on this issue, see *infra* Part II.

62. RESTATEMENT (SECOND) OF TORTS § 552 cmt. a (1977) ("The liability stated in this Section is likewise more restricted than that for fraudulent misrepresentation stated in § 531. When there is no intent to deceive but only good faith coupled with negligence, the fault of

Even the early foundations of American misrepresentation law have recognized this important difference.[63] As Jeremiah Smith noted, "'Negligence is not the same as fraud.' An action of deceit based on fraud cannot be supported by proof of negligent misrepresentation."[64] In addition, conflating the causes of action raises the potential problem of overlooking or disregarding the intentional or unintentional nature of a given misrepresentation.[65]

To address this issue, courts frequently distinguish fraudulent misrepresentation by requiring scienter—that is, that a defendant have actual knowledge or a belief that his representation is not true.[66] Put differently, negligent misrepresentation can be classified as "fraud minus the purpose."[67] The *Restatement* elements of fraudulent misrepresentation are thus essentially the same as negligent misrepresentation, save for the scienter difference:

> A misrepresentation is fraudulent if the maker
>
> (a) knows or believes that the matter is not as he represents it to be,
>
> (b) does not have the confidence in the accuracy of his representation that he states or implies, or
>
> (c) knows that he does not have the basis for his representation that he states or implies.[68]

Still, for a representation "to be fraudulent it is not necessary that the maker know the matter is not as represented. . . . It is enough that being conscious that he has neither knowledge nor belief in the existence of the matter he chooses to assert it as a fact."[69]

Despite what appears to be a fairly simple and workable distinction between the two claims, courts have nonetheless confused them over and over again.[70] In fact, even leading national treatises on tort law pay little heed to the difference between negligent and fraudulent misrepresentation.[71] Some legal commentators have struggled with the fact that negligent misrepresentation and fraudulent misrepresentation both

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the maker of the misrepresentation is sufficiently less to justify a narrower responsibility for its consequences.").

63. *See* Smith, *supra* note 52, at 185.

64. *See id.* at 185.

65. *See* Francis H. Bohlen, *Should Negligent Misrepresentations Be Treated As Negligence or Fraud?*, 18 VA. L. REV. 703, 706 (1932) ("If negligent misrepresentation is called fraud, and, therefore, comes to be regarded by courts as tantamount thereto, there is danger that the unintentional character of the one and the intentional character of the other will be overlooked.").

66. *See* RESTATEMENT (SECOND) OF TORTS § 526.

67. Lipner & Catalano, *supra* note 27, at 664 (citing Reno v. Bull, 124 N.E. 144, 145 (N.Y. 1919)).

68. RESTATEMENT (SECOND) OF TORTS § 526.

69. *Id.* § 526 cmt. e.

70. *See, e.g.*, Wise & Poole, *supra* note 21, at 847 ("Unfortunately, the commentary on negligent misrepresentation under Texas law is cursory, lumping negligent misrepresentation with the discussions of fraud.").

71. *See id.* at 846 n.2.

require an evaluation of the misrepresentor's state of mind, as he is "the only one normally who can explain how he could have honestly made such a mistake."[72] Thus, it is often difficult to differentiate the proof needed for each respective claim.[73]

As such, courts have developed different notions of what kinds of actions or misstatements should give rise to fraudulent misrepresentation, as opposed to negligent misrepresentation. Some cases are easy to categorize—when the defendant makes a statement he believes to be false, then a finding of fraudulent misrepresentation is obvious.[74] But there is a gray area where the defendant makes a statement in "conscious ignorance" of the truth, but not necessarily with knowledge that his words are untrue, especially given the difficulty in determining the requisite state of mind in a given case.[75] Thus, some courts follow the rule that "an unqualified assertion of a fact susceptible of defendant's knowledge is regarded as an assertion of that knowledge, and if the defendant does not have it the statement is fraudulent."[76] Naturally, these shades of gray also impugn the very nature of the respective torts, blurring the line between negligence and more malevolent intentions.

4. Differing State Policy Approaches to Negligent Misrepresentation Claims

To that end, states have developed various policy stances on how negligent misrepresentation claims ought to be treated and classified, forming the basis for state-to-state differences in negligent misrepresentation law.[77] The main question driving the state policy differences flows from the early intellectual and legal underpinnings of misrepresentation law and negligence law[78]—is a claim for negligent misrepresentation tantamount to an action of deceit, or is it so starkly different from an intentional wrong that it must be treated more as an action of negligence?[79]

In *Falls Sand & Gravel Co. v. Western Concrete, Inc.*,[80] the District of Montana addressed this question extensively in a particularly instructive

72. Page Keeton, *Fraud: The Necessity for an Intent To Deceive*, 5 UCLA L. REV. 583, 596 (1958).

73. *Id.* at 583–84.

74. *See, e.g.*, Shackett v. Bickford, 65 A. 252, 252–54 (N.H. 1906) (holding that the fraudulent character of a representation is established when the person making the representation does not believe it to be true); Howard v. Gould, 28 Vt. 523 (1856) (same).

75. *See* RESTATEMENT (SECOND) OF TORTS § 526 reporter's note (1977).

76. *See id.*

77. This subsection of the Note will address the policy issues driving the debate among states over the proper classification of negligent misrepresentation claims. For a more detailed examination of state law variations in negligent misrepresentation law that have developed in part as a result of these interpretative issues, see *infra* Part I.A.5.

78. *See supra* Part I.A.3.

79. *See, e.g.*, Falls Sand & Gravel Co. v. W. Concrete, Inc., 270 F. Supp. 495, 501–02 (D. Mont. 1967).

80. *Id.*

opinion arising out of a dispute between a sand supplier and concrete contractor.[81] In this case, the plaintiff contracted with the defendant to supply sand for a building project, and the defendant provided the plaintiff with production schedules and amounts of sand required at various intervals throughout that schedule.[82] As it turned out, the defendant negligently misrepresented the schedule to the plaintiff, and the resulting deviations led to sporadic operations and increased the attendant costs to the plaintiff by over $100,000.[83]

The plaintiff brought an action against the defendant for several counts of *negligent misrepresentation*, but interestingly, the defendant argued as one of its defenses that the two-year statute of limitations for a claim for *fraud* had expired.[84] The court then conducted an inquiry into whether an action for negligent misrepresentation should essentially be deemed an action for fraud, ultimately holding that it should, meaning that a two-year statute of limitations would apply.[85]

In reaching this conclusion, the court framed its opinion by acknowledging that negligent misrepresentation "is quite different from an action for intentional fraudulent and deceitful misrepresentation, since there is no requirement of scienter."[86] However, the court noted that "as the law of this tort developed, the courts of the United States have frequently extended the action of deceit into that of negligent misrepresentation" by presuming the existence of an intent to deceive.[87]

Ultimately, the opinion reflected a belief held by several states that there can be different grades of severity of negligent misrepresentation. The court emphasized that even Justice Cardozo's opinion in *Ultramares*[88] provided recovery for the plaintiff primarily on grounds of deceit, not strict negligence, because the negligence was "so great that it amounted to scienter."[89] This conception of negligent misrepresentation as a subset of fraud remains alive and well in some states today.[90]

Conversely, many states and legal commentators refuse to extend fraud and actions for deceit to cover negligent misrepresentation claims.[91] Even the opinion in *Falls Sand* acknowledged that the *Restatement, Prosser and*

81. *Id.* at 498.
82. *Id.*
83. *Id.*
84. *Id.* at 501–02.
85. *Id.* at 501–05.
86. *Id.* at 501.
87. *Id.* at 502.
88. For a related discussion, see *supra* Part I.A.2.
89. *Falls Sand*, 270 F. Supp. at 502.
90. *See* Oakland Raiders v. Oakland-Alameda Cnty. Coliseum, 51 Cal. Rptr. 3d 144, 149 (Ct. App. 2006) (holding that the word "fraud" can be used to describe certain negligent misrepresentations); Sheets v. Brethren Mut. Ins. Co., 679 A.2d 540, 553 (Md. 1996); Bourgois v. Montana-Dakota Utils. Co., 466 N.W.2d 813, 818 (N.D. 1991).
91. *See, e.g.*, Bhandari v. VHA Sw. Cmty. Health Corp., No. CIV 09-0932 JB/GBW, 2011 WL 1336512, at *15–17 (D.N.M. Mar. 30, 2011) (collecting cases distinguishing negligent misrepresentation from fraud and deceit); *see also* Tex. Tunneling Co. v. City of Chattanooga, 329 F.2d 402, 410 (6th Cir. 1964); *Falls Sand*, 270 F. Supp. at 502.

Keeton on Torts, and a wide band of case law support the opposite position from the one that the *Falls Sand* court adopted.[92] Thus, courts have differing views about the character of negligent misrepresentation, influencing their legal treatment of negligent misrepresentation claims.

5. State Law Variations in Negligent Misrepresentation

These differing concepts of negligent misrepresentation can affect what a plaintiff is required to show when pleading negligent misrepresentation in a given state. For example, an examination of the law in Florida is instructive because the elements of negligent misrepresentation track a fraud- and deceit-based conception of the tort:

> In Florida, plaintiffs may establish negligent misrepresentation by proving "(1) [a] misrepresentation of a material fact; (2) the representor . . . ma[d]e the representation without knowledge as to its truth or falsity, or . . . under circumstances in which he ought to have known of its falsity; (3) the representor . . . intend[ed] that the misrepresentation induce another to act on it; (4) injury must result to the party acting in justifiable reliance on the misrepresentation."[93]

Florida's highest court has long held that these elements make negligent misrepresentation "tantamount to actionable fraud,"[94] noting that because it is an action "for deceit, [it] is necessarily founded in fraud, and, in order to make out a case of fraud, as distinguished from inadvertence, mistake, negligence, accident, and the like, it is necessary to allege and prove the scienter,—the knowledge of defendant that his representations were false."[95]

Other courts have resisted this approach.[96] New Mexico, for instance, draws careful distinctions in its law between negligent misrepresentation and fraud, noting, inter alia, that "fraudulent misrepresentation requires an untrue statement, while negligent misrepresentation may involve a statement that is 'literally true' but misleading."[97]

Thus, elements of negligent misrepresentation and accompanying standards of proof can vary across states, placing differing burdens on plaintiffs when bringing negligent misrepresentation claims in court.

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92. *Falls Sand*, 270 F. Supp. at 502 (identifying the conflict of authorities regarding the relation of deceit to negligent misrepresentation claims).

