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**SPECIFICITY OR DISMISSAL: THE IMPROPER
EXTENSION OF RULE 9(B) TO NEGLIGENT
MISREPRESENTATION AS A DEPRIVATION OF
PLAINTIFFS' PROCEDURAL DUE PROCESS RIGHTS**

Julie A. Cook*

INTRODUCTION

Federal Rules of Civil Procedure (FRCP) Rule 9(b),¹ applicable to claims of “fraud or mistake,” sets too high a pleading standard for plaintiffs to meet when extended to negligent misrepresentation claims. Rule 9(b), or “heightened pleading,”² for this line of claims may constitute a deprivation of a plaintiff’s due process rights under the Fourteenth Amendment. The information necessary to satisfy the standard—the circumstances underlying the claim, including the who, what, where, when, and how—may be impossible to obtain at the outset of a case. In the event that the court dismisses the complaint, the application of the Rule might prevent a recourse for which the substantive law allows. When justifications for heightened pleading are not fairly balanced with the burden on the plaintiff, as is the case for negligent misrepresentation claims, courts should reject the application of the Rule in lieu of Rule 8 notice pleading.³ Courts’ extension of heightened pleading requirements to non-fraud-based claims is contrary to both the purpose of the FRCP—allowing for liberal pleading and the perseverance of claims⁴—and to due process of law under the Fifth and Fourteenth Amendments. Negligent misrepresentation is not fraud-based, and it differs essentially from the tort of fraud.

This Note examines the current federal circuit court split on the application of Rule 9(b) to negligent misrepresentation claims, the inconsistency with which the Rule is applied, and the lack of clarity on the tort of negligent misrepresentation, all

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¹ FED. R. CIV. P. 9(b).

² *Id.*

³ FED. R. CIV. P. 8.

⁴ See *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957), *abrogated by* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (“Such simplified ‘notice pleading’ is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.”).

combined to constitute a deprivation of procedural due process rights for claimants of the tort. Part I establishes the federal pleading rules, noting the difference between ordinary notice pleading and heightened pleading and the implications of *Bell Atlantic Corp. v. Twombly*⁵ and *Ashcroft v. Iqbal*.⁶ Part I also addresses the ordinary procedures following a pleading the court or a defendant finds unsatisfactory. Part II reviews the tort of negligent misrepresentation as compared to the tort of fraudulent misrepresentation, including the history of the tort, important court decisions in its formation, and the unique elements of the torts. Part III conducts an analysis of the current circuit court split regarding the applicable pleading requirement. Part IV refutes the traditional justifications for heightened pleading when applied to negligent misrepresentation claims. Part V introduces these arguments in a Fifth Amendment procedural due process framework, analogizing plaintiffs' situation to that of pro se litigants. Part VI revisits the difficulties plaintiffs have faced when pleading negligent misrepresentation under the requirements of Rule 9(b), considering the unique elements of the tort and the common conflation of the Rule. Part VII notes that judicial discretion in granting leave to amend plaintiffs' complaints is insufficient to protect the critical procedural due process rights at stake. Part VIII discusses a dangerous future for plaintiffs due to the historical extension of Rule 9(b) to non-fraud-based claims and the increasing strictness in the application of the Rule itself, calling for limitation of the Rule.

I. PLEADING RULES

A. Notice Pleading vs. Heightened Pleading

FRCP Rule 8(a)(2) is the standard pleading requirement known as "notice pleading," governing the majority of civil law claims.⁷ Rule 8 provides, in part:

(a) *Claim for Relief.* A pleading that states a claim for relief must contain:

- (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
- (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

⁵ 550 U.S. 544 (2007).

⁶ 556 U.S. 662 (2009).

⁷ FED. R. CIV. P. 8(a)(2); *see, e.g.*, Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 990–91 (2003) ("Under the Federal Rules, a complaint would serve the single function of providing notice of the claim asserted. . . . For the drafters, this meant notice of the general nature 'of the case and the circumstances or events upon which it is based.'").

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.⁸

Rule 9(b) requires heightened pleading for claims of fraud or mistake, stating, “Fraud or Mistake; Conditions of Mind. 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.”⁹

Courts have established that the circumstances constituting the fraud or mistake include the time and place which the false representation(s) were made, the content of the false misrepresentation(s), the identity of the defendant(s) who made them, and the consequences of the misrepresentation(s).¹⁰ These questions have been analogized to the “who, what, when, where, and how” of a newspaper story.¹¹ Other courts, however, have noted that nothing in Rule 9(b) requires a plaintiff to specify date, place, and time, but that focusing on the “particularity” language of the Rule is too narrow an approach as to subject fraud claims to too strict a scrutiny.¹² These courts have instead suggested that “the requirements of Rule 9(b) are met when there is sufficient identification of the circumstances constituting fraud so that the defendant can prepare an adequate answer to the allegations.”¹³ Although there may be disagreement regarding the requirements of Rule 9(b), the latter appears to be the majority approach.¹⁴ In *The Myth of Notice Pleading*, Christopher M. Fairman states that “[t]ypically, courts applying Rule 9(b) to fraud actions require the ‘circumstances constituting the fraud’ to be pleaded with particularity, not the elements of fraud.”¹⁵ In addition, an obvious exception exists for the state of mind of the defendant, which can be “averred generally.”¹⁶ In other words, it is sufficient to make “a general averment of intent unaccompanied by supporting factual allegations.”¹⁷

⁸ FED. R. CIV. P. 8(a).

⁹ FED. R. CIV. P. 9(b).

¹⁰ See *Lawrence Nat’l Bank v. Edmonds*, 924 F.2d 176, 180 (10th Cir. 1991).

¹¹ *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990).

¹² See *Constitution Bank v. DiMarco*, 155 B.R. 913, 918 (E.D. Pa. 1993) (“It has been held that the purpose of Rule 9(b) is to place the defendant on notice of the precise misconduct with which it is charged and to safeguard defendants against spurious charges of immoral and fraudulent behavior. . . . [W]hile it is true that date, place and time allegations will provide precision, substantiation and notice, nothing in the rule requires them.”(citation omitted)).

¹³ *Id.*

¹⁴ 5A CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1297 (3d ed. 2013).

¹⁵ Fairman, *supra* note 7, at 1004.

¹⁶ FED. R. CIV. P. 9(b).

¹⁷ *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1270 n.5 (10th Cir. 1989) (citation omitted).

B. Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal

Although courts may not require a plaintiff to plead the elements of fraud with particularity, according to Rule 8, a plaintiff still must show that he is entitled to relief.¹⁸ After the Supreme Court's rulings in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, this requires a plaintiff to provide enough factual information as to raise his claim above the speculative level and into the plausible.¹⁹ As a result, even though Rule 9(b) provides a necessary exception in that a plaintiff is not required to prove the mental state of a defendant, and, as Fairman explained, courts have not required the elements of a tort to be stated with particularity, a plaintiff must still allege a defendant's knowledge and fraudulent intent generally and convincingly.²⁰ Without these elements, a claimant of fraud would not be entitled to relief, demonstrating that, intrinsically, the unique elements of the tort require some form of heightened pleading.²¹ In *Setting the Standard: A Fraud-Based Approach to Antitrust Pleading in Standard Development Organization Cases*, James E. Abell III explains the practical complications this poses for plaintiffs during pleading:

As with knowledge, Rule 9(b) exempts plaintiffs from having to plead intent with specificity. Plaintiffs, however, must nevertheless provide enough factual detail to strongly support their allegations of fraudulent intent. One way for plaintiffs to meet this requirement is to provide evidence that the defendants stood to benefit in some way from the fraud The key factor in many cases is that the statements were carefully tailored to eliminate the specific concerns preventing the plaintiff from entering into the transaction. In looking for fraudulent intent, courts will often closely scrutinize cases in which defendants only had one interaction with the plaintiffs. Because the defendants anticipate no future dealings with the plaintiffs, they face fewer consequences

¹⁸ FED. R. CIV. P. 8(a).

¹⁹ *Ashcroft v. Iqbal*, 556 U.S. 662, 666 (2009) (applying the heightened pleading standard set forth in *Twombly* outside of antitrust cases); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (adopting a "plausibility" standard for antitrust complaints). These cases abrogated the standard set forth in *Conley v. Gibson*, which required only a conceivable set of facts in support of a legal claim and allowed courts to dismiss a claim only when the plaintiff, beyond a doubt, would be able to "prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. 41, 45–46 (1957).

²⁰ Fairman, *supra* note 7, at 991–92.

²¹ *See id.* at 999.

if their misrepresentations are discovered and thus may have a stronger motive to commit fraud.²²

This interesting implication of plausibility in pleading may be a contributing factor to courts' uncertainty regarding Rule 9(b), as they have stretched to apply a higher pleading standard than the Rule actually warrants.²³

C. Motions, Defenses, and Leave to Amend

In the circumstance that a plaintiff fails to provide a pleading sufficient for the defendant to be able to prepare a responsive pleading, a defendant may move for a more definite statement under Rule 12(e).²⁴ In negligence cases, this scenario arises only in "unusual or complex factual settings."²⁵ The torts of negligent misrepresentations and fraud, which have elements, discussed later in this Note,²⁶ that often require plaintiffs to allege "complex factual settings," would be a circumstance in which Rule 12(e) would be invoked.²⁷

If possible, a defendant will likely choose to present the defense through a 12(b)(6) motion.²⁸ The claim will be dismissed if, when all facts are construed in favor of the plaintiff and assumed to be true, the plaintiff failed "to state a claim upon which relief can be granted."²⁹ In allowing the maximum possible deference to plaintiff's allegations, the Rule demonstrates a purpose to allow for liberal pleading.³⁰

If the motion is granted, a plaintiff's claim may still be saved. In the event that a plaintiff's pleading fails to pass muster under the applicable requirement, courts generally exercise their discretion to dismiss claims without prejudice, allowing plaintiffs leave to amend.³¹ "[U]nder Fed. R. Civ. P. 15(a), [a] plaintiff should be granted

²² See James E. Abell III, *Setting the Standard: A Fraud-Based Approach to Antitrust Pleading in Standard Development Organization Cases*, 75 U. CHI. L. REV. 1601, 1607 (2008) (citations omitted).

²³ See *infra* Part VIII.

²⁴ "A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." FED. R. CIV. P. 12(e).

²⁵ "[A] more definite statement serves no useful purpose in automobile accident cases and similar routine civil litigation, especially in view of the availability of comprehensive discovery." WRIGHT ET AL., *supra* note 14, at § 1249.

²⁶ See *infra* Part II.

²⁷ WRIGHT ET AL., *supra* note 14, at § 1249; see also FED. R. CIV. P. 12(e).

²⁸ FED. R. CIV. P. 12(b)(6).

²⁹ *Id.*

³⁰ *Id.* But see Jason G. Gottesman, Comment, *Speculating As to the Plausible: Pleading Practice After Bell Atlantic Corp. v. Twombly*, 17 WIDENER L.J. 973, 974 (2008) (suggesting a flexible plausibility standard for pleading which solves the confusion created by *Twombly*).

³¹ See *infra* Part VI.

leave to amend his complaint to plead [his] claims with sufficient specificity.”³² The Rule provides that, in a matter of course, a plaintiff may amend his complaint within twenty-one days after serving it, twenty-one days after receiving a responsive pleading, or twenty-one days after service of a Rule 12(b), (e), or (f) motion.³³ For all other amendments, the Rule states the following: “[A] party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.”³⁴ This Note will discuss courts’ consideration of when “justice so requires” and the sufficiency of this procedure in Part VII.

