UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 82 | Number 3 Article 7

3-1-2004

Even in These Days of Notice Pleadings: Factual Pleading Requirements in the Fourth Circuit

Koan Mercer

"Even in These Days of Notice Pleadings"[1]: Factual Pleading Requirements in the Fourth Circuit

INTRODUCTION

The Fourth Circuit Court of Appeals is defying clear and unanimous Supreme Court precedent and the Federal Rules of Civil Procedure by imposing a heightened factual pleading standard in reviewing motions to dismiss under Federal Rule of Civil Procedure 12(b)(6).[2] The Supreme Court has consistently held that where a complaint puts the defendant on notice of the existence and nature of the claim against him, it is unnecessary for the plaintiff to allege

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

2. Rule 12(b) authorizes parties to make any of seven enumerated defenses by motion prior to filing their responsive pleading. FED. R. CIV. P. 12(b). These defenses are "(1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19." *Id.*

factual details or to plead specifically the existence of each element of a cause of action. In contrast, Fourth Circuit panels continue to follow circuit precedent requiring plaintiffs to explicitly allege facts supporting each element, often with sufficient factual detail to establish a prima facie case.

This Comment begins in Part I by reviewing the language and history of the Rules' notice pleading system. Part II surveys the Supreme Court's pleading jurisprudence[3] and establishes that a Rule 12(b)(6) motion cannot legitimately be granted for failure to allege facts supporting the existence of each necessary element. Part III then examines several representative Fourth Circuit holdings and argues that the Fourth Circuit's pleading rule defies clear Supreme Court precedent. In Part IV, this Comment explores possible explanations for the persistence of Fourth Circuit judges in dismissing complaints for failure to allege facts establishing a prima facie case and concludes by arguing in Part V that continued adherence to factual pleading requirements is unjustified and harmful to judicial principles and litigants.

I. THE DEVELOPMENT OF NOTICE PLEADING

The common law pleading practice that developed in England between the thirteenth and sixteenth centuries required plaintiffs to choose a single writ under which to bring their claims.[4] Each writ triggered a different form of action with distinct procedural, evidentiary, and jurisdictional requirements.[5] Common law pleading developed into a complex and formalistic system under which plaintiff and defendant exchanged hyper-technical pleadings in an attempt to reduce the case to a single legal or factual issue.[6] Plaintiffs often lost their cases on technical pleading grounds without a court ever reaching the merits of their claims.[7] Although less sophisticated,

3. The Court's three leading notice pleading cases are *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), and *Conley v. Gibson*, 355 U.S. 41 (1957).

4. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 914–15 (1987). *See generally* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 53–95 (4th ed. 2002) (describing the rise and decline of the writ system and common law pleadings in England); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 399–418 (5th ed. 1956) (surveying the development of English common law pleading practices).

5. *See* Subrin, *supra* note 4, at 915.

6. *Id.* at 916–17; *see, e.g.*, 3 WILLIAM BLACKSTONE, COMMENTARIES *293–324 (describing eighteenth century pleading practices).

7. *See supra* Subrin, note 4, at 917.

early American pleading practice followed the English common law model and continued to increase in technicalities through the early nineteenth century.[8]

The first reforms of this formalistic system originated with David Dudley Field, who drafted the 1848 New York pleading code ("Field Code").[9] Eventually about half the states adopted pleading procedures based on the Field Code.[10] Although the Field Code adopted a single form of action and eliminated many of the other technicalities of common law pleading,[11] the Field Code pleading still required plaintiffs to allege "facts constituting the cause of action."[12] As the Field Code spread across the country, many judges did not take to its liberalizing spirit and seized on the factual requirement to continue demanding highly detailed and technical pleadings.[13]

In an effort to reform and standardize procedure in federal court and respond to the failings of the Field Code's factual pleading requirements, the Supreme Court adopted the Federal Rules of Civil Procedure in 1937.[14] Rule 8(a)(2) established a liberal, notice pleading standard that embodied the Rules' departure from code pleading's factual requirements.[15] In laying out the Rules' pleading requirements, the drafters of Rule 8(a)(2) explicitly avoided using the

---

8. *See id.* at 927–28. *See generally* BENJAMIN J. SHIPMAN, HAND-BOOK OF COMMON LAW PLEADING (1894) (surveying American common law pleading practice).

9. *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 438 (1986).

10. *See* Subrin, *supra* note 4, at 939.

11. *See id.* at 933–38.

12. An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State, ch. 379, § 120(2), 1848 N.Y. Laws 497, 521 (repealed); *see also* Van Giesen v. Van Giesen, 10 N.Y. 316, 317 (1852) (requiring under the Code of 1848 "a statement of the facts constituting the cause of action"); Hartsfield v. Bryan, 177 N.C. 166, 169, 98 S.E. 379, 380 (1919) ("[A]ll the facts going to make up the cause of action must be stated .... Looseness in pleading and inadequacy of allegation are as much condemned by the present code of procedure as they were under the former strict and exacting system of the common law.").