93. Souran v. Travelers Ins. Co., 982 F.2d 1497, 1503 (11th Cir. 1993) (alterations in original) (quoting Hoon v. Pate Constr. Co., 607 So. 2d 423, 427 (Fla. Dist. Ct. App. 1992) (per curiam)).

94. Ostreyko v. B. C. Morton Org., Inc., 310 So. 2d 316, 318 (Fla. Dist. Ct. App. 1975).

95. Watson v. Jones, 25 So. 678, 681–82 (Fla. 1899).

96. *See, e.g.*, Goehring v. Chapman Univ., 17 Cal. Rptr. 3d 39, 47 (Ct. App. 2004) ("The tort of negligent misrepresentation does not require scienter . . . .").

97. Eckhardt v. Charter Hosp. of Albuquerque, Inc., 953 P.2d 722, 735 (N.M. 1997).

B. Federal Rule of Civil Procedure 8 and Notice Pleading

The Federal Rules of Civil Procedure are a set of rules applying to all civil actions and proceedings in the U.S. district courts.[98] Rule 8 of the Federal Rules of Civil Procedure describes the pleading requirements for most claims in federal courts.[99]

One of the main goals of establishing the Federal Rules of Civil Procedure was to create a system of rules that was simpler and more litigant friendly, in contrast to the formalism of the previous pleading rules, which were especially regimented and formal and frequently prevented litigants from having their day in court.[100] This was the vision of Charles E. Clark, dean of Yale Law School and later a Second Circuit judge, who served as the reporter for the original Advisory Committee for the Federal Rules and is considered to be their chief architect.[101]

Rule 8 of the Federal Rules of Civil Procedure was designed to promote the type of simplicity and increased accessibility to courts that Clark sought to achieve.[102] The rules of pleading in the context of Rule 8, according to Clark, were "not the place to obtain particularization of the case."[103] To that end, Rule 8 requires "a short and plain statement of the claim showing that the pleader is entitled to relief."[104]

The legal sufficiency of a complaint may be challenged by a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted.[105] In deciding a Rule 12(b)(6) motion, "a court must accept the plaintiff's allegations as true and construe the complaint liberally granting the plaintiff the benefit of all inferences that can be derived from the facts."[106]

Clark thought that an important purpose of Rule 8 was to ensure that a complaint would provide sufficient facts to guide a potential res judicata determination, so as to know whether a final judgment had already been rendered on a given matter.[107] In essence, Clark believed that complaints

98. *See* FED. R. CIV. P. 1.

99. *See id.* R. 8.

100. *See* Charles E. Clark, *Simplified Pleading*, 27 IOWA L. REV. 272, 274 (1942) ("Strict pleading produces a reaction, because people will not tolerate the denial of justice for formalities only. That is the history we must always bear in mind as to common-law pleading, as well as under some of the later misapplications of code pleading."); *see also* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 990–91 (2003) ("[T]he Federal Rules are essentially a reform effort designed to ensure litigants have their day in court.").

101. Peter Julian, Comment, *Charles E. Clark and Simple Pleading: Against a "Formalism of Generality,"* 104 NW. U. L. REV. 1179, 1180 (2010).

102. *See id.* at 1196.

103. Clark, *supra* note 100, at 287. While Rule 8 applies to most claims brought in federal court, the pleading of "fraud or mistake" and "conditions of mind" are governed by a heightened standard under Rule 9(b). *See* FED. R. CIV. P. 9(b). For a detailed discussion of Rule 9(b), see *infra* Part I.C.

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

105. *See id.* R. 12(b)(6).

106. Fairman, *supra* note 100, at 992.

107. Julian, *supra* note 101, at 1196.

should give adequate notice to the court and the defendant of a plaintiff's claims by means of "very brief and direct allegation[s]."[108] He did not believe that pleadings were the proper place to provide evidence or proof—a departure from past practice.[109]

This pleading regime became more complex after the Supreme Court's holding in the 1957 case *Conley v. Gibson*.[110] In *Conley*, the plaintiffs, who were African American railway workers, alleged that their union provided them with inferior representation as compared to similarly situated white workers.[111] In response, the union defendants argued, inter alia, that the plaintiffs' complaint failed to state a claim upon which relief could be granted because it contained insufficient factual allegations to support their general claims of discrimination.[112]

In evaluating that argument, the Supreme Court posited that sufficiency of allegations contained in a complaint would follow "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief."[113] The Supreme Court justified this approach by pointing to Rule 8 and stressing that the complaint need only contain "'a short and plain statement of the claim' that will give the defendant fair *notice* of what the plaintiff's claim is and the grounds upon which it rests."[114] Accordingly, the Court found that the plaintiffs survived the 12(b)(6) motion to dismiss because their complaint gave the defendants fair notice of the basis of their claim.[115]

The *Conley* holding set the trajectory for pleading in federal courts for years to come, with its "no set of facts" language characterizing the modern understanding of what came to be known as "notice pleading."[116] The very term "notice pleading" had been rejected by Clark and the original drafters of the Federal Rules, coming into style only after it was used by the Supreme Court in *Conley*.[117]

This style of pleading, as set forth in *Conley*, failed to advance a number of important values courts sought to protect.[118] Courts generally use procedure to promote adjudicative efficiency, fairness, and predictability,

108. *Id.* at 1197 (citing Charles E. Clark, *Fundamental Changes Effected by the New Federal Rules I*, 15 TENN. L. REV. 551, 568 (1939)).

109. *Id.*

110. 355 U.S. 41 (1957).

111. *Id.* at 43.

112. *See id.* at 43, 46–47.

113. *Id.* at 45–46 (emphasis added).

114. *Id.* at 47 (emphasis added) (quoting FED. R. CIV. P. 8(a)(2)).

115. *Id.* at 48.

116. *See* Julian, *supra* note 101, at 1189 ("*Conley*'s 'no set of facts' language was fundamental to the modern understanding of notice pleading, at least as it was expressed in the rhetoric of the courts.").

117. *See id.* at 1189. Courts had used the term very infrequently prior to *Conley*. *Id.* at 1190. After the *Conley* decision, courts' use of the term increased exponentially. *Id.* For a statistical evaluation of this increase, see Fairman, *supra* note 100, at 988 n.4.

118. *See* Julian, *supra* note 101, at 1182, 1191.

among other values.[119] By allowing such a generalized, liberal form of pleading, courts found themselves with clogged dockets, and plaintiffs found a lower initial barrier to entry than before.[120] And many lower courts that disagreed with the "notice pleading" mandate simply eschewed it for their own, ad hoc heightened standards, especially in cases alleging a defendant's improper state of mind, making litigation highly unpredictable.[121]

With lower courts subverting the *Conley* ruling, the Supreme Court revisited pleading standards in 1993 in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*.[122] In this case, the district court had imposed a heightened pleading standard for a civil rights claim—exactly the type of claim that is generally easy to plead and potentially very harmful to a defendant's reputation, triggering policy concerns among lower courts.[123] The Supreme Court rejected the lower court's approach, holding that because civil rights claims were not expressly included in the category of claims eligible for heightened pleading standards under Federal Rule 9(b), Rule 8 applied.[124]

Even after *Leatherman*, though, lower courts persisted in applying heightened pleading standards.[125] This led the Supreme Court to address the issue again in *Swierkiewicz v. Sorema N. A.*,[126] attempting to restore order to the district courts and bring them in line with *Conley* notice pleading.[127] In this employment discrimination action, the Court reinforced its holding in *Leatherman*.[128]

Nonetheless, the pattern of ignoring notice pleading at the district court level continued, with courts becoming increasingly concerned about protecting defendants' reputations, trimming ever-expanding dockets, and addressing increasingly expensive discovery costs as a result of electronic discovery.[129]

As evidenced by *Leatherman* and *Swierkiewicz*, certain types of claims—especially easy-to-plead claims with significant reputational implications like fraud and civil rights violations—required greater factual specificity in order to preserve these fairness- and efficiency-based values.[130] This practice threatened the transsubstantive nature of Rule 8.[131] As different

119. *See id.* at 1182.
120. *See id.* at 1192.
121. *See id.* at 1191 ("[L]ower courts [paid] lip service to the rhetoric of notice pleading while actually imposing heightened pleading standards.").
122. 507 U.S. 163 (1993).
123. *See id.* at 165.
124. *Id.* at 168.
125. *See* Julian, *supra* note 101, at 1190.
126. 534 U.S. 506 (2002).
127. *See id.* at 514.
128. *Id.* at 512–13.
129. *See* Julian, *supra* note 101, at 1192–93, 1210.
130. *See id.* at 1192–93.
131. *See* Fairman, *supra* note 100, at 1037–38. Transsubstantivity is essentially "the notion that the same procedural rules should be available for all civil law suits: (1) regardless of the substantive law underlying the claims, or "case-type" transsubstantivity;

styles of pleading continued to pervade the district courts, it became appropriate to question not only the force of Rule 8, but even the place of Rule 9(b) as well.

C. Rule 9(b): The Heightened Federal Pleading Standard

Federal Rule of Civil Procedure 9(b) requires plaintiffs to plead claims of fraud or mistake with particularity.[132] As courts typically look to the "circumstances constituting fraud,"[133] factors such as "time, place, contents of the false representation, the person making it, and what was obtained from it must be stated with specificity."[134] This is a sensible formulation for *affirmative* misrepresentations because they "are discrete, observable events which can be particularized."[135] Just because a claim is not technically referred to as "fraud" does not mean it is automatically exempt from the heightened standard.[136]

Interestingly, Clark never thought that Rule 9(b) was very significant; he assumed that courts had the discretion to adjust pleading standards as they saw fit on a case-by-case basis.[137] In the congressional hearings on the Federal Rules at the time of their inception—and in related American Bar Association proceedings—Rule 9(b) was barely discussed.[138]

Rule 9(b) was initially drawn from Rule 22 of the English Practice Rules, which allowed for knowledge to be alleged in general terms, without an explanation of the surrounding circumstances.[139] However, while the plain language of Rule 9(b) and its origins do not seem entirely stringent, courts have, over time, applied an even more heightened version of the standard, with the Second Circuit requiring plaintiffs to plead facts giving rise to a "strong inference of scienter."[140] Other circuits have recognized that plaintiffs may generally allege scienter merely by stating its existence.[141]

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and (2) regardless of the size of the litigation or the stakes involved, or case-size transsubstantivity." Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377, 378 (2010).

132. FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.").

133. *Id.*

134. Fairman, *supra* note 100, at 1004.

135. Breeden v. Richmond Cmty. Coll., 171 F.R.D. 189, 195 (M.D.N.C. 1997) ("An affirmative misrepresentation involves a specific statement made at a specific place and time and involves specific persons.").

136. *See* Fairman, *supra* note 100, at 1005 ("[I]f the claim is 'fraud-like,' specificity is required.").

137. *See* Clark, *supra* note 100, at 274. Clark argued that the rule was not important because it "probably state[d] only what courts would do anyhow and may not be considered absolutely essential." *Id.*

138. William E. Richman, Donald E. Lively & Patricia Mell, *The Pleading of Fraud: Rhymes Without Reason*, 60 S. CAL. L. REV. 959, 965 (1987).

139. Daniel L. Brockett & Jeremy D. Andersen, *Pleading Common Law Fraud in the Second Circuit*, N.Y. L.J., Sept. 27, 2012, at A4.

140. *Id.*

141. *Id.*

It is important to note that cases of securities fraud automatically adhere to a separate, heightened standard as a result of the Private Securities Litigation Reform Act of 1995[142] (PLSRA)—the standard is similar to that of Rule 9(b).[143] Congress adopted the Second Circuit's version of this standard—considered to be the most stringent—for applicable securities fraud claims.[144] Significantly, Congress also required that the Rule 9(b) standard be applied to claims of misrepresentation in the same context.[145]

While this Note addresses only common law claims of misrepresentation—not those in the securities fraud context falling under the PSLRA—it is important to understand how the PSLRA standard may have leaked into common law pleading standard jurisprudence.[146] As courts have decided more and more cases under the PSLRA, which essentially adopted the toughest version of Rule 9(b)'s standard, common law fraud claims across circuits have been increasingly held to a similar standard.[147]

D. Putting Conley *to Bed: A New Pleading Regime Under* Twombly *and* Iqbal

As lower courts continued to reject *Conley* and its progeny when choosing which pleading standard to apply, the Supreme Court ultimately decided to abandon *Conley* for good. This subsection examines a pair of Supreme Court cases that collectively heightened the pleading requirement under Rule 8 and established a new pleading standard regime.

1. *Bell Atlantic Corp. v. Twombly*

Not even *Swierkiewicz* could put an end to lower courts' subversion of *Conley*'s notice-pleading pronouncement.[148] Accordingly, just four years after its decision in *Swierkiewicz*, the Supreme Court revisited the Rule 8 pleading standard yet again in *Bell Atlantic Corp. v. Twombly*.[149] The case would come to signify a major shift in the Rule 8 standard, effectively retiring *Conley*-style notice pleading.[150]

142. Pub. L. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.).

143. *See* Evan Hill, Note, *The Rule 10b-5 Suit: Loss Causation Pleading Standards in Private Securities Fraud Claims After* Dura Pharmaceuticals, Inc. v. Broudo, 78 FORDHAM L. REV. 2659, 2672 (2010).

144. *See id.*

145. *See id.* at 2672–73 (citing S. REP. NO. 104-98, at 15 (1995), *reprinted in* 1995 U.S.C.C.A.N. at 694).

146. *See* Brockett & Andersen, *supra* note 139.

147. *See id.*

148. *See supra* note 129 and accompanying text.

149. 550 U.S. 544 (2007).

150. *See* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 432, 432 (2008) ("Although the Court's move in this direction is consistent with long-held sentiment among the lower federal courts, the *Twombly* decision represents a break from the Court's previous embrace of notice pleading.").

In *Twombly*, customers of local internet and telephone companies brought a putative class action suit against these companies alleging, inter alia, antitrust violations.[151] At bottom, plaintiffs claimed that larger local telephone companies conspired to restrict smaller carriers' access to their local markets, which effectively drove down competition locally, and the companies also agreed not to compete with one another, which enabled them to charge artificially high prices for their services.[152]

Writing for the majority, Justice David H. Souter emphasized that in order for the plaintiffs' claim to survive a 12(b)(6) motion to dismiss, the plaintiffs would need to provide evidence in their complaint that demonstrated that the defendant telephone companies did not act independently.[153] The Court then, citing to *Conley*, explained that while Rule 8(a)(2) only requires a short and plain statement that gives a defendant fair notice of the claims, a "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[154]

The Court then went on to depart from notice pleading even further, asserting that the facts pled must be sufficient to "raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true."[155] The Court reasoned that requiring the complaint to state "*plausible grounds* to infer an agreement [among the defendant telephone companies] does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[156]

Thus, in the context of the complaint in *Twombly*, the Court held that while the underlying allegations regarding an agreement among the defendant telephone companies were almost sufficient to state a claim, "without some further factual enhancement it stops short of the *line between possibility and plausibility* of 'entitle[ment] to relief.'"[157]

Furthermore, the Court disposed of the plaintiffs' argument that a common reading of *Conley* and its "no set of facts" language precluded the application of this higher, plausibility-based standard.[158] In essence, the Court claimed that the *Conley* language had been widely misinterpreted over the years and could conceivably permit a "wholly conclusory" claim to survive a 12(b)(6) challenge where the pleading left open the chance of establishing some set of facts which at a later time might establish grounds

151. *See Twombly*, 550 U.S. at 550–51.
152. *Id.*
153. *Id.* at 554.
154. *Id.* at 555.
155. *Id.* at 555 (citing Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508 n.1 (2002)). To this end, the court noted that Rule 8 required some "showing" of "entitlement to relief." *Id.* at 555 n.3.
156. *Id.* at 556 (emphasis added).
157. *Id.* at 557 (alteration in original) (emphasis added).
158. *Id.* at 560–61.

for recovery.[159] Therefore, with respect to the "no set of facts" language, the Court declared that "this famous observation has earned its retirement."[160]

Justice John Paul Stevens wrote a dissenting opinion in *Twombly*, observing that the high costs of discovery in an antitrust suit such as the one at bar—as well as the generally increasing costs of discovery because of electronic documents—implicitly drove the majority's decision to heighten the pleading standard.[161] Justice Stevens believed that the answer to this potential problem was not a plausibility standard, but "careful case management, including strict control of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries."[162] In addition, Justice Stevens felt that Rule 8, as codified in the Federal Rules, "does not require, or even invite, the pleading of facts," noting that *Conley* remained good law despite the majority's interpretation of it.[163]

The Court's decision in *Twombly* left many questions unanswered and raised questions regarding transsubstantivity in the process—should this pleading standard apply only to antitrust claims and the like, or to all claims? Justice Stevens reflected on this question in his *Twombly* dissent, wondering "[w]hether the Court's actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint w[ould] inure to the benefit of all civil defendants."[164]

2. *Ashcroft v. Iqbal*

The Supreme Court answered those questions two years later when it revisited the Rule 8 standard once more in *Ashcroft v. Iqbal*.[165] *Iqbal* involved an entirely different set of claims from those in *Twombly*—in *Iqbal*, an individual arrested on immigration charges sued former Attorney General John Ashcroft and Robert Mueller, director of the FBI, among others, for violations of his First and Fifth Amendment rights because of mistreatment while in detention.[166]

Writing for the majority, Justice Anthony Kennedy reaffirmed the Court's holding in *Twombly* that Rule 8(a)(2) requires a complaint to contain enough allegations such that relief would be plausible.[167] However, the Court expanded on the holding in *Twombly*, specifically highlighting two "working principles"[168] at the core of the *Twombly* decision: (1) in

159. *Id.* at 561; *see also* Spencer, *supra* note 150, at 447 (describing the inconsistency between *Twombly* plausibility pleading and *Conley*'s "no set of facts" language).
160. *Twombly*, 550 U.S. at 563.
161. *See id.* at 572–73 (Stevens, J., dissenting).
162. *Id.* at 573.
163. *See id.* at 580.
164. *Id.* at 596.
165. 556 U.S. 662 (2009).
166. *Id.* at 667–68.
167. *See id.* at 677–78.
168. *Id.* at 678.

deciding a 12(b)(6) motion to dismiss, a court must accept the factual allegations of a complaint as true, but not conclusory allegations that track the relevant legal standard, and (2) only a complaint containing a plausible claim for relief can survive a motion to dismiss.[169] Accordingly, a court must conduct a two-step inquiry when reviewing a complaint challenged under 12(b)(6), first identifying which claims do not deserve to be accepted as true because they are factually unsupported and are "no more than conclusions,"[170] and then deciding whether the remaining allegations can plausibly support entitlement to relief.[171]

In applying this analysis to Iqbal's claims, the Court found that the factual allegations pled did not give rise to a plausible inference that Iqbal was entitled to relief, primarily because there were other "more likely" explanations for Iqbal's alleged mistreatment than those that he pleaded.[172]

Even more important, however, the Court clearly stated that *Twombly* reached beyond the context of antitrust cases: "[*Twombly*] was based on our interpretation and application of Rule 8 . . . [which] governs the pleading standard 'in all civil actions and proceedings . . . .' Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike."[173]

The Court also pushed back on Iqbal's argument that Rule 9(b)'s statement that "conditions of a person's mind may be alleged *generally*"[174] permitted him to allege generally the discriminatory intent underlying his claims for relief.[175] Specifically, the Court noted that "generally" is a "relative term," which "in the context of Rule 9" is to be "compared to the particularity requirement applicable to fraud or mistake."[176]

Justice Souter wrote a dissenting opinion, disagreeing with the notion that allegations in a complaint do not deserve to be automatically accepted as true: "*Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be."[177]

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169. *See id.* at 678–79; *see also* Anthony Gambol, Note, *The* Twombly *Standard and Affirmative Defenses: What Is Good for the Goose Is Not Always Good for the Gander*, 79 FORDHAM L. REV. 2173, 2188 (2011).

170. *Iqbal*, 556 U.S. at 679.

171. *Id.*

172. *Id.* at 680.

173. *Id.* at 684 (citation omitted) (quoting FED. R. CIV. P. 1).

174. FED. R. CIV. P. 9(b) (emphasis added).

175. *Iqbal*, 556 U.S. at 687 ("Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss.").

176. *Id.* at 686–87 ("Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of Rule 8.").

177. *Id.* at 696 (Souter, J., dissenting).

3. Reconciling Rule 9(b) with Rule 8(a)(2) After *Twombly* and *Iqbal*

In order to understand the interplay between Rule 9(b) and Rule 8(a) in the context of negligent misrepresentation claims, it is necessary to examine the potential impact that the revised Rule 8 standard has on the operation of Rule 9.