II. ELEMENTS OF THE TORTS

A. History of the Tort Through the Restatement

The tort of negligent misrepresentation historically developed out of circumstances resulting in physical injury, or the branch of tort law known as product liability.³⁵ This influence can be seen in the 1934 Restatement of Torts, which primarily defined the tort of negligent misrepresentation in the context of bodily harm.³⁶ The Second Restatement adapted Section 311 as follows:

- (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results
 - (a) to the other, or
 - (b) to such third persons as the actor should expect to be put in peril by the action taken.
- (2) Such negligence may consist of failure to exercise reasonable care
 - (a) in ascertaining the accuracy of the information, or
 - (b) in the manner in which it is communicated.³⁷

With the advent of more sophisticated business relationships came the extension of the tort of negligent misrepresentation into its more modern application, which

³² FED. R. CIV. P. 12; FED. R. CIV. P. 15; *Gunningham v. Standard Fire Ins. Co.*, No. 07-cv-02538-REB-KLM, 2008 WL 4377451 (D. Colo. Sept. 19, 2008).

³³ FED. R. CIV. P. 12; FED. R. CIV. P. 15.

³⁴ FED. R. CIV. P. 15(a)(2).

³⁵ For an introductory understanding of the common law development of liability for sellers of products and the related issue of the liability of “sellers” of information, see Seth E. Lipner & Lisa A. Catalano, *The Tort of Giving Negligent Investment Advice*, 39 U. MEM. L. REV. 663, 669–78 (2009).

³⁶ RESTATEMENT OF TORTS §§ 304, 310, 311 (1934).

³⁷ RESTATEMENT (SECOND) OF TORTS § 311 (1965).

the Second Restatement has called “Information Negligently Supplied for the Guidance of Others”³⁸:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), *the liability stated in Subsection (1) is limited to loss suffered*

(a) by the person or *one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it*; and

(b) through reliance upon it in a transaction that *he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction*.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.³⁹

In Subsection (2), the Restatement outlines an intent element, limiting liability to only those persons to whom the defendant intends to supply the information or whom she knows will receive the information, and when the defendant intends or knows that the information will influence the recipient through reliance upon it.⁴⁰ In both sections, the authors supply the language of negligence—the failure “to exercise reasonable care”—setting the clear standard of scienter for the tort.⁴¹

³⁸ RESTATEMENT (SECOND) OF TORTS § 552 (1977).

³⁹ *Id.* (emphasis added).

⁴⁰ [T]he liability stated in Subsection (1) is limited to loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Id.

⁴¹ RESTATEMENT (SECOND) OF TORTS § 552 (1977); RESTATEMENT (SECOND) OF TORTS § 311 (1934).

The Restatement also outlines liability for fraudulent misrepresentation, appearing to be the same as for negligent misrepresentation, but fails to define the term:

One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced.⁴²

B. State of Mind

It is therefore necessary to look to other authority in order to distinguish negligent from fraudulent misrepresentation. In Section 2:15 of *The Law of Fraudulent Transactions*, Peter A. Alces explains the interplay between fraud and negligence in misrepresentations as follows:

By recognizing fraud premised on less than intentional misrepresentation, the law increasingly has expanded liability. If reckless behavior is actionable, the instances of fraud liability increase. That enhanced exposure is further expanded when even less culpable mental states, such as negligence, can trigger fraud liability. The consequence of not recognizing negligent misrepresentation is leaving a victim uncompensated for the loss occasioned by a negligent party, not a particularly desirable result. When mere negligence becomes actionable, the court can engage in a familiar analysis: Did the defendant owe the plaintiff a duty? Was that duty breached? Did the plaintiff suffer damage? Was the breach of duty the proximate cause of the plaintiff's injury?⁴³

In an analysis of *Breedon v. Richmond Community College*,⁴⁴ William P. Hoye, in *Tort Litigation in Higher Education*, remarks that the Middle District of North Carolina took a similar approach to fraudulent and negligent misrepresentation, distinguishing them only by the state of mind of the defendant.⁴⁵ In *Breedon*, the plaintiff employee alleged that the defendant college and its employees fraudulently and negligently concealed from him available positions for which he was qualified and

⁴² RESTATEMENT (SECOND) OF TORTS § 531 (1977).

⁴³ PETER A. ALCES, *THE LAW OF FRAUDULENT TRANSACTIONS* § 2:15 (2012).

⁴⁴ 171 F.R.D. 189 (M.D.N.C. 1997).

⁴⁵ See William P. Hoye, *Tort Litigation in Higher Education*, 25 J.C. & U.L. 257, 281 (1998).

could have applied and failed to inform him that his current position was contingent upon grant funding.⁴⁶ The court held that Rule 9(b) applied not only to affirmative misrepresentations but also to fraudulent concealment, or fraud by omission.⁴⁷ Then, after recognizing federal district courts' split on the applicability of Rule 9(b) to negligent misrepresentation claims, the court concluded that the Rule should apply to all claims "where the gravamen of the claim is fraud even though the theory supporting the claim is not technically termed fraud."⁴⁸ Hoye states, "[a]ccording to the court, fraud and negligent misrepresentation are both based upon confusion or delusion of a party, and the only distinction between the two is the state of mind of the defendant."⁴⁹

The District of Delaware, in applying Delaware law, a leading state in corporate law, has also recognized that the distinction between fraud and negligent misrepresentation lies in the state of mind of the defendant.⁵⁰ In *Snowstorm Acquisition Corp. v. Tecumseh Products Co.*, the court stated that "a negligent misrepresentation claim . . . is in essence a fraud claim with a reduced state of mind requirement."⁵¹ In listing the elements of negligent misrepresentation under Delaware law, including the "failure to exercise reasonable care in obtaining or communicating information,"⁵² the court uses the language of ordinary negligence to describe this reduced state of mind.⁵³ The District of Delaware, however, has held that Rule 9(b) should *not* be applied to negligent misrepresentation claims.⁵⁴

⁴⁶ *Breeden*, 171 F.R.D. at 196; Hoye, *supra* note 45, at 280–81.

⁴⁷ *Breeden*, 171 F.R.D. at 195, 203 (dismissing the plaintiff's fraudulent concealment claims without prejudice); Hoye, *supra* note 45, at 281 (noting that the *Breeden* court found that "the plaintiff could not meet this extremely high burden. For example, the plaintiff could not satisfy the factor called 'general content of the information withheld,' because '[a]lthough the general content of these omissions seems clear . . . this statement is still too general.'" (footnotes omitted)).

⁴⁸ *Breeden*, 171 F.R.D. at 199 (quoting *Pitten v. Jacobs*, 903 F. Supp. 937, 951 (D.S.C. 1995)).

⁴⁹ Hoye, *supra* note 45, at 281.

⁵⁰ See *Lincoln Nat'l Life Ins. Co. v. Snyder*, 722 F. Supp. 2d 546, 561 (D. Del. 2010); *Snowstorm Acquisition Corp. v. Tecumseh Prods. Co.*, 739 F. Supp. 2d 686, 709 (D. Del. 2010); *End of the Road Trust v. Terex Corp. (In re Fruehauf Trailer Corp.)*, 250 B.R. 168, 197–98 (D. Del. 2000).

⁵¹ 739 F. Supp. 2d at 709 (quoting *Corporate Prop. Assocs. 14 Inc. v. CHR Holding Corp.*, Civ. No. 3231, 2008 WL 963048 (Del. Ch. Apr. 10, 2008)).

⁵² *Id.* (emphasis added) (quoting *Westfield Ins. Co. v. Chip Slaughter Auto Wholesale, Inc.*, 717 F. Supp. 2d 433, 446 (D. Del. 2010)).

⁵³ *Id.*

⁵⁴ See *id.* (quoting *Lincoln Nat'l Life Ins. Co.*, 722 F. Supp. 2d at 561); see also *In re Fruehauf Trailer Corp.*, 250 B.R. at 168, 197–98 (comparing precedent from other jurisdictions in support of its conclusion from the District of New Jersey (*In re Cendant Corp. Sec. Litig.*, 190 F.R.D. 331, 337 (D.N.J. 1999)), the Eastern District of Pennsylvania (*Small v. Provident Life & Accident Ins. Co.*, 1998 WL 848112, at *3 (E.D. Pa. 1998)), and the First Circuit (*Mass. Sch. of Law v. Am. Bar Assoc.*, 142 F.3d 26, 41 (1st Cir. 1998))).

C. Privity

The Eastern District of Pennsylvania, subscribing to the definition of negligent misrepresentation outlined in the Restatement,⁵⁵ has also differentiated the two torts by state of mind:

Essentially, the only distinction between the torts of fraudulent and negligent misrepresentation is the state of mind of the purported actor(s); the key element to both of these causes of action is that a false representation must have been made. Stated otherwise, a “negligent” misrepresentation is a misrepresentation which arises from a want of “reasonable care or competence in obtaining or communicating information,” as opposed to a “fraudulent” misrepresentation which involves either a “knowing” or a “reckless” communication of a misrepresentation.⁵⁶

The court’s decision, however, suggests that there are additional differences between the torts of negligent and fraudulent misrepresentation. Without setting forth the applicable Federal Rule for negligent misrepresentation pleadings, the court determined that the plaintiff did not allege the elements of negligent misrepresentation, requiring the court to grant the defendants’ motions for judgment on that portion of the complaint.⁵⁷ The court stated that the plaintiff bank, in pleading negligent misrepresentation, failed to allege that the defendants owed the plaintiff bank a duty “to provide accurate information” or that the defendants “failed to exercise reasonable care or competence in fulfilling such a duty and in communicating th[e] . . . information to the plaintiff.”⁵⁸ The court, however, found that the plaintiff, while alleging the same set of facts,⁵⁹ adequately stated a claim upon which relief may be

⁵⁵ See *Constitution Bank v. DiMarco*, 155 B.R. 913, 919 (E.D. Pa. 1993).

⁵⁶ *Id.* (citations omitted).

⁵⁷ *Id.* at 919–20.

⁵⁸ *Id.* at 920.

⁵⁹ The court described the portion of the complaint alleging fraudulent misrepresentation as follows: “[Defendants,] in an effort to induce Constitution Bank into giving the DiMarco Development Group a \$300,000 line of credit, fraudulently misrepresented their son and daughter-in-law’s true financial condition and did not disclose that they had received mortgage interests in the amount of \$300,000 on the junior DiMarcos’ residence.” *Id.* at 919. The court described the negligent misrepresentation portion of the complaint as follows:

[Defendants] failed to disclose to Constitution Bank what they purportedly knew to be the truth concerning the financial condition of their son and daughter-in-law and DiMarco Development. Those paragraphs further aver (1) that the defendants made these misrepresentations in order to induce the plaintiff to extend the \$300,000 line of credit to the DiMarco Development Group and to forego execution upon the junior

granted for *fraudulent* misrepresentation and satisfied the heightened pleading requirements of Rule 9(b).⁶⁰ The decision clearly makes an additional distinction between fraudulent misrepresentation and negligent misrepresentation, in that fraudulent misrepresentation is not limited to circumstances in which the defendant owes the plaintiff a specific duty to provide certain information. It must be assumed that the court read this duty requirement into the Restatement's definition of negligent misrepresentation,⁶¹ the only support the court provided in explanation of the tort.⁶² The court, however, explicitly provided what a plaintiff must claim in order to state a cause of action for fraudulent misrepresentation under state law:

(1) a misrepresentation; (2) a fraudulent utterance thereof; (3) intention by the maker that the recipient will thereby be induced to act; (4) justifiable reliance by the recipient upon the misrepresentation; and (5) damage to the recipient as the proximate result of the misrepresentation.⁶³

This definition is devoid of any language that suggests any duty to the plaintiff and requires only that the utterance or information supplied, was "fraudulent," made with the intention to elicit action by the recipient, justifiably relied on by the recipient, and caused the recipient damage.⁶⁴

In *Negligent Misrepresentation in Texas: The Misunderstood Tort*, Robert K. Wise and Heather E. Poole have attempted to clarify the tort of negligent misrepresentation in response to many courts' conflation of negligent misrepresentation and fraudulent misrepresentation.⁶⁵ The authors note that often times a plaintiff claims negligent misrepresentation when the defendant did not make the statement or representation "with knowledge of its falsity or with recklessness" as to constitute fraud, but that "the defendant at least made the statement without due care."⁶⁶ As the authors argue, "[n]egligent misrepresentation, however, is not nearly as broad as its name

DiMarcos's Guaranty Agreement in order to protect its loan; and (2) that the bank suffered the loss of the \$300,000 loaned as a consequence.