In many ways, *Twombly* and *Iqbal* have seemingly blurred the line between Rule 8(a)(2) and 9(b), or, at minimum, produced inconsistencies among the rules. To the former point, the *Twombly* rule that the complaint must include factual allegations sufficient "to raise a right to relief above the speculative level" seems similar to a particularity requirement.[178] To the latter point, Rule 9(b)'s language about averring conditions of the mind "generally" refers to the traditional Rule 8(a)(2) pleading standard—the very standard that *Twombly* raises.[179]

While it may still be too early to discern how the rules in the post–*Twombly* and *Iqbal* era will work in conjunction with each other in practice, there are reasons to believe that the distinction remains meaningful.[180] *Twombly* specifically distinguished the new Rule 8 standard from Rule 9(b):

> In reaching this conclusion, we do not apply any "heightened" pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished "by the process of amending the Federal Rules, and not by judicial interpretation." On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires. Here, our concern is not that the allegations in the complaint were insufficiently "particular[ized]," rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible.[181]

Only time will tell how this distinction actually plays out in the lower courts, which have demonstrated—in the arena of pleading standards—a pattern of ignoring Supreme Court precedent.

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178. *See* Spencer, *supra* note 150, at 432 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

179. *See id.* at 474 ("Any standard that requires 'more than labels and conclusions' and explicitly calls for the pleading of suggestive facts supporting legal assertions such as the existence of an unlawful agreement or conspiracy fails to permit matters to be averred generally.").

180. *See* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 88 n.333 (2010) ("[I]n *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314 (2d Cir. 2010), the court suggested that facts related to time, place, or the specific individuals involved are necessary to satisfy Rule 8 only if the other factual allegations do not provide notice."); *see also* Hollander v. Etymotic Research, Inc., 726 F. Supp. 2d 543, 551 (E.D. Pa. 2010) (finding allegations might meet Rule 8 standards, but not Rule 9(b)).

181. *Twombly*, 550 U.S. at 569 n.14 (alteration in original) (quoting Swierkiewicz v. Sorema N. A., 534 U.S. 506, 515 (2002)). Thus, it would appear that there is an important distinction to be made between particularized allegations and allegations that fail to support a showing of plausible entitlement to relief.

II. THE DIVIDE OVER THE PLEADING STANDARD FOR NEGLIGENT MISREPRESENTATION CLAIMS

Federal courts have not reached a consensus on which pleading standard, Rule 8(a) or 9(b), should apply to negligent misrepresentation claims. The issue of pleading negligent misrepresentation splits not only circuit courts, but district courts as well. There are various explanations, ranging from state law differences to policy preferences to courts failing to apply recent pleading standard precedent, for why the division and confusion among courts has become so widespread. Because individual circuits have tended not to be uniform in their approach to addressing pleading standards in the context of negligent misrepresentation claims, it is not fair to call the conflict at issue a true "circuit split." Further, since no single factor alone is responsible for the divergent approaches, it is difficult to identify the true root of the conflict.

Thus, this Part of the Note explains how the conflict plays out in federal courts by attempting to excavate the most important areas of contention among the courts, and how this contributes to the divergent pleading standard rationales. Since there is no clearly identifiable circuit split, per se, but more accurately just confusion among courts, it will be more productive to examine the engines of the conflict thematically as opposed to geographically.

First, this Part will look at conflicting, pre-*Twombly* policy approaches to interpreting Federal Rules 8 and 9 in the context of negligent misrepresentation claims. It is vital to look at pre-*Twombly* approaches in depth because they still persist to a lesser, but significant, degree today.[182] Some courts, before and after *Twombly*, have embraced a broader, expanded role for Rule 9(b) in pleadings and have chosen to apply that standard to claims of negligent misrepresentation.[183] On the other hand, some pre-*Twombly* courts, relying on the lenient constructs of transsubstantive notice pleading and a policy of lowering the bar for specificity in pleadings, had found Rule 8(a) to be the proper pleading standard for negligent misrepresentation.[184]

The Part also examines how *Twombly* and *Iqbal* have impacted these policy approaches, with some courts using the framework of the new plausibility standard under Rule 8 to evaluate negligent misrepresentation claims.[185]

Next, this Part evaluates how state law differences in negligent misrepresentation law affect the pleading standards courts apply when sitting in diversity. Some states view negligent misrepresentation as tantamount to fraud or mistake, leading courts to apply the Rule 9(b) standard.[186] Other states treat negligent misrepresentation more as a claim

182. *See infra* Part II.A.4.
183. *See infra* Part II.A.1.
184. *See infra* Part II.A.2.
185. *See infra* Part II.A.3.
186. *See infra* Part II.B.

of pure negligence than as a claim sounding in fraud or mistake, prompting federal courts applying the laws of those states to apply the Rule 8(a) pleading standard.[187]

The final factor influencing the debate is an obvious one that flows from state law differences: the ability of litigants to differentiate between claims of negligent misrepresentation and claims of fraud in their pleadings, so as to determine whether the former claims can stand on their own or are merely redundant claims of fraud, which require a Rule 9(b) pleading standard.[188]

A. Differing Policy Approaches to Pleading Negligent Misrepresentation Before Twombly

Differing policy considerations and emphases led courts to different conclusions regarding the proper pleading standard for negligent misrepresentation claims before *Twombly*. These considerations still affect some courts' requirements for pleading negligent misrepresentation today.[189]

Some courts, in applying Rule 9(b), have noted that negligent misrepresentation claims deserve more careful scrutiny at the pleading stage because they implicate serious reputational injury concerns.[190] Other courts dismiss this policy rationale as unimportant or untrue and instead have applied Rule 8(a) as the pleading standard in the context of negligent misrepresentation.[191]

Courts' pre-*Twombly* preferences for how to evaluate the roles of Rules 8 and 9, respectively, also factor into the debate. Some courts envisioned Rule 9(b) taking on a larger role in pleadings generally.[192] Others embraced a policy of transsubstantive notice pleading under Rule 8(a), lowering the bar for pleading negligent misrepresentation.[193]

As noted above, while some of these pre-*Twombly* policy approaches continue to influence decisions in applying 9(b) or 8(a) to negligent misrepresentation claims today, some courts have started to adjust their approaches to deciding which pleading standard to apply, forgoing a Rule 9(b) analysis and using the "plausibility" requirements of Rule 8(a) as a guide.[194]

1. A Pre-*Twombly* Policy Favoring Rule 9(b)

Before *Twombly*, two major policy considerations regarding negligent misrepresentation influenced courts to apply the heightened Rule 9(b)

187. *See infra* Part II.B.
188. *See infra* Part II.B.
189. *See infra* Part II.A.4.
190. *See infra* Part II.A.1.
191. *See infra* Part II.A.2.
192. *See infra* Part II.A.1.
193. *See infra* Part II.A.2.
194. *See infra* Part II.A.3.

standard to common law negligent misrepresentation claims. First, as the Fifth Circuit posited in *Williams v. WMX Technologies, Inc.*,[195] Rule 9(b) generally deserved a larger role in pleading.[196] This was especially true because, as the Southern District of New York reinforced in *Simon v. Castello*,[197] negligent misrepresentation claims can seriously harm a defendant's reputation and thus deserve more initial scrutiny under the Rule 9(b) standard.[198] Second, some courts treated negligent misrepresentation claims under the umbrella of "mistake," as enumerated in Rule 9(b).[199]

In *Williams*, the Fifth Circuit addressed the idea that Rule 9(b) should take on a larger role in pleading generally.[200] In the case, the plaintiffs, former owners of a small sanitation company, sued WMX, a national garbage hauling service.[201] The plaintiffs sold their company for WMX stock, claiming that they relied on misrepresentations by WMX that the United States was running out of space to dispose of trash.[202] Accordingly, the plaintiffs brought claims of fraud and negligent misrepresentation, inter alia, against WMX.[203]

In an opinion dismissing the claims for failing to meet the specificity requirements of Rule 9(b), the Fifth Circuit declared that Rule 9(b) "demands a larger role for pleading in the pre-trial defining of such claims."[204] The court further stressed that the increased costs of pre-trial discovery militate in favor of applying Rule 9(b) more rigorously.[205] Although the *Williams* court did recognize that courts should give plaintiffs "a fair opportunity to plead,"[206] consistent with Rule 8(e)'s command that "pleadings must be construed so as to do justice,"[207] it still held that the plaintiffs' claims lacked the requisite specificity under 9(b) to withstand a motion to dismiss, despite the relative length of their complaint.[208] Critical to the Fifth Circuit's analysis in *Williams* was the nature of the fraud and negligent misrepresentation claims and how close they were to "non-actionable expression[s] of opinion," requiring that Rule 9(b) "take[] on especial force."[209]

195. 112 F.3d 175 (5th Cir. 1997).
196. *See id.* at 178.
197. 172 F.R.D. 103 (S.D.N.Y. 1997).
198. *Id.* at 105.
199. *See, e.g.*, Breeden v. Richmond Cmty. Coll., 171 F.R.D. 189, 199 (M.D.N.C. 1997).
200. *See Williams*, 112 F.3d at 178.
201. *Id.* at 176–77.
202. *Id.*
203. *Id.* at 177.
204. *Id.* at 178.
205. *Id.*
206. *Id.*
207. FED. R. CIV. P. 8(e).
208. *Williams*, 112 F.3d at 178 ("A complaint can be long-winded, even prolix, without pleading with particularity. Indeed, such a garrulous style is not an uncommon mask for an absence of detail. The amended complaint here, although long, states little with particularity.").
209. *Id.*

The impact that allegations of negligent misrepresentation can have on one's reputation led the Southern District of New York in *Simon v. Castello*[210] to require the Rule 9(b) pleading standard.[211] In *Simon*, the court recognized that some of the common policy considerations militating in favor of applying Rule 9(b) to traditional fraud claims apply to negligent misrepresentation claims as well.[212]

Some courts adopt Rule 9(b) because of the close similarity between mistake and negligent misrepresentation.[213] For instance, while there is no controlling precedent in the Fourth Circuit,[214] courts have pointed to several factors favoring Rule 9(b). Most notably, because Rule 9(b) includes *mistake*, the rule is not confined to willful misrepresentations and could encompass negligently made ones.[215]

In *Breeden v. Richmond Community College*,[216] the Middle District of North Carolina (which sits in the Fourth Circuit) reasoned that a negligent misrepresentation claim, "[l]ike a claim for fraud or mistake, . . . is based upon some confusion or delusion of a party such as by some misrepresentation, omission, misapprehension or misunderstanding."[217] In its analysis, the court examined the history of Rule 9(b), explaining that claims of "mistake" for reasons other than fraud and deceit have been disfavored at common law.[218]

2. A Pre-*Twombly* Policy Approach Applying Rule 8(a)(2)

While some courts took an expansive view of Rule 9(b) with regard to negligent misrepresentation claims, other courts insist that 9(b) ought to be treated as an exception to the general rule of pleading—which is governed by Rule 8(a)(2)—and, in the case of negligent misrepresentation, that this exception ought not to apply.[219] These diverging approaches appear even

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210. 172 F.R.D. 103 (S.D.N.Y. 1997).