Id. at 920.

⁶⁰ *Id.* at 919.

⁶¹ See RESTATEMENT (SECOND) OF TORTS § 552 (1977); see also *supra* notes 38–41 and accompanying text.

⁶² See *Constitution Bank*, 155 B.R. at 919 (articulating Pennsylvania law's subscription to the definition of negligent misrepresentation outlined in the *Restatement (Second) of Torts*, Section 552).

⁶³ *Id.* at 918.

⁶⁴ *Id.*

⁶⁵ See generally Robert K. Wise & Heather E. Poole, *Negligent Misrepresentation in Texas: The Misunderstood Tort*, 40 TEX. TECH L. REV. 845 (2008).

⁶⁶ *Id.* at 846.

might imply.”⁶⁷ Wise and Poole clarify that an additional element is present in negligent misrepresentation but not fraud, which stems out of privity of contract,⁶⁸ becoming a relevant factor in some cases such as *Constitution Bank*.⁶⁹ The authors compare the traditional standard of privity of contract, or “strict-privity,” set forth in *Ultramares Corp. v. Touche*,⁷⁰ to the looser standards adopted by most jurisdictions, which allow third parties to sue information providers under certain circumstances.⁷¹ The majority of courts, including the court in *Constitution Bank*,⁷² have adopted Section 552 of the Restatement,⁷³ which Wise and Poole explain is “an intermediate standard—broader than the near-privity standard and narrower than the foreseeability standard.”⁷⁴ The standard is not near-privity because the information provider does not need to know the identity of the third party who is relying on the information.⁷⁵ Under Section 552(2)(a), as long as “the information provider actually intends” that the third party receive or knows that the third party will receive the information and “that the provider intends to guide with the information,” the information provider meets the standard.⁷⁶ The standard is also narrower than foreseeability because, under Section 552(2)(b), an information provider will not be liable for transactions that are not the same, or substantially the same, as the ones the provider actually intends to be or knows will be influenced by the information he provides.⁷⁷ The authors argue that these privity-like standards, creating a narrower scope of liability for negligent misrepresentation than for fraud, are a result of the difference between the obligations of honesty and of care.⁷⁸ Honesty, requiring only that “the maker of a representation speak in good faith and without consciousness

⁶⁷ *Id.*

⁶⁸ *See id.* at 847–49, 914–15.

⁶⁹ 155 B.R. at 919.

⁷⁰ 174 N.E. 441 (N.Y. 1931). The plaintiff, in extending credit to a corporation, relied on an erroneous balance sheet that the defendant accountant audited for the corporation and sought damages for negligent and fraudulent misrepresentation. *Id.* at 443. The court, in an opinion by Chief Judge Cardozo, held that the accountant did not owe a duty of care to the creditor, protecting accountants from “liability in an indeterminate amount for an indeterminate time to an indeterminate class.” *Id.* at 444.

⁷¹ *See* Wise & Poole, *supra* note 65, at 848 (“Three different standards have evolved to replace the strict-privity standard and to delineate which third parties have standing to sue an information provider for negligent misrepresentation: (1) the near-privity standard, (2) the foreseeability standard, and (3) the standard set forth in section 552 of the Second Restatement.”).

⁷² 155 B.R. 919 (“Pennsylvania subscribes to the definition of negligent misrepresentation outlined in the Restatement (Second) of Torts . . .”).

⁷³ Wise & Poole, *supra* note 65, at 851; *see also* Lipner & Catalano, *supra* note 35, at 678–81.

⁷⁴ Wise & Poole, *supra* note 65, at 852.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 552(2)(a) (1977).

⁷⁸ Wise & Poole, *supra* note 65, at 852–53.

of a lack of any basis for belief in the truth or accuracy of what he says,⁷⁹ can be reasonably expected of a supplier of information by any user of the information if his use is reasonably foreseeable, allowing for the broad action of fraud.⁸⁰ Duty of care, however, which implies an “undertaking to observe a relative standard,”⁸¹ would require an information provider to weigh the risks involved in a specific transaction should the information provided be incorrect. This obligation can only be expected of someone who “was manifestly aware of the use to which the information was to be put and intended to supply it for that purpose.”⁸² Similarly, in *International Products Co. v. Erie Railroad Co.*,⁸³ a monumental decision in the development of common-law negligent misrepresentation from the New York Court of Appeals, a state which has not adopted Restatement Section 522, Judge Andrews noted that the duty inquiry must look to the “peculiar facts presented,” including “the relationship of the parties, arising out of contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care.”⁸⁴ More recent cases from New York have set forth a clearer, possibly more limited standard of privity, including when there is actual privity of contract, the existence of fiduciary obligations, or “a special relationship of trust or confidence between the parties.”⁸⁵ A duty of care may also arise when the relationship between the parties is “so close as to approach that of privity.”⁸⁶

⁷⁹ *Id.* at 853.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ 155 N.E. 662 (N.Y. 1927).

⁸⁴ *Id.* at 664. Judge Andrews held that the defendant, who falsely told the plaintiff that the plaintiff’s goods had already arrived in the plaintiff’s warehouse, causing the plaintiff to procure insurance only for the goods that he believed were still in transit and, consequently, to suffer loss when the uninsured goods were destroyed by fire, was not liable because the defendant did not owe plaintiff a duty to give correct information. *Id.*; Lipner & Catalano, *supra* note 35, at 672–74; *see also* White v. Guarente, 372 N.E.2d 315, 319 (N.Y. 1977) (“As to duty imposed, generally a negligent statement may be the basis for recovery of damages, where there is carelessness in imparting words upon which others were expected to rely and upon which they did act or failed to act to their damage, but such information is not actionable unless expressed directly, with knowledge or notice that it will be acted upon, to one to whom the author is bound by some relation of duty, arising out of contract or otherwise, to act with care if he acts at all.” (footnotes omitted)).

⁸⁵ *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566, 584 (2d Cir. 2005) (quoting *Banque Arabe et Internationale D’Investissement v. Md. Nat’l Bank*, 57 F.3d 146, 158 (2d Cir. 1995)).

⁸⁶ *Id.* (“A relationship is considered ‘so close as to approach that of privity when the following criteria are met: 1) the defendant makes a statement with the awareness that the statement was to be used for a particular purpose; 2) a known party or parties rely on this statement in furtherance of that purpose; and 3) there is some conduct by the defendant

The court in *Constitution Bank*, however, when applying the concept of duty, was speaking of the defendants' duty to the bank.⁸⁷ The bank was not a third party to this information supplier, but it seemed that the defendants, who received credit from the bank and arguably had at least near-privity, if not strict-privity (privity of contract), with the bank, possessed a very specific duty in regards to the credit transaction.⁸⁸ It is, therefore, possible that the court's decision hinged more precisely on the issue of who may be a proper defendant of a negligent misrepresentation claim, found in Section 552(1) of the Restatement.⁸⁹ This Section, limiting liability to "[o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest,"⁹⁰ does not only apply to defendants who are in the business of supplying information for others' guidance, as plaintiffs may incorrectly argue, but applies to a professional or anyone else so long as they have a "pecuniary interest" in the transaction.⁹¹ In other words, a defendant may be a professional who is paid for his information—for example, providing services—but he may also be a person who is paid "in the course of and as part of [the transaction in] which [the information] is supplied."⁹² Typically, the defendant of a negligent misrepresentation claim is a professional seeking to profit in a business or commercial transaction.⁹³ *Constitution Bank* may be read as holding that the receivers of the loan did not qualify as proper defendants, as the bank, not the creditees, possessed the stronger pecuniary interest in the transaction.⁹⁴

linking it to the party or parties and evincing defendant's understanding of their reliance." (citation omitted)).

⁸⁷ *Constitution Bank v. DiMarco*, 155 B.R. 913, 920–21 (E.D. Pa. 1993).

⁸⁸ *See id.*

⁸⁹ *See Lipner & Catalano*, *supra* note 35, at 708 (examining *J.A.O. Acquisition Corp. v. Stavitsky*, 863 N.E.2d 585 (N.Y. 2007) (affirming the lower court's holding that the plaintiff buyer in a stock purchase transaction, who relied on an incorrect "pay-off letter" from the seller company's bank, did not demonstrate that a special relationship or that privity existed and that reliance had not been demonstrated, entitling the bank to summary judgment)). The authors stated:

J.A.O. Acquisition [is not] about privity. [It is] about determining whether the defendant fits the mold of the . . . warehouseman in *International Products*—that is, whether this defendant is within the class of enterprises that can be a potential *defendant* in a negligent misrepresentation case. Privity cases are about whether the plaintiff is in the class of *plaintiffs* who may sue.

Id. (citing *Int'l Prods. Co. v. Erie R.R. Co.*, 155 N.E. 662, 664 (N.Y. 1927)).

⁹⁰ Wise & Poole, *supra* note 65, at 861 (quoting RESTATEMENT (SECOND) OF TORTS § 552(1) (1977)).

⁹¹ Lipner & Catalano, *supra* note 35, at 682–84.

⁹² Wise & Poole, *supra* note 65, at 864 (alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS § 552(a) cmt. d. (1977)).

⁹³ *See id.*

⁹⁴ *See Constitution Bank v. DiMarco*, 155 B.R. 913, 920–21 (E.D. Pa. 1993); Wise & Poole, *supra* note 65, at 864.

D. But-for Reliance and Economic Loss

Negligent misrepresentation also includes the element of “but-for” reliance, requiring the court to find that, but for the misrepresentation by the defendant, the plaintiff would not have gone through with the transaction.⁹⁵ The impact of this element can also be seen in the more limited damages recovery available to plaintiffs in negligent misrepresentation actions than to plaintiffs in fraud actions.⁹⁶ It is also clear that victims of negligent misrepresentation must have suffered some kind of economic loss in order to recover under the tort.⁹⁷

III. CIRCUIT COURT SPLIT ON THE APPLICABILITY OF RULE 9(B) TO NEGLIGENT MISREPRESENTATION

The federal circuit courts of appeals are currently split on the issue of whether FRCP Rule 9(b) should apply to negligent misrepresentation claims, and judicial opinions, from both state and federal courts, differ in their classification of negligent misrepresentation as a “fraud-based” claim.⁹⁸ Federal courts, in applying state law, have characterized the tort of negligent misrepresentation in divergent ways. In *Baltimore County v. Cigna Healthcare*,⁹⁹ the Fourth Circuit concluded that “a claim of negligent misrepresentation under Maryland law does not contain an essential showing of fraud and thus heightened pleading requirements of Rule 9(b) do not

⁹⁵ See, e.g., Lipner & Catalano, *supra* note 35, at 708 (“The *J.A.O. Acquisition* court, however, rested its decision exclusively on a determination that there was no reliance, finding that the buyer would have gone through with the transaction anyway. . . . The case serves as an important reminder that the tort of negligent misrepresentation includes the element of ‘but-for’ reliance.”).

⁹⁶ See Wise & Poole, *supra* note 65, at 914 (“[Negligent misrepresentation] is limited to misrepresentations of past or existing facts made in connection with a business or commercial transaction and provides a more limited exception to the economic-loss rule, permitting the recovery of only out-of-pocket losses and reliance damages rather than the benefit of the plaintiff’s bargain.”).

⁹⁷ See R. Joseph Barton, Note, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 WM. & MARY L. REV. 1789, 1822 (2000) (“The final approach to resolving the tension between the economic loss rule and negligent misrepresentation concludes that ‘negligent misrepresentation is a species of negligence.’ Accordingly, no exception applies to negligent misrepresentation.” (citations omitted)).

⁹⁸ See Barney J. Finberg, *Construction and Application of Provision of Rule 9(b), Federal Rules of Civil Procedure, that Circumstances Constituting Fraud or Mistake Be Stated with Particularity*, 27 A.L.R. FED. 407 (1976); A. Benjamin Spencer, *D. Colo. Notes Split Re Whether FRCP 9(b) Applies to Negligent Misrepresentation Claims*, SPLIT CIRCUITS (Mar. 13, 2012, 5:18 AM), <http://splitcircuits.blogspot.com/2012/03/d-colo-notes-split-re-whether-frcp-9b.html>.

⁹⁹ 238 F. App’x 914 (4th Cir. 2007).

apply” even when they appear alongside fraud allegations.¹⁰⁰ Similarly, in *Tricontinental Industries, Ltd. v. PricewaterhouseCoopers, LLP*,¹⁰¹ the Seventh Circuit held that heightened pleading requirements do not apply to negligent misrepresentation claims.¹⁰² Nonetheless, the court found that the plaintiff, Tricontinental, failed to satisfy the ordinary pleading standard of Rule 8, requiring the plaintiff to set forth “a short and plain statement of the claim showing that [it] is entitled to relief.”¹⁰³ The court stated the following:

Tricontinental alleges that PwC knew of its reliance on the 1997 audit opinion, knew of the misrepresentation contained in the statement and “allowed plaintiffs to rely on the false and misleading information.” . . . [A]lthough we agree with Tricontinental that neither privity nor independent verification need to be asserted or shown in order to state a claim, Tricontinental must set forth “a short and plain statement of the claim showing that [it] is entitled to relief.” Absent an allegation that fairly states that Anicom’s primary intent in retaining and utilizing PwC’s services and work product during the transaction was to influence Tricontinental, or absent factual allegations that support such an inference, Tricontinental has not stated a claim for negligent misrepresentation under Illinois law.¹⁰⁴

In requiring “intent to influence” to be alleged in the complaint in order to satisfy notice pleading, the Seventh Circuit dismissed the complaint—not because heightened pleading was required for negligent misrepresentation—but because the plaintiff would not have been entitled to relief without alleging the essential elements of the tort.¹⁰⁵

The Eighth Circuit has adopted the opposite conclusion, applying Rule 9(b) to negligent misrepresentation claims.¹⁰⁶ A strong dissent by Chief Judge Riley in *Trooien v. Mansour* accompanied this ruling, arguing that the trial court “wrongly conflated” the plaintiff’s negligent misrepresentation claim with his fraudulent misrepresentation claim.¹⁰⁷ The Chief Judge stated, “[i]t appears the district court

¹⁰⁰ *Id.* at 921 (“In evaluating whether a cause of action must be pled with particularity, a court should examine whether the claim requires an essential showing of fraud.” (citing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1104–05 (9th Cir. 2003))).

¹⁰¹ 475 F.3d 824, 838 (7th Cir. 2007).

¹⁰² *Id.* at 838–39.

¹⁰³ *Id.* at 839 (alteration in original).

¹⁰⁴ *Id.* (alterations in original) (citations omitted).

¹⁰⁵ *Id.*

¹⁰⁶ *See, e.g., Trooien v. Mansour*, 608 F.3d 1020, 1028 (8th Cir. 2010).

¹⁰⁷ *Id.* at 1033 (Riley, C.J., dissenting).

impermissibly subjected Trooien's negligent misrepresentation claim to the more exacting scrutiny it applied to his fraudulent misrepresentation claim. . . . The district court might have reached a different conclusion had it applied the Minnesota law of negligent misrepresentation independently and completely."¹⁰⁸

The Second Circuit, in *Aetna Casualty & Surety Co. v. Aniero Concrete Co.*, has also applied Rule 9(b) to negligent misrepresentation claims.¹⁰⁹ After defining the tort of negligent misrepresentation under New York law,¹¹⁰ the court dismissed the claim under Rule 9(b), holding that the plaintiff "failed to allege with specificity any representation made to it by the instant movants [for dismissal] to induce its entry into the . . . Agreement," and, therefore, did not demonstrate that the negligent misrepresentation was made "for the very purpose of inducing action."¹¹¹ Without undertaking an independent analysis of whether Rule 9(b) should apply to negligent misrepresentation claims, the court cited precedent including *Pitten v. Jacobs*,¹¹² a district court opinion from the District of South Carolina which stated the following: "Although the language of Rule 9(b) confines its requirements to claims of mistake and fraud, the requirements of the rule apply to all cases where the gravamen of the claim is fraud even though the theory supporting the claim is not technically termed fraud."¹¹³

The Second Circuit's application of Rule 9(b) to negligent misrepresentation claims is also odd considering that the circuit applies Rule 8(a) to claims under the Securities Act, which contains the same elements as negligent misrepresentation under New York law.¹¹⁴

Denver Health & Hospital Authority v. Beverage Distributors Co.,¹¹⁵ a 2012 district court opinion from the District of Colorado, differed from the District of South Carolina's characterization of negligent misrepresentation as a fraud-based claim, and rejected the application of Rule 9(b) to these claims.¹¹⁶ The court reasoned:

¹⁰⁸ *Id.* (citation omitted).

¹⁰⁹ 404 F.3d 566 (2d Cir. 2005).

¹¹⁰ *Id.* at 583 ("[W]here the defendant has been careless 'in imparting words upon which others were expected to rely and upon which they did or failed to act to their damage,' and where the author of the statement has 'some relationship or duty . . . to act with care' vis-à-vis the party at whom the statement is directed." (citations omitted)).

¹¹¹ *Id.* at 583–84.

¹¹² 903 F. Supp. 937 (D.S.C. 1995).

¹¹³ *Id.* at 951 (quoting *Toner v. Allstate Ins. Co.*, 821 F. Supp. 276, 283 (D. Del. 1993)).

¹¹⁴ See Kimball Dean Parker, Comment, *A Historical Approach to Negligent Misrepresentation and Federal Rule of Civil Procedure 9(b)*, 80 U. CHI. L. REV. 1461, 1462 (2013).

¹¹⁵ 843 F. Supp. 2d 1171 (D. Colo. 2012).

¹¹⁶ *Id.* at 1178–79 (holding that, under Colorado law, the plaintiff, although not providing any "factual allegations [in the complaint] regarding exactly what was said by whoever said it," provided enough factual allegations to "support the reasonable inference that [the defendant] itself represented that [the plaintiff] was covered" under its insurance plan as to "elevate the claim 'above the speculative level'" (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007))).

“The crux of the claim is that [the defendant] failed to use reasonable care or competence in obtaining and communicating information concerning [the plaintiff’s] eligibility. This rings not of fraud but negligence.”¹¹⁷

Other opinions from this district, however, have held the reverse, applying the heightened pleading of Rule 9(b) to negligent misrepresentation claims and demonstrating a lack of uniformity within districts themselves.¹¹⁸

Without clear authority on the topic, potential plaintiffs are left without guidance on how to adequately plead their claims. The circuit split on which Rule applies encourages forum shopping, and plaintiffs will seek to file their claims in a federal court which applies Rule 8(a).¹¹⁹ In 2010, the Supreme Court denied certiorari in *Eames v. Nationwide Mutual Insurance Co.*,¹²⁰ letting stand the Third Circuit’s decision not to disturb the district court’s ruling that Rule 9(b) heightened pleading applied to the plaintiffs’ claims under the Delaware Consumer Fraud Act, which can be violated by common-law negligent misrepresentation.¹²¹ The district court held that, although negligent misrepresentation is sufficient to violate the statute, the plaintiffs’ complaint “appear[ed] to allege false representations by [the insurer] that were known to be false,” and, therefore, the alleged fraud had to be pled with particularity.¹²² Having received a petition for certiorari in the recent past involving the scope of Rule 9(b), it is likely that the Supreme Court will be confronted with this issue again. Should the Supreme Court be faced with a clear case of dismissal of a petitioner’s common-law negligent misrepresentation claim due to his failure to satisfy heightened pleading, the Court should grant certiorari and resolve the circuit court split by restoring Rule 8(a) notice pleading for all claims that are not based in fraud.

The remainder of this Note argues that an analysis of the issue in the context of the goals and design of the Federal Rules and in the context of plaintiffs’ rights of procedural due process would support a conclusion limiting the application of the Rule to the tort of fraudulent misrepresentation.

¹¹⁷ *Id.* at 1177.

¹¹⁸ Compare *Conrad v. Educ. Res. Inst.*, 652 F. Supp. 2d 1172, 1183 (D. Colo. 2009) (“The theory of liability for negligent misrepresentation is one of negligence, rather than of intent to mislead. Thus, a claim for negligent misrepresentation should not be governed by the pleading standard set forth in Rule 9(b).” (citations omitted)), with *Gunningham v. Standard Fire Ins. Co.*, No. 07-cv-02538, 2008 WL 4377451, at *2 (D. Colo. Sept. 19, 2008) (holding that, because the plaintiff failed to allege “how this information was communicated to the plaintiff, where the plaintiff was located when such communications were received, or the identity of any representative of the defendants who communicated this information on behalf of the defendants,” the plaintiff’s general pleading of negligent misrepresentation did not satisfy Rule 9(b)).

¹¹⁹ See *Parker*, *supra* note 114, at 1463.

¹²⁰ 346 F. App’x 859 (3d Cir. 2009), *cert. denied*, 559 U.S. 1006 (2010).

¹²¹ *Id.* at 860–61.

¹²² *Eames v. Nationwide Mut. Ins. Co.*, 412 F. Supp. 2d 431, 437 (D. Del. 2006).