211. *See id.* at 105.

212. *See id.*

213. *See* Breeden v. Richmond Cmty. Coll., 171 F.R.D. 189, 199 (M.D.N.C. 1997).

214. *See* Madison River Mgmt. Co. v. Bus. Mgmt. Software Corp., 351 F. Supp. 2d 436, 447 (M.D.N.C. 2005); *Breeden*, 171 F.R.D. at 199.

215. *Breeden*, 171 F.R.D. at 199 ("Rather, the rule was designed to govern claims premised upon a party's misrepresentation, misapprehension, or misunderstanding; in short, arising out of either mutual or unilateral confusion, whether intentionally or carelessly generated.").

216. 171 F.R.D. at 189.

217. *Id.* at 202.

218. *Id.* at 201. Accordingly, the court held that Rule 9(b) should apply to negligent misrepresentation claims. *Id.* at 202 ("In conclusion, from the rule's historical foundations, its text, and the nature of fraud and mistake actions, this Court finds that Rule 9(b) applies to actions wherein the major component involves significant delusion or confusion of a party, whether intentional or not.").

219. *See, e.g.*, Balt. Cnty. v. Cigna Healthcare, 238 F. App'x 914, 922 (4th Cir. 2007); Gen. Elec. Capital Corp. v. Posey, 415 F.3d 391, 396 (5th Cir. 2005); Am. Realty Trust, Inc. v. Hamilton Lane Advisors, Inc., 115 F. App'x 662, 668–69 (5th Cir. 2004); HSA Residential Mortg. Servs. of Tex. v. Casuccio, 350 F. Supp. 2d 352, 368 (E.D.N.Y. 2003).

within the same circuit, illuminating the conflict over the negligent misrepresentation pleading standard.[220]

In *American Realty Trust, Inc. v. Hamilton Lane Advisors, Inc.*,[221] a case arising in the Fifth Circuit, a real estate company sued financial advisors for negligently misrepresenting their ability to assist the company with a refinancing project.[222] The plaintiffs brought separate claims for fraud as well, alleging that the defendants had made these misrepresentations to induce them to enter into a separate consulting contract.[223]

In its decision, the Fifth Circuit was careful to distinguish between the fraud claim and the negligent misrepresentation claim, taking a substantially different view of the purpose of Rule 9(b) than it did in *Williams*.[224] The court specifically emphasized that Rule 9(b) is an exception to the general pleading standard that must be applied cautiously.[225]

Significantly, the court advanced this policy view of applying Rule 9(b) sparingly in conjunction with espousing what it described as "liberal"[226] Rule 8 pleading requirements. This policy approach to Rule 9(b), when combined with a liberal attitude about pleading more in line with *Swierkiewicz* than with the courts that defied notice pleading, leads to a different result in evaluating how negligent misrepresentation claims are pleaded.

The *American Realty* complaint did include separate counts for fraud and negligent misrepresentation, but the latter count contained little substance to set it apart from the fraud claim.[227] Still, the court found it to be sufficiently detailed to survive under Rule 8(a)(2), while dismissing the fraud counts under Rule 9(b).[228]

Taking such an approach is significant when the plaintiff fails or is unable to make allegations of negligent misrepresentation with the level of specificity required under Rule 9(b).[229] In *General Electric Capital Corp. v. Posey*,[230] yet another Fifth Circuit case, a lender sued former directors and officers of a medical services company, claiming that negligent misrepresentations on financial statements induced the lender to make a bad

220. *See, e.g.*, *Am. Realty*, 115 F. App'x at 662; *Gen. Elec. Capital Corp.*, 415 F.3d at 391.

221. 115 F. App'x at 662.

222. *Id.* at 663–64.

223. *Id.*

224. *See id.* at 668.

225. *See id.* ("Rule 9(b) is an exception to the liberal federal court pleading requirements embodied in Rule 8(a). Rule 9(b)'s stringent pleading requirements should not be extended to causes of actions not enumerated therein." (footnotes omitted)).

226. *Id.*

227. *See* Amended Complaint at 9–10, *Am. Realty*, 115 F. App'x at 662 (No. 3:02-CV-0641-G).

228. *Am. Realty*, 115 F. App'x at 668.

229. *See* Gen. Elec. Capital Corp. v. Posey, 415 F.3d 391, 396 (5th Cir. 2005) (holding that plaintiff's complaint sufficiently pleaded negligent misrepresentation despite the fact that "the allegations are devoid of much factual particularity").

230. *Id.*

loan to the company.[231] At oral argument, one defendant insisted—and the court did not disagree[232]—that the plaintiff never stated "any kind of detail for us to be able to discern what facts are being alleged" regarding the misrepresentations of the financial statements.[233] Still, the court concluded that "[u]nder the lenient standard of notice pleading, such a 'short and plain statement of the claim' is sufficient" and allowed the negligent misrepresentation claim to proceed.[234]

The Fifth Circuit is not the only court to manifest conflicting pre-*Twombly* precedents regarding the proper negligent misrepresentation pleading standard; both the Fourth Circuit and the Eastern District of New York have, in certain cases, aligned with the approach in *American Realty* and *General Electric*.[235]

In *Baltimore County v. Cigna Healthcare*,[236] the Fourth Circuit—which itself is divided on the proper pleading standard for negligent misrepresentation claims—distinguished fraud from negligent misrepresentation on policy grounds, positing that the latter did not implicate reputational injury concerns, thereby justifying the application of Rule 8.[237] The court explained, "To require that non-fraud allegations be stated with particularity merely because they appear in a complaint alongside fraud averments, however, serves no similar reputation-preserving function, and would impose a burden on plaintiffs not contemplated by the notice pleading requirements of Rule 8(a)."[238]

This view directly clashes with the assertion in *Simon v. Castello* that negligent misrepresentation claims bear heavily on one's reputation.[239] A dissenting opinion in *Cigna Healthcare* highlighted this conflict, noting that "negligent misrepresentation claims bear on the morality of defendant's conduct and his reputation going forward."[240]

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231. *Id.* at 393–94.

232. *Id.* at 397 (noting that the complaint contained "minimal factual particularity").

233. *Id.*

234. *Id.* (quoting FED. R. CIV. P. 8(a)). It is very important to note, however, that this case was decided before *Twombly* and *Iqbal*. While the "short and plain statement" language remains present in Rule 8(a), *Conley*-style notice pleading, as the Fifth Circuit imagined it in *General Electric*, has since been retired. Whether the allegations of the complaint in *General Electric* would survive a motion to dismiss under a heightened Rule 8 standard remains uncertain. For a thorough discussion on the impact of *Twombly* and *Iqbal* on notice pleading, see *supra* Part I.D.

235. *See* Balt. Cnty. v. Cigna Healthcare, 238 F. App'x 914, 922 (4th Cir. 2007); HSA Residential Mortg. Servs. of Tex. v. Casuccio, 350 F. Supp. 2d 352, 368 (E.D.N.Y. 2003); *In re* LILCO Sec. Litig., 625 F. Supp. 1500, 1504 (E.D.N.Y. 1986).

236. 238 F. App'x at 914.

237. *Id.* at 922.

238. *Id.* (quoting Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1104 (9th Cir. 2003)).

239. *See* Simon v. Castello, 172 F.R.D. 103, 105 (S.D.N.Y. 1997). Of course, because all of these cases were decided before *Twombly*, the courts were following then-current precedents, which, depending on the case, may or may not conflict with the *Twombly* holding.

240. *Cigna Healthcare*, 238 F. App'x at 925 (Wilkinson, J., dissenting); *see also* William D. Bolling III, Comment, Denver Health & Hospital Authority v. Beverage Distributors Co.*: An Illustration of Converging Pleading Doctrines*, 36 AM. J. TRIAL ADVOC. 369, 390 (2012)

In fact, six years before *Simon v. Castello* was decided, the Eastern District of New York (which sits in the Second Circuit) in *HSA Residential Mortgage Services of Texas v. Casuccio*,[241] reflected the tone of *General Electric* and embraced a liberal, notice-pleading approach to negligent misrepresentation claims.[242] In that case, the court cited *Swierkiewicz*[243] and *Conley*[244] to hold that the plaintiff "need only give fair notice of the negligent misrepresentation claim and the grounds upon which it rests."[245]

3. A Post-*Twombly* Policy Adjustment

In light of the *Twombly* decision, courts across several circuits have started to reevaluate their previous policy rationales regarding the pleading standard for negligent misrepresentation claims, ultimately settling on Rule 8(a)(2) and forgoing a Rule 9(b) analysis because of the higher bar now imposed by the generalized standard.[246]

This trend is particularly notable within the Fifth Circuit, which had previously been fractured over the proper pleading standard for negligent misrepresentation claims.[247] In *Williams v. Wells Fargo Bank N.A.*,[248] the Northern District of Texas was presented with negligent misrepresentation and breach of contract claims stemming from the defendant bank's alleged misrepresentation of the language it used to characterize a sale of property to the plaintiffs in the defendant's report to a credit bureau.[249]

In granting the defendant's motion to dismiss, the court applied the Rule 8(a)(2) plausibility standard under *Twombly* and reasoned that the plaintiffs only recited the elements of the cause of action for negligent misrepresentation in their complaint and did not allege enough facts, showing that the defendant "failed to exercise reasonable care in communicating the information in the agreement [regarding the reporting of the property sale]."[250]

(discussing implications of *Cigna Healthcare* and the policy rationale underlying the application of Rule 8(a) to negligent misrepresentation claims).

241. 350 F. Supp. 2d 352 (E.D.N.Y. 2003).

242. *See id.* at 368–69.

243. 534 U.S. 506 (2002).

244. 355 U.S. 41 (1957).