IV. TRADITIONAL JUSTIFICATIONS FOR HEIGHTENED PLEADING

Circuit courts have proposed several justifications for heightened pleading required by FRCP Rule 9(b) for fraud claims, emphasizing a necessity to protect defendants from harmful allegations.¹²³

Rule 9(b) requires that a plaintiff plead fraud with particularity, so that the pleading “provides defendants with fair notice of the plaintiffs’ claims, protects defendants from harm to their reputation and goodwill, reduces the number of strike suits, and prevents plaintiffs from filing baseless claims and then attempting to discover unknown wrongs.”¹²⁴

However, it is the goal of the court system for cases to be assessed on their merits and not lost on procedural technicalities.¹²⁵ Given the recognized liberal thrust of Rule 8 notice pleading and of the Federal Rules in general¹²⁶—favoring the survival of claims—it is important to consider whether Rule 9 as currently applied by federal circuit courts reflects the goals of the Federal Rules and of our court system. The broad consensus regarding heightened pleading,¹²⁷ mainly that, in instances of fraud, defendants should be afforded greater knowledge of—and, in the subsequent event of dismissal, protection against—the allegations against them, implies

¹²³ See, e.g., *supra* note 118.

¹²⁴ *Zuckerman v. Foxmeyer Health Corp.*, 4 F. Supp. 2d 618, 622–23 (N.D. Tex. 1998) (quoting *Tuchman v. DSC Commc’ns Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994)) (determining that, because a plaintiff can plead the scienter element of fraud by “alleging either motive and opportunity to commit fraud, or by pleading facts which identify circumstances indicating [d]efendants’ conscious or reckless behavior, so long as the totality of the allegations raises a strong inference of fraudulent intent,” the plaintiff met the heightened pleading requirements of FRCP 9(b)).

¹²⁵ See 61A AM. JUR. 2D *Pleading* § 104 (2010) (“Underlying the construction of any pleading in a federal district court is the principle that pleadings must be construed so as to do justice. To this end, a complaint is to be liberally construed in favor of the pleader, with the benefit of all proper inferences being given to him or her. This principle of liberal construction of pleadings embodies the fundamental design of the Federal Rules of Civil Procedure to preserve the substance of an action from failing because of technical irregularities in form.” (footnotes omitted)).

¹²⁶ See WRIGHT ET AL., *supra* note 14, at § 1202 (“[P]leadings are to be construed liberally so as to do substantial justice As a practical matter . . . provisions in Rule 8 have ramifications that transcend the pleading stage of federal practice. To some degree, the functioning of all the procedures in the federal rules for broad joinder of parties and claims, discovery, liberal amendment, judicial management, and summary judgment are intertwined inextricably with the pleading philosophy embodied in Rule 8.”).

¹²⁷ See Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 563–65 (2002) (explaining the broad consensus behind the reasons for heightened pleading).

that the defendants' interests in these cases outweigh the traditional aims of the Federal Rules.¹²⁸ It is imperative to consider whether, with the extension of the application of heightened pleading requirements to the tort of negligent misrepresentation, these justifications still stand as to outweigh the intent of the Federal Rules and, arguably, plaintiffs' rights to procedural due process.

A. Injury to Defendant's Reputation

A primary rationale for affording the protection of heightened pleading lies in the belief that fraud is a serious allegation and could cause enormous injury to a defendant's reputation.¹²⁹ Assuming that this is the real rationale behind Rule 9(b), Fairman argues that the Rule's application solely to claims of "fraud or mistake" would be enormously underinclusive.¹³⁰ The risk of reputational harm is not unique to defendants of fraud, but is present for defendants of virtually all intentional tort claims, including assault and battery, and even claims which may be unintentional, such as professional malpractice and wrongful death.¹³¹ However, heightened pleading is not required for any other tort.¹³² What Fairman fails to acknowledge is that, practically, common defendants of allegations of fraud are corporations, or individuals which represent a corporation and are integral to the corporation's reputation,¹³³ a quality that most torts, such as assault and battery, do not possess. In this sense, fraud is unique in its potential for enormous reputational damage due to the larger, public audience that corporations receive. For corporations, reputational harm has a greater likelihood of translating into material harm and can be demonstrated tangibly through the success or failure of the business in the aftermath of a fraud claim.¹³⁴

¹²⁸ See *id.* at 618.

¹²⁹ See Christopher M. Fairman, *An Invitation to the Rulemakers—Strike Rule 9(b)*, 38 U.C. DAVIS L. REV. 281, 291–92 (2004) ("The court clearly states the rationale: 'Rule 9(b)'s specificity requirement stems . . . from the desire to protect defendants from the harm that comes to their reputations or to their goodwill when they are charged with serious wrongdoing.' The only explanation offered, however, is that it is a 'serious matter to charge a person with fraud.'" (citing *Segal v. Gordon*, 467 F.2d 602, 607 (2d Cir. 1972))); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 448 (1986) ("It is a serious matter to charge a person with fraud and hence no one is permitted to do so unless he is in a position and is willing to put himself on record as to what the alleged fraud consists of specifically." (citing *Segal*, 467 F.2d at 607)).

¹³⁰ Fairman, *supra* note 129, at 292.

¹³¹ *Id.*

¹³² See FED. R. CIV. P. 9(b); Fairman, *supra* note 129, at 292.

¹³³ See, e.g., Finberg, *supra* note 98 (listing relevant federal court decisions regarding the application of Rule 9(b) to claims of fraud and negligent misrepresentation).

¹³⁴ *Reputation Changer: Scam Accusations, Fraud Complaints Can Destroy Businesses and Brands*, MARKETWIRE (Jan. 7, 2013, 9:00 AM), <http://www.marketwired.com/press-release/reputation-changer-scam-accusations-fraud-complaints-can-destroy-businesses-brands-1742803.htm>.

Assuming that this rationale may be valid for fraud claims, the rationale seems inapplicable to negligent misrepresentation, which, as an unintentional tort, is distinguishable from fraud and is viewed in the public opinion as less culpable.¹³⁵ Consider the following argument from Francis Bohlen, in *Should Negligent Misrepresentations Be Treated as Negligence or Fraud*:

[I]t is apt to lead to false analogies to speak of negligent conduct which leads to unintended misinformation as fraud, which, both in the law and in public opinion, implies a conscious purpose to mislead. In all other fields of tort law the line is sharply drawn between intentional and unintentional injury. The persistence of this distinction can only be explained by recognizing the fact that it is in accord with the normal reactions of the mass of mankind. If negligent misrepresentation is called fraud, and, therefore, comes to be regarded by courts as tantamount thereto, there is anger that the unintentional character of the one and the intentional character of the other will be overlooked. There is danger that that liability, which is regarded both by lawyers and laymen as just where there is conscious dishonesty, will be imposed although there is no purpose to deceive.¹³⁶

In this sense, not only is the justification of protecting defendants from reputational harm weak in cases of negligent misrepresentations, in which a defendant's actions are viewed as less culpable, but classifying negligent misrepresentation as a fraud-based claim as to require the heightened pleading of Rule 9(b) may actually pose a greater risk of reputational harm to defendants.¹³⁷ To recognize claims of negligent misrepresentations as "serious" allegations that require heightened pleading would be to blur the distinction between the unintentional and intentional character of these torts.¹³⁸ As Bohlen warned in 1932, "[c]all any two essentially different things by the same name and the two are likely to be treated as identical for all purposes."¹³⁹

Fairman argues that the rationale that heightened pleading protects defendants from the risk of reputational harm is indefensible considering the practical impact of the Rule; procedurally, the Rule is invoked *after* a claim has been filed, through a defendant's motion to dismiss.¹⁴⁰ Fairman argues that, presumably, "[o]nce the

¹³⁵ See Francis H. Bohlen, *Should Negligent Misrepresentations Be Treated as Negligence or Fraud?*, 18 VA. L. REV. 703, 706–07 (1932); Fairman, *supra* note 129, at 292.

¹³⁶ Bohlen, *supra* note 135, at 706–07.

¹³⁷ See *id.*

¹³⁸ See *id.*

¹³⁹ *Id.* at 707.

¹⁴⁰ Fairman, *supra* note 129, at 293; see FED. R. CIV. P. 9(b); FED. R. CIV. P. 12(b)(6).

fraud claim is filed, the reputational damage is largely done.”¹⁴¹ It is almost certain that defendants, especially corporate defendants, would disagree, and the reputational risks the corporation would face if the claim survives the pleading stages and the issue is subject to discovery would be much greater than if the baseless claim had been dismissed.¹⁴² Firstly, during discovery, the corporation is vulnerable to exposure as it is required to supply information to the courts, and subsequently, the media.¹⁴³ Additionally, if a claim survives, it is generally assumed to have some merit and would be taken more seriously by the public.¹⁴⁴ The additional time and resources expended in defending against the claim would alone draw additional attention to the lawsuit.¹⁴⁵ These basic, practical consequences of a lawsuit, which Fairman ignores, provide an explanation for why corporate defendants settle early in the vast majority of cases, despite the fact that they may be unlikely to lose against these weak claims in court.¹⁴⁶

B. Deterrence for Plaintiffs in Filing Baseless Claims

The procedural placement of the Rule does, however, negate the traditional justification that heightened pleading would deter plaintiffs from filing baseless claims.¹⁴⁷ Common sense reveals that if a plaintiff is so audacious as to file a frivolous lawsuit, heightened pleading requirements would not be an obstacle that would deter him from bringing suit.¹⁴⁸ Because judges often allow leave to amend, a plaintiff would then be afforded more time to “discover unknown wrongs,”¹⁴⁹ accompanied with the expenditure of more judicial resources in assessing the sufficiency of the complaint.¹⁵⁰

¹⁴¹ Fairman, *supra* note 129, at 293.

¹⁴² *See, e.g., infra* notes 186–87 and accompanying text; *see also* Jeannette Neumann, Evan Perez & Jean Eaglesham, *U.S., S&P Settle in for Bitter Combat*, WALL ST. J., Feb. 6, 2013, at A1, A2.

¹⁴³ *See, e.g.,* Neumann, Perez & Eaglesham, *supra* note 142; *see also* *To Settle or Not to Settle? That is the Question*, LAWYERS.COM (2013), <http://research.lawyers.com/To-Settle-or-Not-to-settle-that-is-the-question.html> (last visited Apr. 15, 2014) (discussing the privacy benefits involved in settling a case).

¹⁴⁴ *See, e.g.,* Neumann, Perez & Eaglesham, *supra* note 142.

¹⁴⁵ *See, e.g., id.*

¹⁴⁶ *See* Jonathan D. Glater, *The Cost of Not Settling a Lawsuit*, N.Y. TIMES, Aug. 8, 2008, at C1 (summarizing a study on the benefits of settling lawsuits); *To Settle or Not to Settle? That is the Question*, *supra* note 143.

¹⁴⁷ Fairman, *supra* note 129, at 294–96.

¹⁴⁸ *Id.* at 295.

¹⁴⁹ *Zuckerman v. Foxmeyer Health Corp.*, 4 F. Supp. 2d 618, 622 (N.D. Tex. 1998) (quoting *Tuchman v. DSC Commc’ns Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994)).

¹⁵⁰ Fairman, *supra* note 129, at 295.

C. Fair Notice for Defendants

Finally, Fairman argues that the rationale that heightened pleading is necessary to provide defendants of fraud claims with fair notice of a plaintiff's claims fails because ordinary Rule 8 notice pleading is sufficient.¹⁵¹ Fairman asserts that, because Rule 8 guarantees notice and a "showing that the pleader is entitled to relief,"¹⁵² Rule 9(b) is unnecessary.¹⁵³ Although defendants of fraud claims may require more information in order to understand the basis of the claim due to the nature of the tort, or "fraud's intrinsic amorphousness,"¹⁵⁴ the remedies of filing a motion for a more definite statement¹⁵⁵ or a motion for dismissal for failure to state a claim¹⁵⁶ are adequate alternatives.¹⁵⁷ In other words, the requirements of Rule 9(b)—that the circumstances surrounding the claim including the who, what, where, when, and how, be plead with particularity—are unnecessary, because if the essential elements of the tort are not alleged, the plaintiff could not show that he is entitled to relief, and his complaint will be dismissed anyway.¹⁵⁸ The Seventh Circuit's decision in *Tricontinental Industries, Ltd. v. PricewaterhouseCoopers, LLP*, is an example of how courts, using ordinary notice pleading, have dismissed claims which may, in some jurisdictions, require the application of Rule 9(b).¹⁵⁹ However, adopting Rule 8 notice pleading might invite courts to assume a more lackadaisical approach, resulting in the survival of baseless claims which, under proper scrutiny, would not demonstrate all the essential elements of the alleged tort.¹⁶⁰ Those elements which may intrinsically require more detailed pleading, such as intent, may be overlooked.¹⁶¹ In this event, Fairman provides an unjustifiable alternative. He states, if the remedies that would result in dismissal are not available, "details can be developed through the regular course of discovery."¹⁶² This argument completely ignores that the prevention of baseless claims from reaching discovery is the central goal pervasive in all the justifications reviewed thus far. This Note will later address how, although Rule 9(b) may be justifiable for fraud-based claims in order to provide defendants with adequate notice, the justification may not be present for the fundamentally different tort of negligent misrepresentation or is outweighed by plaintiff's right of due process.

¹⁵¹ *Id.* at 296–97.

¹⁵² FED. R. CIV. P. 8.

¹⁵³ Fairman, *supra* note 129, at 286.

¹⁵⁴ *Id.* at 296.

¹⁵⁵ FED. R. CIV. P. 15(e).

¹⁵⁶ FED. R. CIV. P. 12(b)(6).

¹⁵⁷ Fairman, *supra* note 129, at 296–97.

¹⁵⁸ *See supra* Parts I.A–B.

¹⁵⁹ 475 F.3d 824, 838–39 (7th Cir. 2007).

¹⁶⁰ *See supra* Part I.B.

¹⁶¹ *See supra* Part I.B.

¹⁶² Fairman, *supra* note 129, at 297.

It would be a momentous and unjustifiable step for legislatures to strike Rule 9(b) altogether. The justifications for heightened pleading for fraud-based claims have been historically accepted and judicially enforced, and, after having scrutinized these justifications, they cannot all be determined to be without merit.¹⁶³ For these reasons, it is also unlikely that the Supreme Court would refuse to apply Rule 9(b) to fraud claims.

V. PROCEDURAL DUE PROCESS

The Fifth and Fourteenth Amendments of the U.S. Constitution provide that no citizen of the United States will be deprived of “life, liberty, or property, without due process of law.”¹⁶⁴ Due process violations related to the pleading stage of a lawsuit are typically viewed in the context of a defendant’s rights and the common justifications of “notice” pleading.¹⁶⁵ “Due process requires that a complaint be definite and certain so as to reasonably apprise the defendant of the nature of a charge against him or her, so that he or she may be prepared properly to meet such charges.”¹⁶⁶

Instead of limiting a due process inquiry to defendants’ rights, a standard applicable to both plaintiffs’ and defendants’ rights would allow for a finding of denial of due process as a result of a court ruling in connection to a pleading

where they adversely affect a party’s material and substantial rights, such as to file a responsive pleading, but will not be deemed to deny due process if there is no material or substantial injury to the party concerned, as where the ruling, even if erroneous, is merely incidental and subject to correction.

In the absence of harm to an opposing party, there is no denial of due process in extending the time to answer without notice to the opposing party.¹⁶⁷

This standard is more neutral, providing both examples in the context of defendants’ rights—their ability “to file a responsive pleading”—and a consideration of

¹⁶³ See *supra* notes 124–56 and accompanying text.

¹⁶⁴ All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

¹⁶⁵ See 17 OHIO JUR. 3D *Constitutional Law* § 523 (2013). Ohio’s civil procedure laws are patterned after the Federal Rules of Civil Procedure and can be used in support of a federal-level constitutional analysis.

¹⁶⁶ *Id.*

¹⁶⁷ 16D C.J.S. *Constitutional Law* § 1769 (2013) (footnotes omitted).

harm to plaintiffs—as a result of “extending [a defendant’s] time to answer.”¹⁶⁸ Considering the substantial injury to either party in a lawsuit is in accord with due process generally, as due process “protects persons against deprivations of life, liberty, or property, and those who seek to invoke its procedural protection must establish that one of those interests is at stake.”¹⁶⁹ A plaintiff’s cause of action, as a constitutionally protected property right, cannot be dismissed without adequate procedural consideration.¹⁷⁰

It is clear that “[t]he dismissal of an insufficient or defective pleading does not deny a plaintiff’s right to due process of law.”¹⁷¹ However, dismissing claims that may have merit but cannot satisfy the stringent requirements of heightened pleading would be to deny a recourse for which the substantive law may allow.

Some student authors have considered the result of pleading requirements on plaintiffs’ procedural due process rights in the context of pro se litigants.¹⁷² Their argument is that pro se litigants, who lack the financial means to hire legal representation and the expertise to file an effective pleading themselves, and often are “frequently denied the right to proceed through our court system”¹⁷³ and are left “without an avenue to rightfully address their grievances”¹⁷⁴ because they cannot satisfy the requirements of ordinary notice pleading. Consider the following:

In light of the recent decision announced by the Supreme Court of the United States in *Ashcroft v. Iqbal*, the pleading standard established under Federal Rule of Civil Procedure 8(a)(2) requires that, in order to survive a motion to dismiss, a complaint must contain sufficient factual matter to “state a claim to relief that is plausible on its face.” With respect to pro se plaintiffs, Federal

¹⁶⁸ *Id.*

¹⁶⁹ OHIO JUR. 3D, *supra* note 165, at § 523.

¹⁷⁰ See R. D. Rees, Note, *Plaintiff Due Process Rights in Assertions of Personal Jurisdiction*, 78 N.Y.U. L. REV. 405, 406–14 (2003) (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)).

¹⁷¹ 11A ILL. LAW & PRAC. *Constitutional Law* § 412 (2013); see, e.g., *Deasey v. City of Chicago*, 105 N.E.2d 727, 729 (Ill. 1952).

¹⁷² See Candice K. Lee, Note, *Access Denied: Limitations on Pro Se Litigants’ Access to the Courts in the Eighth Circuit*, 36 U.C. DAVIS L. REV. 1261, 1280 (2003) (“Pro se litigants, however, like all citizens, have the constitutional right to meaningful access to the courts. Accordingly, the courts should ensure that this right of access is a realistic goal for pro se litigants to reach.” (footnotes omitted)); Melodee C. Rhodes, Comment, *The Battle Lines of Federal Rule of Civil Procedure 8(a)(2) and the Effects on a Pro Se Litigant’s Ability to Survive a Motion to Dismiss*, 22 ST. THOMAS L. REV. 527, 530 (2010) (proposing that “the Federal Rules of Civil Procedure be modified to include guidance for pro se plaintiffs filing a civil complaint or a prohibition against pro se plaintiffs filing their own complaint”).

¹⁷³ Rhodes, *supra* note 172, at 529.

¹⁷⁴ *Id.* at 539.

Rule of Civil Procedure 8(a)(2) is unconstitutional because it violates an individual's procedural due process rights by requiring a pleading standard that a layperson finds difficult to satisfy. . . . Nevertheless, pro se plaintiffs who do not possess the requisite skill, knowledge, or experience to effectively comply with the requirements of Federal Rule of Civil Procedure 8(a)(2), are allowed to draft and file their own complaints in civil action cases.¹⁷⁵

The argument presented in this Note is analogous to the deprivation of pro se litigants' right to due process. Just as pro se litigants lack the information and expertise necessary to pass muster under the standard of Rule 8, resulting in the premature dismissal of their claims,¹⁷⁶ plaintiffs asserting negligent misrepresentation claims may not have the tools necessary to satisfy heightened pleading.¹⁷⁷ The lack of uniformity in courts in applying a pleading standard, as demonstrated by the current federal circuit court split,¹⁷⁸ prevents plaintiffs from receiving adequate notice of what is sufficient to avoid dismissal.¹⁷⁹ Courts' conflation of the elements of negligent misrepresentation with fraud also contributes to the dismissal of claims that might otherwise have merit.¹⁸⁰ Finally, the inconspicuous elements of negligent misrepresentation, when paired with the requirements of heightened pleading, present an undue burden on plaintiffs who, at the outset of a claim, are unable to utilize the tools of discovery.¹⁸¹ This Note argues that the result of plaintiffs' inability to obtain the information necessary to satisfy the stringent requirements of Rule 9(b), the dismissal of the claim, is a material injury constituting a deprivation of plaintiffs' right to procedural due process.

VI. DIFFICULTIES OF PLEADING NEGLIGENT MISREPRESENTATION PRE-DISCOVERY

The difficulty in submitting a well-pleaded complaint—stating “with particularity the circumstances constituting fraud or mistake,”¹⁸² including the time, place, contents of the fraud, identity of the fraudulent persons, and the consequences of the

¹⁷⁵ *Id.* at 529 (footnotes omitted).

¹⁷⁶ *Id.* at 529–30.

¹⁷⁷ *See infra* Part VI.

¹⁷⁸ *See supra* note 98 and accompanying text.

¹⁷⁹ *See infra* Part VII.

¹⁸⁰ *See, e.g.,* Trooien v. Mansour, 608 F.3d 1020, 1028 (8th Cir. 2010).

¹⁸¹ The scienter requirement for fraud is substituted with the negligence standard in negligent misrepresentation. *See* Marcus, *supra* note 129, at 436–37, 468 (arguing that, instead of the requirement of heightened pleading, the preferable route for probing plaintiff's factual conclusions should be to rely on more flexible use of summary judgment); *supra* Part II.B.

¹⁸² FED. R. CIV. P. 9(b).

fraud—arises when the necessary information cannot be obtained before reaching the discovery process.¹⁸³ The specific instances constituting the tort of negligent misrepresentation may not be as conspicuous as fraud, making the pinning down of the time, place, and parties involved especially difficult, but such information may be just as buried within the records of the defendant.¹⁸⁴ Difficulties are even greater when courts improperly require some form of heightened pleading for the *elements* of negligent misrepresentation, including state of mind, privity, and but-for reliance.¹⁸⁵

In contemplating the necessity of information, which may only be available in discovery, to the survival of negligent misrepresentation claims, it may be useful to examine the specific information lacking in a complaint that has led to dismissal. In its dismissal of the plaintiff's negligent misrepresentation claims under the heightened pleading standard of Rule 9(b), the court in *Aetna Casualty & Surety Co. v. Aniero Concrete Co.* has provided a good example of difficult-to-obtain information that courts may require of claimants of this tort:

If Aniero is able to cite specific representations made by Aetna or Hudson for the purpose of inducing it to enter the contract, the elements needed to establish a relationship of near-privity may be met. Because I do not believe the filing of an amended complaint would be futile as to this claim, I grant the plaintiff leave to amend so as to set forth the representations at issue with greater particularity.¹⁸⁶

It is easy to imagine the difficulty posed to the plaintiff by the Second Circuit's dictate in amending their complaints. In order to establish the privity requirement and satisfy this element of negligent misrepresentation in pleading, an element not present for fraud claims, must Aniero claim that specific representations were made by the defendant *for the purpose* of inducing them to act? How can Aniero effectively

¹⁸³ See Marcus, *supra* note 129, at 468 (“Where the court requires detailed support for a legal conclusion, analysis of the details may permit the court to conclude confidently that the plaintiff has no case. But where the plaintiff is unable to provide details because only the defendant possesses such information, no such confidence is possible. To the contrary, it may be that the defendant has so effectively concealed his wrongdoing that the plaintiff can unearth it only with discovery. To insist on details as a prerequisite to discovery is putting the cart before the horse.” (footnotes omitted)).