245. *See HSA Residential*, 350 F. Supp. 2d at 368 (citing *Swierkiewicz*, 534 U.S. at 512–13).

246. *See, e.g.*, Williams v. Wells Fargo Bank N.A., No. 4:12-CV-602-A, 2012 WL 5510747, at *1–2 (N.D. Tex. Nov. 14, 2012); Blonski v. Rogers, No. Civ. 2:12-01083 WBS DAD, 2012 WL 5289325, at *2 (E.D. Cal. Oct. 23, 2012); Massey v. JPMorgan Chase Bank, N.A., No. 4:12-CV-154-A, 2012 WL 3743493, at *3 (N.D. Tex. Aug. 29, 2012); Gonzalez v. Bristol-Myers Squibb Co., Civil Action No. 3:07-cv-00902 (FLW), 2009 WL 5216984, at *4 (D.N.J. Dec. 30, 2009); City of Raton v. Ark. River Power Auth., 600 F. Supp. 2d 1130, 1153 (D.N.M. 2008); *see also* Bolling, *supra* note 240, at 388–91 (tracing the trend of courts incorporating *Twombly* into their negligent misrepresentation pleading standard jurisprudence).

247. *See supra* Part II.A.1–2.

248. 2012 WL 5510747, at *1.

249. *Id.* at *1. This misrepresentation ultimately hindered the plaintiffs' ability to refinance at low rates and jeopardized their ability to retain the purchased property. *Id.*

250. *Id.* at *2.

In particular, the court cited both *Twombly* and *Iqbal* to set forth the misrepresentation pleading standard and support its conclusion that negligent misrepresentation should be pleaded in accordance with the post-*Twombly* plausibility standard under Rule 8(a)(2): "Although a complaint need not contain detailed factual allegations, the 'showing' contemplated by Rule 8 requires the plaintiff to do more than simply allege legal conclusions or recite the elements of a cause of action."[251]

The approach taken by the court in *Wells Fargo* could represent an emerging trend among Texas district courts to treat negligent misrepresentation claims under the general Rule 8 pleading standard, but to require a greater level of specificity than has traditionally been required under Rule 8 in light of *Twombly* and *Iqbal*.[252]

This development is not unique to district courts within the Fifth Circuit. The District of New Mexico first recognized this shift just a year after *Twombly* was decided, citing the elevated pleading standard as additional support for applying Rule 8 instead of Rule 9(b) to claims of negligent misrepresentation.[253]

> [T]he Supreme Court has recently made the standards for dismissal under rule 12(b)(6) more rigorous. Notice pleading under [*Twombly*] has real teeth. There is no sound reason to give corporate defendants accused of negligent misrepresentation more protection that [sic] doctors accused of malpractice or automobile operators of negligence. *Bell Atlantic Corp. v. Twombly* serves the purposes of pleading negligent misrepresentation as well as would rule 9(b). Indeed, the *Twombly* rule is better, because there is nothing served by creating a new exception to *Twombly*'s general rule for a negligence tort unless there is some compelling reason to do so.[254]

More recently, a court in the District of New Jersey confronted the negligent misrepresentation pleading standard in light of both *Twombly* and *Iqbal* when it granted a motion to dismiss for failure to state a claim for negligent misrepresentation under New York law stemming from the development, labeling, and marketing of the drug Plavix.[255] In that case, *Gonzalez v. Bristol-Myers Squibb*, the defendants sought dismissal of the plaintiff's negligent misrepresentation claim because it allegedly failed to satisfy the requirements of Rule 9(b).[256] The plaintiff countered that Rule 8 was the proper standard for pleading negligent misrepresentation claims.[257]

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251. *Id.* at *1.

252. *See* Massey v. JPMorgan Chase Bank, N.A., No. 4:12-CV-154-A, 2012 WL 3743493, at *3 (N.D. Tex. Aug. 29, 2012) (holding that a negligent misrepresentation claim did not survive a 12(b)(6) motion to dismiss because it failed to meet "the standard set forth in Rule 8(a)(2), as interpreted by the Supreme Court in *Twombly* and *Iqbal*"); Maisa Prop., Inc. v. Cathay Bank, No. 4:12-CV-066-A, 2012 WL 1563938, at *3 (N.D. Tex. May 2, 2012) (same).

253. *See* City of Raton v. Ark. River Power Auth., 600 F. Supp. 2d 1130, 1144 (D.N.M. 2008).

254. *See id.*

255. *See* Gonzalez v. Bristol-Myers Squibb Co., Civil Action No. 3:07-cv-00902 (FLW), 2009 WL 5216984, at *6–8 (D.N.J. Dec. 30, 2009).

256. *See id.* at *5.

257. *See id.*

The court's opinion first addressed the question by pointing out that the "inapplicability of Rule 9(b) to negligent misrepresentation claims . . . is not as settled as Plaintiff suggest[ed]."[258] However, the court decided to cut the plaintiff off not with Rule 9(b), but with Rule 8.[259] The court noted that the complaint lacked any allegations regarding the specifics of the misrepresentations that the plaintiff relied on and did not address which misrepresentations he relied on in choosing to take Plavix.[260]

Recently, the Eastern District of California took a similar approach, where the court dismissed the defendants' counterclaim of negligent misrepresentation because, "[r]egardless of whether negligent misrepresentation claims are governed by the pleading standards of Federal Rule of Civil Procedure 8 or the heightened pleading standard of Rule 9(b), in light of *Iqbal* and *Twombly*, the court finds defendant's allegations insufficient to state claims for either negligent or intentional misrepresentation."[261] Thus, the court effectively refused to resolve directly whether the pleading standard should be governed by Rule 8(a)(2) or 9(b), because if a plaintiff cannot satisfy the former, he most certainly cannot satisfy the latter.

4. Failing To Apply New Precedent to the Pleading Standard Analysis

Even in the face of the emerging trend in various districts and circuits to resolve the negligent misrepresentation pleading standard quandary by looking to the Supreme Court's recent guidance in *Twombly* and *Iqbal*, many courts have continued to apply pre-*Twombly* policy rationales in choosing Rule 8(a)(2) or Rule 9(b).[262]

In that sense, disarray persists over what the proper pleading standard should be, even within the same district. Within the Fifth Circuit, a court in

258. *See id.* The court cited an abundance of authority elucidating the debate and emphasizing that courts are split. *Id.*

259. *See id.* at *6–8.

260. *See id.* at *8. The plaintiff had pointed to an allegation in his complaint that he thought adequately satisfied the negligent misrepresentation element that he reasonably relied on defendants' misrepresentations to his detriment: "Defendants' misrepresentations were made to Plaintiff, as well as the general public. Plaintiff and Plaintiff's healthcare provider justifiably relied and acted upon Defendants' misrepresentations and consequently, Plaintiff's ingestion of Plavix was to Plaintiff's detriment." *Id.* (internal citation omitted).

261. Blonski v. Rogers, No. Civ. 2:12-01083 WBS DAD, 2012 WL 5289325, at *2 (E.D. Cal. Oct. 23, 2012).

262. *See, e.g.*, Pacchiega v. Fed. Home Loan Mortg. Corp., 2:13-CV-478 JCM PAL, 2013 WL 3367576, at *2–3 (D. Nev. July 5, 2013) (applying Rule 9(b) to a negligent misrepresentation claim, while applying *Twombly*'s Rule 8(a)(2) standard to another common law claim); Kiper v. BAC Home Loans Servicing, LP, 884 F. Supp. 2d 561, 568–69 (S.D. Tex. 2012) (citing pre-*Twombly* precedent in choosing Rule 9(b) as the negligent misrepresentation pleading standard); Roubinek v. Select Portfolio Servicing, Inc., No. 3:11–CV–3481–D, 2012 WL 2358560, at *4 (N.D. Tex. June 21, 2012) (same); Proctor v. Metro. Money Store Corp., 645 F. Supp. 2d 464, 473–76 (D. Md. 2009) (applying a liberal notice pleading to a negligent misrepresentation claim); Apace Commc'ns, Ltd. v. Burke, 522 F. Supp. 2d 509, 518–19 (W.D.N.Y. 2007) (using pre-*Twombly* case law as a rationale to apply Rule 9(b) to a negligent misrepresentation claim, while applying *Twombly*'s Rule 8(a)(2) standard to other common law claims).

the Southern District of Texas decided to apply Rule 9(b) in *Kiper v. BAC Home Loans Servicing, LP*.[263] In *Kiper*, plaintiff sued a lender and mortgage servicer for, inter alia, misrepresenting the status of plaintiff's request for a loan modification.[264] In selecting Rule 9(b) as the proper pleading standard for the negligent misrepresentation claim, the court cited *Williams v. WMX Technlologies, Inc.*[265]—the 1997 Fifth Circuit opinion espousing a broader role for Rule 9(b) in pleadings[266]—to support its analysis.[267]

Districts in other circuits have conducted similar analyses in continuing to apply Rule 9(b) to negligent misrepresentation claims in a post-*Twombly* world, taking into account the policy factors, such as reputational consequences, that courts urged in pre-*Twombly* case law. The District of Nevada (which sits in the Ninth Circuit) took this approach in *Pacchiega v. Federal Home Loan Mortgage Corp.*,[268] recently applying Rule 9(b) to negligent misrepresentation claims in a loan misrepresentation context similar to *Kiper*.[269] In choosing to apply Rule 9(b) to the negligent misrepresentation claim, the court acknowledged the importance of *Twombly* and the Rule 8(a)(2) plausibility standard, which the court discussed extensively in emphasizing the *Twombly* plausibility standard.[270] Even so, the court insisted on holding the negligent misrepresentation claim to the Rule 9(b) standard while noting that one of the main purposes of that rule is to protect against unfair reputational injury.[271]

In *Apace Communications, Ltd. v. Burke*,[272] the Western District of New York further evidenced a refusal to align the standard for pleading negligent misrepresentation with the *Twombly* decision, citing a Second Circuit case decided before *Twombly* to support the application of Rule 9(b).[273] Like the Northern District of Texas in *Kiper*, the Western District of New York subjected other common law claims, including constructive fraud, "to the 'plausibility' requirement of Rule 8 as enunciated in *Twombly*."[274]

On the other hand, some courts preferring a Rule 8(a)(2) pleading standard for negligent misrepresentation claims appear to be giving these claims less scrutiny than they deserve in light of *Twombly*'s plausibility requirement. In 2009, more than two full years after *Twombly*, the District of Maryland (which sits in the Fourth Circuit) cited *Baltimore County v.*

263. 884 F. Supp. 2d at 561. This approach contrasted with the Northern District of Texas's decision in *Wells Fargo*, which cited *Twombly* in support of applying the Rule 8(a)(2) pleading standard. *See* Williams v. Wells Fargo Bank, N.A., No. 4:12-CV-602-A, 2012 WL 5510747, at *1–2 (N.D. Tex. Nov. 14, 2012).
264. *Kiper*, 884 F. Supp. 2d at 565–67.
265. 112 F.3d 175, 178 (5th Cir. 1997).
266. *Id.*
267. *Kiper*, 884 F. Supp. 2d at 569.
268. 2:13-CV-478 JCM PAL, 2013 WL 3367576, at *1–3 (D. Nev. July 5, 2013).
269. *Id.*
270. *Id.* at *1–2.
271. *Id.* at *2–3.
272. 522 F. Supp. 2d 509 (2007).
273. *Id.* at 518–19.
274. *Id.* at 520.

Cigna Healthcare[275] in support of applying a "liberal" standard of "'notice pleading' under Rule 8(a)(2)" to a negligent misrepresentation claim.[276] And, in contrast to the Western District of New York's approach in *Apace Communications*, a magistrate judge in the Eastern District of New York recently cited *HSA Residential*—a 2003 Eastern District of New York decision relying heavily on *Conley* and *Swierkiewicz*[277]—in considering the appropriate pleading standard for a negligent misrepresentation claim in his report and recommendation.[278]

B. The Impact of Differing State Legal Interpretations of Negligent Misrepresentation on the Federal Pleading Standard

Differing state law interpretations and formulations of negligent misrepresentation also influence the corresponding federal pleading standard for cases heard in federal court under diversity jurisdiction. This state law impact occurs because some states, such as Florida and Kentucky, consider negligent misrepresentation to be tantamount, or nearly tantamount, to actual fraud—which in federal court must be pleaded with particularity.[279] Other states, such as Illinois and New Mexico, treat negligent misrepresentation as closer to a claim of pure negligence, which would be governed by the Rule 8(a)(2) standard.[280]

For instance, the Southern District of Florida has gravitated towards Rule 9(b) for pleading negligent misrepresentation because the state law elements of the claim sound in fraud.[281] Under Florida law, the elements of negligent misrepresentation make it "tantamount to actionable fraud."[282] The Florida Supreme Court noted that, because it is an action "for deceit, [it] is necessarily founded in fraud, and, in order to make out a case of fraud, as distinguished from inadvertence, mistake, negligence, accident, and the like, it is necessary to allege and prove the scienter,—the knowledge of defendant that his representations were false."[283]

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275. 238 F. App'x 914, 922 (4th Cir. 2007) (downplaying reputational injury in the context of negligent misrepresentation).

276. Proctor v. Metro. Money Store Corp., 645 F. Supp. 2d 464, 476 (D. Md. 2009).

277. *See* HSA Residential Mortg. Servs. v. Casuccio, 350 F. Supp. 2d 352, 368 (E.D.N.Y. 2003).

278. *See* ADL, LLC v. Tirakian, No. CV 2006-5076(SJF)(MDG), 2010 WL 3925131, at *8 (E.D.N.Y. Aug. 26, 2010) (citing *HSA Residential*, 350 F. Supp. 2d at 368). The report and recommendation did not specifically decide what the pleading standard should be.

279. *See, e.g.*, Republic Bank & Trust Co. v. Bear Stearns & Co., 683 F.3d 239, 248 (6th Cir. 2012); Pruco Life Ins. Co. v. Brasner, No. 10-80804-CIV, 2011 WL 2669651, at *4 (S.D. Fla. July 7, 2011).

280. *See, e.g.*, City of Raton v. Ark. River Power Auth., 600 F. Supp. 2d 1130, 1149 (D.N.M. 2008); Masso v. United Parcel Serv. of Am., Inc., 884 F. Supp. 610, 615 (D. Mass. 1995).

281. *See, e.g.*, *Pruco Life Ins. Co.*, 2011 WL 2669651, at *4 ("Though the Eleventh Circuit itself has not ruled on the question, '[h]istorically, in Florida an action for negligent misrepresentation sounds in fraud rather than negligence.'" (quoting Souran v. Travelers Ins. Co., 982 F.2d 1487, 1511 (11th Cir. 1993))).

282. Ostreyko v. B. C. Morton Org., Inc., 310 So. 2d 316, 318 (Fla. Dist. Ct. App. 1975).

283. Watson v. Jones, 25 So. 687, 681–82 (Fla. 1899).

The Sixth Circuit took a similar approach when examining Kentucky law.[284] In a recent case, the court highlighted the duplicitous nature of one element of a properly pleaded negligent misrepresentation claim under Kentucky law, which requires a plaintiff to allege that the defendant provided false information for the guidance of others in a transaction.[285] As a result, the court concluded that Kentucky's negligent misrepresentation law necessarily implicated various policy issues normally associated with applying Rule 9(b), namely threat of reputational injury.[286]

Conversely, where a state's laws recognize a more concrete dividing line between negligent misrepresentation and fraud, federal courts applying that state's laws are more likely to allow Rule 8 to govern a negligent misrepresentation claim.[287] In *Tricontinental Industries v. PricewaterhouseCoopers*,[288] the Seventh Circuit used Illinois law to inform its choice about the proper pleading standard for a claim by the plaintiff that the defendant accounting firm negligently misrepresented the financial worth of a client whose stock the plaintiff was considering purchasing.[289] The court refused to apply Rule 9(b) to the claim, treating it more like negligence than actual fraud, because Illinois law imposes a duty on accounting firms, such as the defendant, to refrain from negligently or carelessly making false statements on which third parties not in privity with the defendant may foreseeably rely.[290]

Along the same lines, the District of New Mexico, in *City of Raton v. Arkansas River Power Authority*,[291] recently addressed the pleading standard for negligent misrepresentation in light of New Mexico law, under which there has been a longstanding and important distinction in state courts between negligent misrepresentation and fraud- and deceit-style claims.[292] Specifically, the highest court in New Mexico has stated, "Negligent misrepresentation is not, of course, a 'lesser included' cause of action within a claim for deceit or fraud."[293] Thus, in contrast to the Florida Supreme Court's proclamation that negligent misrepresentation is tantamount to fraud,[294] the differing treatment of negligent

284. *Republic Bank*, 683 F.3d at 248.

285. *Id.* ("This element, plainly understood, requires an allegation of duplicity. Such an allegation implicates Rule 9(b)'s 'purpose[s] . . . to alert defendants as to the particulars of their alleged misconduct so that they may respond. . . . [T]o [sic] prevent fishing expeditions, to protect defendants' reputations from allegations of fraud, and to narrow potentially wide-ranging discovery to relevant matters.'" (alterations in original) (quoting Chesbrough v. VPA, P.C., 655 F.3d 461, 466 (6th Cir. 2011))).

286. *Id.*

287. *See, e.g.*, Tricontinental Indus., Ltd. v. PricewaterhouseCoopers, LLP, 475 F.3d 824, 833 (7th Cir. 2007) (holding that the necessary elements to make out a claim for negligent misrepresentation in Illinois are such that Rule 9(b)'s heightened standard cannot govern).

288. *Id.* at 824.

289. *Id.* at 828–29.

290. *Id.* at 833–34.

291. 600 F. Supp. 2d 1130 (D.N.M. 2008).

292. *See id.* at 1149.

293. Ledbetter v. Webb, 711 P.2d 874, 879 (N.M. 1985).

294. *See supra* note 283 and accompanying text.

misrepresentation in New Mexico has led the District of New Mexico to apply Rule 8(a)(2) to negligent misrepresentation claims, instead of the heightened Rule 9(b) standard imposed for claims sounding in fraud.[295]

III. THE NEED TO ABANDON PRE-*TWOMBLY* PRECEDENTS

Thus, on a global level, there is an array of complex issues affecting the way that federal courts evaluate and choose pleading standards for claims of negligent misrepresentation, contributing to the courts' general lack of consistency on the subject.

However, there is one common theme linking everything together and keeping the confusion alive: a high level of casualness among federal courts in regard to federal pleading standards, a problem which is compounded by inconsistencies in state law. As such, the pleading standard for negligent misrepresentation remains in a state of chaotic disarray.

To be sure, *Twombly* and *Iqbal* are relatively new precedents, and it will take time for federal courts to recognize how they apply to meaningfully distinguish or merge Rules 8(a)(2) and 9(b).[296] But, at least for the time being, one thing is clear: while *Twombly* and *Iqbal* have influenced some courts' evaluation of negligent misrepresentation pleading standards,[297] other courts persist in applying pre-*Twombly* precedent,[298] rendering the Supreme Court's most recent pronouncements on pleading standards ineffectual in the negligent misrepresentation context.

As a result, pre-*Twombly* precedent takes on even greater importance in the discussion about negligent misrepresentation pleading standards. And needless to say, that precedent is not well settled.[299]

But perhaps the most important problem causing differing and competing approaches to negligent misrepresentation pleading standards is not necessarily what the conflicts within the precedents are, but rather how the courts have chosen to treat precedent in the first place. In order to better track the development and pervasiveness of this theme, it is important to start from *Conley*, not from *Twombly*.

One of Clark's main goals in crafting the Federal Rules of Civil Procedure was to eliminate obstacles so that litigants could have their day in court.[300] He sought to break down the rigid formalism that characterized the previous system of rules.[301]

In some respects, *Conley* was the realization of that vision, though perhaps an extreme one. The "no set of facts" standard created a precedent that sought to eliminate barriers to entry for litigants pursuing claims in federal court.[302] In the process, lower courts, though technically bound by

295. *See Ark. River*, 600 F. Supp. 2d at 1142–44.
296. *See supra* notes 178–82 and accompanying text.
297. *See supra* note 246 and accompanying text.
298. *See supra* note 262 and accompanying text.
299. *See supra* notes 199, 219 and accompanying text.
300. *See supra* notes 100–01 and accompanying text.
301. *See supra* note 100 and accompanying text.
302. *See supra* notes 110–18 and accompanying text.

the Supreme Court's precedent, found that the standard was not appropriate for certain types of claims, and so they routinely ignored the *Conley* command, instead raising the Rule 8(a)(2) bar on a seemingly ad hoc basis.[303]

The Supreme Court tried to address the lower courts' casual disregard for the *Conley* ruling in *Leatherman*, which proved only to be a failed attempt at upholding the *Conley* version of notice pleading.[304] Indeed, lower courts continued to find ways around *Leatherman*, reflecting a special concern that the ease with which a litigant could plead a claim under *Conley* threatened to put a dent in the reputations—and the pocketbooks—of defendants who potentially were not at any legal fault.[305]

The Supreme Court made one last attempt in *Swierkiewicz* to rein in the lower courts and restore the *Conley* notice pleading standard.[306] But those efforts failed, as was plainly apparent by the Court's revisiting and "retiring" of *Conley*'s rendition of notice pleading four years later in *Twombly*.[307]

This narrative of the lower courts' persistently casual treatment of Supreme Court pleading standard precedent helps to inform the development and muddled state of the law as it relates to evaluating a proper pleading standard for negligent misrepresentation.