¹⁸⁴ See *id.*

¹⁸⁵ See *id.* at 469 (“[I]nsistence on detailed evidence regarding state of mind violates the second sentence of Rule 9(b), which specifies that ‘[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally.’ On its face, this sentence precludes use of the Rule to require plaintiffs to provide particulars on the very matters for which so many courts say that supporting facts are now required.” (footnotes omitted)).

¹⁸⁶ *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566, 584 (2d Cir. 2005). The court granted leave to amend pursuant to FRCP Rule 15(a).

allege the state of mind of another party—a corporate defendant—in such a circumstance? Seemingly contrary to the court’s mandate in this decision, Rule 9(b) provides that the state of mind of the defendant may be alleged generally.¹⁸⁷ Nevertheless, the court’s unreasonable requirement in this instance demonstrates the unique difficulties for claimants of negligent misrepresentation when faced with the standard of Rule 9(b) heightened pleading.

Some proponents argue that heightened pleading is more favorable than notice pleading for all claims, as it is more conducive to dismissal.¹⁸⁸ There are obvious reasons why claims that do not sufficiently meet pleading standards should be dismissed. The fear that defendants would be forced to settle unmeritorious claims to prevent the depletion of their resources during discovery is supreme among these reasons.¹⁸⁹ Discovery tactics, such as seemingly endless information requests, employed to drain the other parties’ time and finances during discovery, is not an ethical way to win a case.¹⁹⁰ Despite this concern, plaintiffs must be afforded a viable opportunity to redress wrongs. Imposing such a high standard on pleading, before the availability of information through discovery, leaves claimants of negligent misrepresentation with little such opportunity, depriving them of their procedural due process rights.

VII. THE INSUFFICIENCY OF JUDICIAL DISCRETION IN GRANTING LEAVE TO AMEND

The danger to plaintiff’s procedural due process rights—that plaintiffs will improperly be left without an avenue to address their grievances—becomes relevant when plaintiffs’ complaints are dismissed for failing to satisfy Rule 9(b). Although often times leave to amend is granted and plaintiffs are given a second opportunity to meet the specificity requirements of Rule 9(b), the determination is one of judicial discretion.¹⁹¹ The area is governed by FRCP Rule 15(a)(2), which states the following:

¹⁸⁷ FED. R. CIV. P. 9(b).

¹⁸⁸ See Ni Qian, *Heightened Pleading Standard Should Be Applied in Negligent Misrepresentation Cases*, COLUM. BUS. L. REV. (Nov. 26, 2012, 12:00 AM), <http://cblr.columbia.edu/archives/12443>.

¹⁸⁹ See *id.*

¹⁹⁰ See Marcus, *supra* note 129, at 441 (“Peering out from behind this mountain of litigation, federal judges also perceived a pro-plaintiff shift in the balance of power in litigation resulting largely from the breadth of discovery, which could impose very substantial costs on defendants. Moreover, at least some courts said that once the plaintiff had obtained information through discovery he could do anything he wanted with it; discovery could even become the principal objective of a lawsuit, rather than merely a device for helping resolve it.” (footnotes omitted)).

¹⁹¹ See, e.g., *Cont’l Cas. Co. v. United States ex. rel. Ainsworth*, 68 F.2d 577, 580 (7th Cir. 1934) (“The disposition of a motion to amend is usually within the court’s discretion . . .”); *Deasey v. City of Chicago*, 105 N.E.2d 727, 730 (Ill. 1952) (“It is not prejudicial error to

“In all other cases, a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.”¹⁹²

In *Deasey v. City of Chicago*, a state court case applying FRCP Rule 15(a)(2) and federal law, the Illinois Supreme Court examined appellants’ contention that the denial of their motion for leave to amend was arbitrary and an abuse of the trial court’s discretion.¹⁹³ The court explained that the proper standard for determining whether the trial court properly exercised its discretion in this circumstance was “whether it furthers the ends of justice.”¹⁹⁴ In recognizing that “[j]ustice is not served by fruitless expenditure of time and effort by our courts, their officers and litigants,”¹⁹⁵ the court stated that it may consider “the ultimate efficacy of a claim” in determining whether leave to amend should be granted.¹⁹⁶ Though the facts of this case were extreme in that the court was able to determine that it was manifest on the face of the complaint that the plaintiffs’ claims had no equity, the court held that the dismissal with prejudice was not an abuse of discretion as to constitute a deprivation of procedural due process.¹⁹⁷

In response to this holding, it is possible for a court to determine that a plaintiff suing for negligent misrepresentation has no “lawful claim” because he did not, with proper specificity allege a legal duty¹⁹⁸ or the circumstances surrounding the misrepresentation. In this hypothetical, the court could easily come to the conclusion that

refuse an amendment unless there has been a manifest abuse of this discretion on the part of the trial court.”).

¹⁹² FED. R. CIV. P. 15(a)(2).

¹⁹³ 105 N.E.2d 727, 729 (Ill. 1952).

¹⁹⁴ *Id.* at 730; *see also* *Broxham v. Borden’s Farm Prods. Co.*, 53 F.2d 946, 947 (7th Cir. 1931).

¹⁹⁵ *Deasey*, 105 N.E.2d at 730.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 729. The appellees’ original complaint alleged that the appellants and the appellee, a city employer, made an agreement which amounted to a contract or a trust that appellants would be repaid the amount that their salaries had been reduced when the appellee had sufficient finances, and that appellant was then able to pay but had not. *Id.* at 728. The appellees’ motion to dismiss alleged nineteen grounds for dismissal, including “the failure to set out the appropriation bills on which plaintiffs rely, *laches*, limitations, insufficient allegations to show a contract, fraud, or any legal duty in defendant.” *Id.* Appellees filed a motion for leave to amend their complaint “for the purpose of making additional parties parties-complainant, and for other purposes.” *Id.* The appellant agreed with appellees that “the complaint does not, and cannot, state a good cause of action because it has already been held that appellants have no lawful claims,” holding “[a]ppellants presented no proposed amendment in seeking to amend and the court was justified in assuming that no amendment could have rejuvenated their dead claims.” *Id.* at 729–30.

¹⁹⁸ Although some authorities argue that the elements of the tort do not need to be stated with specificity pursuant to Rule 9(b), other holdings are unclear as to what allegations would satisfy. *See* *Marcus*, *supra* note 129 and accompanying text.

the plaintiff could be successful in amending the complaint in these areas and should be allowed to in order to further the ends of justice. On the other hand, it is also possible that the trial court, in considering the “ultimate efficacy of a claim,” could conclude that the plaintiff probably would not be successful and dismiss the case with prejudice. The appellate court, unwilling to determine an abuse of discretion, the highest standard of appellate review, upholds the dismissal with prejudice, and the plaintiff’s possibly meritorious claim is lost. The determination of the survival of a plaintiff’s complaint, defective but with the potential to state a good cause of action, is too crucial to be trusted with judicial discretion, as it is plaintiff’s sole opportunity for redress. Because complaints are submitted before plaintiffs are afforded the benefits of discovery and sufficient time to develop their arguments to meet their full potential, it would be a great deprivation of procedural due process to dismiss their claims—potentially arbitrarily—at such an early stage.

It should be stated that “[d]ismissals made pursuant to . . . Rule [9(b)], however, are ‘almost always’ accompanied by a grant of leave to amend, unless the plaintiff has had a prior opportunity to amend its complaint or the allegations were made after full discovery in a related case.”¹⁹⁹ In a decision from the Second Circuit, the court held that the plaintiff was required to plead its negligent misrepresentation claim in accordance with the specificity criteria of Rule 9(b), but failed to allege with specificity any representation made by the defendants to induce its action or “a special relationship between the parties so as to give rise to a duty of care,” thereby failing to state a claim under New York law.²⁰⁰ The court, in concluding that leave to amend should be granted on the issue of negligent misrepresentation, stated that it could not “state with certainty” that amendment would be futile.²⁰¹ The court stated, “[i]f [plaintiff] is able to cite specific representations made by [defendants] for the purpose of inducing it to enter the contract, the elements needed to establish a relationship of near-privity may be met.”²⁰²

The *Aetna* court also considered the relevance of the discovery process in whether summary judgment should be granted in regards to certain claims²⁰³ and whether dismissal with leave to amend should be granted in others.²⁰⁴ In arguing that

¹⁹⁹ *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566, 581 (2d Cir. 2005) (quoting *Luce v. Edelstein*, 802 F.2d 49, 56 (2d Cir. 1986)).

²⁰⁰ *Id.* at 584.

²⁰¹ *Id.* (“Leave to amend may be denied following a Rule 9(b) dismissal if an amendment would be futile.” (citing *Chill v. Gen. Elec. Co.*, 101 F.3d 263, 271 (2d Cir. 1996))).

²⁰² *Id.* The difficulty of satisfying these requirements has been discussed in Part VI.

²⁰³ *Id.* at 595 (“General argues that, because it is an ‘outsider’ in this litigation, it should be entitled to further discovery before summary judgment may be granted as to this claim. I noted in my prior opinion that ‘a bare assertion that the evidence supporting a plaintiff’s allegation is in the hands of the defendant is insufficient . . .’ to warrant a denial of summary judgment on the grounds that further discovery is necessary.” (quoting *Contemporary Mission, Inc. v. U.S. Postal Serv.*, 648 F.2d 97, 107 (2d Cir. 1981))).

²⁰⁴ *Id.* at 584.

summary judgment should not be granted against Aetna in respect to defendant's cross-claims, Aetna argued that it required additional discovery to respond properly to the motion pursuant to Rule 56:

(d) *When Facts Are Unavailable to the Nonmovant.* If a non-movant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.²⁰⁵

The court ultimately held that, “[w]hile it is true that caution should be exercised in granting summary judgment when the nonmoving party lacks relevant discovery, Aniero has not made a sufficient showing [pursuant to Rule 56(f)] that this is the case here.”²⁰⁶

In assessing whether a defendant's fraudulent inducement claim should be dismissed with leave to amend or with prejudice, for failure to satisfy Rule 9(b), the court was required to undergo a separate analysis of the level of discovery completed absent the applicability of Rule 56.²⁰⁷ The court stated that inquiry may include whether the plaintiff had a proper opportunity to amend its complaint or allegations after full discovery in a related case, or if discovery had “barely begun” or “very little” was completed at the time motions were filed.²⁰⁸ The court, in granting leave to amend defendants' fraudulent inducement claim, explained an important rationale: “[T]he liberal provisions for amendment under the Federal Rules are restricted *following* the filing of a motion for summary judgment and the completion of discovery.”²⁰⁹ The decision demonstrated the court's belief in the importance of the survival of a claim pre-discovery, as evidenced by the goals of the Federal Rules, in which a too-stringent dismissal may potentially give rise to a procedural due process claim.

²⁰⁵ FED. R. CIV. P. 56.