Before *Twombly*, the level of specificity required in a complaint under Rule 8(a)(2) was relatively low, making it easy for plaintiffs to bring claims of negligent misrepresentation under that pleading standard.[308] Even courts that embraced the Rule 8(a)(2) standard referred to it as "liberal."[309]

As such, it is no surprise that, without clear direction from the Supreme Court—and with so many lower courts choosing not to follow its pleading standard decisions anyway—some lower courts adopted a preference for Rule 9(b).[310] Purely as a matter of policy, some courts gravitated towards Rule 9(b) for pleading negligent misrepresentation claims because Rule 8(a)(2) had no bite, making it too easy for plaintiffs to survive Rule 12(b)(6) motions to dismiss.[311] And lower courts' concerns over applying a relatively weak pleading standard to negligent misrepresentation claims were magnified because of the potential reputational implications these claims can have on defendants.[312] Finally, negligent misrepresentation on its own—state law differences and interpretations aside—is an interesting claim because it can conceivably be thought of as a type of "mistake" in the Rule 9(b) sense, thereby requiring the Rule 9(b) standard to govern.[313]

303. *See supra* note 121 and accompanying text.
304. *See supra* notes 122–26 and accompanying text.
305. *See supra* notes 122–26 and accompanying text.
306. *See supra* notes 126–30 and accompanying text.
307. *See supra* note 149 and accompanying text.
308. *See supra* notes 230–35 and accompanying text.
309. *See supra* notes 222–29 and accompanying text.
310. *See supra* note 199 and accompanying text.
311. *See supra* notes 200–10 and accompanying text.
312. *See supra* notes 210–18 and accompanying text.
313. *See supra* notes 216–19 and accompanying text.

Thus, to the extent that policy affects courts' pleading standard calculus, negligent misrepresentation claims may be conducive to a heightened pleading standard.

The other important aspect of negligent misrepresentation, which is heavily dictated by state law differences, is that the claim itself is not always so different from a straightforward claim of fraud.[314] The Federal Rules of Civil Procedure have specifically enumerated fraud as a claim to be pleaded under the heightened Rule 9(b) pleading standard.[315] States that treat negligent misrepresentation as being tantamount to fraud then give federal courts in those states good reason to apply the fraud pleading standard to negligent misrepresentation claims.[316]

On the other hand, some states take the view that negligent misrepresentation is closer to a claim of pure negligence.[317] In that context, it would make sense for a federal court to apply the general pleading standard for negligence, which is unquestionably Rule 8(a)(2).[318]

Thus, given the variations in states' formulations and interpretations of negligent misrepresentation law, coupled with conflicting categorizations of the claim at the federal level, it is naturally difficult for courts to agree on a uniform standard for negligent misrepresentation claims.[319]

Where the substantive state law on negligent misrepresentation is clear, the federal courts should be responsible for carrying it out, and applying an appropriate pleading standard accordingly. Therefore, if a state law very clearly treats negligent misrepresentation as being tantamount to fraud, then the federal court should have a responsibility to apply Rule 9(b) to a negligent misrepresentation claim. And, if a state obviously favors treating negligent misrepresentation as closer to negligence, then Rule 8(a)(2) ought to apply.

The problem is that state law is not always clear, and what's more, federal courts do not always apply it properly or treat it with an appropriate level of care. In fact, in the context of negligent misrepresentation, a Montana district court ignored lines of precedent and conflicting interpretations of the state's negligent misrepresentation law to bring the tort closer to fraud.[320] Further, as a policy matter, it is potentially problematic for federal judges within the same district sitting in diversity to apply different pleading standards to the same claim because of nebulous state law variations.

Thus, while consulting and applying state law should theoretically be the first step of federal courts in trying to decide which pleading standard should govern a claim of negligent misrepresentation, in practice it is not

314. *See supra* note 279 and accompanying text.
315. *See supra* notes 132–37 and accompanying text.
316. *See supra* notes 280–87 and accompanying text.
317. *See supra* notes 291–96 and accompanying text.
318. *See supra* notes 291–96 and accompanying text.
319. *See supra* notes 279–81 and accompanying text.
320. *See supra* note 92 and accompanying text.

clear that this strategy would work.[321] And further, given how complex and conflicted the law on negligent misrepresentation may be within a given state, it is not always true that state law will draw a clear distinction about whether negligent misrepresentation is closer to fraud or negligence.[322] So, in such a situation, what is a federal court to do?

Since *Twombly*, federal courts' answer to that question has turned, rather predictably, on the courts' willingness, or lack thereof, to adhere to pleading standard precedent.[323] And while the *Twombly* and *Iqbal* precedents are still young, there are preliminary indications that lower courts are not following them in the negligent misrepresentation context.[324]

In light of *Twombly*, the need to have an expanded role for Rule 9(b), as the Fifth Circuit urged in *Williams*, should no longer be too significant.[325] Nonetheless, even after *Twombly*, the Northern District of Texas recently cited the *Williams* opinion in applying Rule 9(b) to a claim of negligent misrepresentation.

That courts are lagging behind in applying the proper precedent for negligent misrepresentation claims is more alarming and dangerous than the end result of selecting one standard over the other. The District of Maryland, in selecting Rule 8(a)(2) as the standard to govern negligent misrepresentation, cited case law discussing the liberal standard of notice pleading under Rule 8(a)(2), as though the decision were being rendered in the *Conley* era.[326]

This is the crux of the conflict and major reason for why federal courts ought to be concerned.

One of the great difficulties, in light of the plausibility standard announced in *Twombly*, in deciding whether to apply Rule 8 or 9(b) to negligent misrepresentation claims, is that both standards have started to converge.[327] However, to the extent that the standards remain separate from each other, with Rule 9(b) acting as a clearly heightened standard over Rule 8(a)(2), Rule 8(a)(2) cannot easily become a panacea for the negligent misrepresentation pleading problem given state law differences in the treatment of negligent misrepresentation claims.[328] *Twombly* has decidedly not altered the original motivation for a heightened pleading standard for fraud,[329] so district courts in states that treat negligent misrepresentation as tantamount to fraud would likely want to continue applying Rule 9(b) to negligent misrepresentation claims, and rightfully so.

Thus, at bottom, the revised pleading standard under Rule 8(a)(2) should not be the first resort for federal courts. First, it is important for courts to

321. *See supra* Part II.B.
322. *See supra* Parts I.A., II.B.
323. *See supra* Part II.A.
324. *See supra* Part II.A.4.
325. *See supra* Part II.A.3.
326. *See supra* note 276 and accompanying text.
327. *See supra* notes 178–80 and accompanying text.
328. *See supra* Part I.A.
329. *See supra* note 181 and accompanying text.

attempt to determine the thrust of state law and apply the appropriate pleading standard accordingly. However, given the uncertainty surrounding state law and the conflicting line of precedents both pre- and post-*Twombly*, federal courts must rely on the revised general pleading standard under Rule 8(a)(2) as the default option when state law does not provide clear guidance.[330]

The *Twombly* and *Iqbal* decisions militate against the old policy justifications for elevating pleading standards for claims not clearly sounding in fraud or mistake. Where state law does not dictate otherwise, negligent misrepresentation does not deserve an elevated pleading standard: the Supreme Court has already addressed concerns about possible threats to a defendant's reputation or high litigation expenses.[331]

In addition, courts treating negligent misrepresentation as a non-fraud-based, traditional common law claim have never provided rationale for why pure claims of negligent misrepresentation ought to be viewed and pleaded differently and more liberally than general common law claims. These courts would not argue that negligent misrepresentation should be some sort of exception, like fraud, to transsubstantive norms.[332] As such, there is no reason why negligent misrepresentation claims should not be subjected to a less stringent pleading standard than any other typical common law claim. *Conley*-style notice pleading for negligent misrepresentation is outdated and should never be articulated as a rationale for applying Rule 8(a)(2) to govern such claims.[333]

On the other hand, raising the bar uniformly to a Rule 9(b) standard requiring particularity would extinguish negligent misrepresentation claims as we know them, making them essentially tantamount to traditional fraud claims. This policy is not a sound one, because there are subtle yet important differences between negligent misrepresentation and fraud.[334] Rule 9(b) is very much a special breed of pleading requirement, and it needs to be cabined as such.

As it stands now, the PSLRA has influenced courts even in their treatment of common law claims, notably fraud-based ones.[335] Raising the negligent misrepresentation standard uniformly to that set forth in Rule 9(b) threatens to elevate the pleading standard beyond what should be appropriate for a common law claim not purely rooted in fraud.

Therefore, the revised standard under Rule 8(a)(2) provides a good compromise solution for federal courts when there is uncertainty over the treatment of state law negligent misrepresentation claims.

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330. *See supra* notes 255–61 and accompanying text.
331. *See supra* Part I.D.
332. *See supra* Part II.B.
333. *See supra* Part I.D.
334. *See supra* Part I.A.3.
335. *See supra* notes 139–42, 146–48 and accompanying text.

CONCLUSION

Lower federal courts have traditionally taken a casual approach to the Supreme Court's pronouncements on pleading standards. And they have made no exception for claims of negligent misrepresentation. As such, the pleading standard for negligent misrepresentation in federal courts remains as murky as ever. In addition, state law variations in negligent misrepresentation further prevent federal courts from adopting a universal standard, or even from taking a consistent approach to evaluating which standard to apply. Thus, to eliminate the confusion, to streamline pleading, and to follow current precedent, federal courts must first do a better job of attempting to discern state law on negligent misrepresentation. When the law is unclear, the courts should not hesitate to apply Rule 8(a)(2) for claims of negligent misrepresentation in light of *Twombly* and *Iqbal*, as the revised pleading standard more comfortably fits these unique common law claims.