²⁰⁶ *Aetna*, 404 F.3d at 573 (citing *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir. 1983)). Further, the court explained that “to oppose a motion on the basis of Rule 56(f), a party must file an affidavit detailing: (1) what facts are sought and how they are to be obtained; (2) how these facts are reasonably expected to create a genuine issue of material fact; (3) what efforts the affiant has made to obtain those facts; and (4) why these efforts were unsuccessful.” *Id.* at 606 (citing *Sage Realty Corp. v. Ins. Co. of N. Am.*, 34 F.3d 124, 128 (2d Cir. 1994)).

²⁰⁷ *Id.* at 580.

²⁰⁸ *Id.* at 581.

²⁰⁹ *Id.* (emphasis added) (citing *Ansam Assocs., Inc. v. Cola Petroleum Ltd.*, 760 F.2d 442, 446 (2d Cir. 1985)). The court also granted the defendants leave to amend their negligent misrepresentation claim because the court did “not believe the filing of an amended complaint would be futile as to [the] claim.” *Id.* at 584.

VIII. THE HISTORICAL EXTENSION OF RULE 9(B) TO NON-FRAUD-BASED CLAIMS & THE INCREASING STRICTNESS IN THE APPLICATION OF THE RULE ITSELF

The historical extension of Rule 9(b) to non-fraud-based claims and the increasing strictness in the application of the Rule itself make heightened pleading a dangerous instrument for defendants and courts in the dismissal of claims.²¹⁰ The availability of the tort of negligent misrepresentation is often already limited for plaintiffs who do not meet the applicable privity standard or the requirement of economic loss.²¹¹ Combined with a standard of heightened pleading that is unclear and being applied with increasing severity, the restrictions on the tort may make it virtually unavailable to plaintiffs in future years.

A. The Uncertainty of Negligent Misrepresentation as a “Tort”

First, courts’ too-strict privity-like requirements for the tort combined with the increasing quantity of information available to the public in the modern era demonstrate the possibility of a difficult future for plaintiffs who seek recovery for negligent misrepresentation.²¹² The unsteady footing that negligent misrepresentation possesses in many jurisdictions is evident from the history of the tort. Negligent misrepresentation was not solidly in existence before Justice Cardozo’s *Ultramares* decision in 1931.²¹³ Sixty years after *Ultramares*, in the early 1990s, legal authors criticized the then-current cause of action, with privity standards such as “special relationship,” as one based in contract instead of in tort.²¹⁴ The authors instead called for the application of tort principles, particularly foreseeability, which would contemplate contemporary business relationships and lift the tort out of its “minor role” in the laws of those jurisdictions.²¹⁵ One author in New York, sixty years after the

²¹⁰ See *infra* Parts VIII.A–B.

²¹¹ See *supra* Part II.

²¹² See *supra* notes 55–60 and accompanying text.

²¹³ Michael D. Lieder, *Constructing a New Action for Negligent Infliction of Economic Loss: Building on Cardozo and Coase*, 66 WASH. L. REV. 937, 948 (1991) (citing *Ultramares Corp. v. Touche, Niven & Co.*, 174 N.E. 441 (N.Y. 1931)) (“The action for negligent misrepresentation developed largely out of several decisions of the New York Court of Appeals, culminating in the 1931 decision in *Ultramares*.”).

²¹⁴ See Richard D. Holahan, Jr., Note, *Security Pacific Business Credit, Inc. v. Peat Marwick Main & Co.: Just in Case You Had Any Doubts—There Is No Tort of Negligent Misrepresentation in New York*, 13 PACE L. REV. 763, 813–14 (1993); Philip Steven Horne, Note, *Onita Pacific Corp. v. Trustees of Bronson: The Oregon Supreme Court Recognizes the Negligent Misrepresentation Tort*, 72 OR. L. REV. 753, 754 (1993).

²¹⁵ See Holahan, *supra* note 214, at 812–14 (arguing that “[b]y expanding liability for negligent misrepresentation to all reasonably foreseeable third parties, while simultaneously excising joint and several liability, the legislature could provide an equitable result for both the accountants and third parties involved”); Horne, *supra* note 214, at 767.

Ultramares decision, went so far as to remark that a recent decision in the jurisdiction applying the contract-based privity restrictions dictated that “[t]here is no tort of negligent misrepresentation in New York.”²¹⁶ Privity requirements were significantly more restricted than contemplated for the tort under the Restatement.²¹⁷ At that time, approximately only thirty jurisdictions recognized any tort of negligent misrepresentation.²¹⁸ Since the 1990s, the advent of the World Wide Web and the prevalence of the Information Age in the lives of consumers have undoubtedly increased the possibility of third party liability, and, consequently, transformed the nature of the tort.²¹⁹

B. The Increasing Severity with Which Rule 9(b) Is Applied

Second, the rule of heightened pleading itself is similarly under established, both in the severity with which it is applied and in the causes of action in which it governs, offering little guidance to potential plaintiffs.²²⁰ There have been several instances in which federal courts assessing fraud claims have gone beyond the limited text of Rule 9(b) and have required even more heightened pleading, resulting in an increase in motion practices under the Rule.²²¹ “Clearly, the use of heightened pleading increases the risk of erroneous dismissal of valid claims.”²²² The third edition of Federal Practice and Procedure suggests that the Rule, which only requires

²¹⁶ Holahan, *supra* note 214, at 770. Holahan further argues:

[i]n sum, the practical significance of *Security Pacific* is that in New York, in order for a nonclient to successfully assert negligent misrepresentation against an accountant, it must show that it is a third-party beneficiary to the audit contract. Under *Security Pacific*, the bounds of the negligent misrepresentation cause of action are coterminous with those of contract law.

Id. at 805 (citing *Sec. Pac. Bus. Credit, Inc. v. Peat Marwick Main & Co.*, 597 N.E.2d 1080 (1992)).

²¹⁷ RESTATEMENT (SECOND) OF TORTS § 552 (1977). Horne argues, “[t]his scope of liability seems more restrictive than the Restatement’s actually foreseen reliance scope of liability.” Horne, *supra* note 214, at 766.

²¹⁸ Horne, *supra* note 214, at 753.

²¹⁹ See, e.g., Deborah A. Ballam, *The Expanding Scope of the Tort of Negligent Misrepresentation: Are Publishers Next?*, 22 LOY. L.A. L. REV. 761 (1989) (predicting the tort’s expansion in future years).

²²⁰ See WRIGHT ET AL., *supra* note 14, at § 1297 (“In recent years, the application of Rule 9(b) has become more demanding for certain types of cases and in certain federal courts.”).

²²¹ See *id.* for an analysis of the factors contributing to the “increased attention to the pleading of fraud.” “[S]tatutory developments and judicial changes in attitude undoubtedly reflect the federal courts’ understanding of the congressional intent underlying a statute, a reaction to the increased numbers of these types of cases, or a desire to filter out at an early stage what are perceived to be frivolous cases.” *Id.*

²²² Fairman, *supra* note 129, at 295.

that the “circumstances” surrounding the fraud such as the “time, place, and contents of the false representations or omissions, as well as the identity of the person making the misrepresentation or failing to make a complete disclosure and what that defendant obtained thereby” to be subject to heightened pleading, has been extended by some federal judges “who require more particularity on a greater range of subjects.”²²³ Thus, lawyers should “plead all of the elements of fraud and . . . do so in some detail whenever that is possible” in order to avoid dismissal of their claims.²²⁴ Furthermore, the authors argue that even the explicit application of heightened pleading to “circumstances” of fraud should be interpreted more flexibly under the Rule:

[I]t is inappropriate to focus exclusively on the fact that Rule 9(b) requires particularity in pleading the circumstances of fraud. This is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the federal rules and the many cases construing them; in a sense, therefore, the rule regarding the pleading of fraud does not require absolute particularity or a recital of the evidence, especially when some matters are beyond the knowledge of the pleader and can only be developed through discovery.²²⁵

C. The Expansion of Rule 9(b) to Non-Fraud-Based Claims

Third, the scope of Rule 9(b) in regards to the causes of action which it governs has spanned outside of “fraud.”²²⁶ Patent claims that sound in fraud are subject to the requirements of the Rule, and causes of action which are not fraud but are premised on fraudulent conduct also require heightened pleading.²²⁷ The Rule has even applied to claims which are not based in fraud.²²⁸ For example, consider Fairman’s argument regarding the extension of Rule 9(b) to non-fraud-based claims:

Federal procedure could tolerate the deadweight of Rule 9(b) if it were limited to its own short list. But 9(b) is not so benign. Instead, its malignant pleading requirement spreads to other claims that courts deem “fraud-like.” Thus, Rule 9(b)’s heightened pleading now infects such “quasi-fraud” claims as statutory civil rights violations, defamation suits, and CERCLA actions.²²⁹

²²³ WRIGHT ET AL., *supra* note 14, at § 1297.

²²⁴ *Id.*; *see also supra* Part I.

²²⁵ WRIGHT ET AL., *supra* note 14, at § 1298 (footnotes omitted).

²²⁶ *See* Fairman, *supra* note 129, at 282.

²²⁷ WRIGHT ET AL., *supra* note 14, at § 1297.

²²⁸ Fairman, *supra* note 129, at 282.

²²⁹ *Id.* (footnotes omitted).

Thus, federal courts have extended Rule 9(b) in two ways: (1) in the scope of the types of claims which it governs, and (2) in the application of its heightened pleading requirements. Courts have also developed a very limited tort of negligent misrepresentation, often restricting the tort to contract-based theories and failing to implement a foreseeability standard more appropriate for the modern age. In order to effectuate a process conducive to the survival of negligent misrepresentation claims which may have merit, courts must clarify the tort, preferably through the reasonable expansion of privity standards, and determine that Rule 9(b) does not apply to these claims. Without a change in the legal environment, plaintiffs will be left without a remedy for the tort.

CONCLUSION

The current circuit split regarding the applicability of Rule 9(b) to negligent misrepresentation claims must be resolved in favor of potential plaintiffs by limiting heightened pleading to claims of fraud. The continual extension of Rule 9(b) has been a result of defendants' and courts' manipulation of procedural rules in order to eliminate liability through dismissal. Although pleading requirements may not be completely outcome-determinative, as judges should give plaintiffs the opportunity to amend their complaints, the inquiries courts have taken in determining whether to grant leave to amend, and the subsequent, strict appellate standard of review of judicial discretion are insufficient protections for the crucial procedural due process interest at stake.

The inquiry, which involves some determination of the ultimate success of the claim based on its merits and some consideration of the level of completed discovery, may seem rational in relation to the goal of the Federal Rules: liberally allowing plaintiffs sufficient opportunity to address their grievances. However, combined with the application of Rule 9(b) heightened pleading to the tort of negligent misrepresentation, the inconsistency with which courts have applied the Rule itself, and the failure of the justifications for Rule 9(b)'s displacement of the more liberal Rule 8 notice pleading, plaintiffs' claims are continuing to fail to pass muster in state and federal courts.

The solution is uniformity. Clarity on the tort of negligent misrepresentation must be achieved through the limitation of Rule 9(b) to claims of *fraud*, a fundamentally different tort. This solution should be achieved through the Rules Committee's amendment of the Rule, limiting the Rule's application by inserting the exclusive language of what constitutes fraud, or by Supreme Court review on the issue. Until heightened pleading can be confined to the original tort for which it was intended to apply, potential plaintiffs' procedural due process rights will be continually threatened.