13. *See* Marcus, *supra* note 9, at 438 (noting that the failure of the Field Code's reforms was attributable in part to "judicial sabotage"); Subrin, *supra* note 4, at 940 (discussing the resistance to the Field Code's new procedures).

14. *See* Edward Cavanagh, *Pleading Rules in Antitrust Cases: A Return to Fact Pleading?*, 21 REV. LITIG. 1, 3–5 (2002); Marcus, *supra* note 9, at 434, 439; Paul J. McArdle, *A Short and Plain Statement: The Significance of* Leatherman v. Tarrant County, 72 U. DET. MERCY L. REV. 19, 21–23 (1994). The Rules took effect in 1938 when Congress adjourned without taking action on them. McArdle, *supra*, at 22.

15. Rule 8(a) states that a pleading making a claim for relief must contain (1) an allegation of the basis for jurisdiction, "(2) a short and plain statement of the claim showing that the pleader is entitled to relief," and (3) a demand for relief. FED. R. CIV. P. 8(a).

charged term "facts."[16] The contrast between the general pleading standard of Rule 8(a) and the requirement to plead certain "Special Matters" with factual "particularity"[17] under Rule 9 also highlighted the liberal nature of the Rules' basic notice pleading scheme.[18] Where in the past, pleadings had become a virtual end in themselves, under the Rules the purpose of pleading procedure became facilitation of decisions on the merits.[19]

The example pleadings attached to the Rules emphasized—and continue to emphasize—how brief and conclusory acceptable complaints can be.[20] Form 9, for example, made out a negligence claim by simply stating that "[o]n June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway."[21] The complaint did not specifically allege the

16. Marcus, *supra* note 9, at 439 (reporting also that Charles E. Clark, the Reporter of the Supreme Court Advisory Committee that drafted the Rules, initially proposed eliminating pleading motions altogether); *see* FED. R. CIV. P. 8(a)(2).

17. Rule 9, entitled "Pleading Special Matters," requires parties to plead "with particularity" certain enumerated issues, such as lack of capacity to be sued, circumstances of fraud or mistake, denial of performance, and special damages. FED. R. CIV. P. 9. For example, Rule 9(b) states, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." FED. R. CIV. P. 9(b). However, Rule 9(b) concludes by noting that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally." *Id.*

18. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 (2002).

19. *See* FED. R. CIV. P. 8(f) ("All pleadings shall be so construed as to do substantial justice."); *see also* Cavanagh, *supra* note 14, at 3–5 ("Whereas the goal of the Federal Rules is to assure that meritorious claims are heard on the merits, the goal of common law pleading was to avoid trial."); Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 554–58 (2002) (discussing strengths and weaknesses of notice pleading and Code pleading); Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 327–28 (2001) (contrasting code pleading's requirement to allege facts supporting each element of a cause of action with the Rules' notice pleading standard).

20. FED. R. CIV. P. 84 ("The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate."); *see also Swierkiewicz*, 534 U.S. at 513 n.4 (identifying Form 9 as an example of how little detail is actually required).

21. FED. R. CIV. P. FORM 9. Form 9's complete, sufficient "Complaint for Negligence" reads as follows:

> 1. Allegation of jurisdiction.
>
> 2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.
>
> 3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and

existence of each element of a negligence claim, nor did it assert any factual basis for its conclusory allegation that the defendant was negligent.[22] As required by Rule 9(g),[23] Form 9 alleged the plaintiff's special damages with particularity; but to plead the negligence itself, Form 9 required nothing more than giving notice of when and where the claim arose and of the plaintiff's assertion that defendant acted negligently.[24] Similarly, Form 11 made out an adequate complaint for conversion by identifying the property in question and then making a simple, conclusory allegation that the defendant converted it to his own use.[25] Form 12 stated a contract claim by merely alleging that the parties "entered into an agreement" without separately alleging the existence of offer and acceptance.[26]

The leading early judicial interpretation of the Rules' new, liberal pleading system came from Judge Charles E. Clark in *Dioguardi v. Durning*.[27] The district court in *Dioguardi* dismissed a complaint "on the ground that it 'fail[ed] to state facts sufficient to constitute a cause of action.' "[28] In reversing and remanding, Judge Clark stated emphatically that under the Rules "there is no pleading requirement of stating 'facts sufficient to constitute a cause of action.' "[29] Rather, all the Rules require, Judge Clark held, is Rule 8(a)'s short and plain statement giving notice and showing that the plaintiff is entitled to relief.[30]

During the early 1950s there were several unsuccessful challenges to the Rules' notice pleading. Federal trial judges in the Southern District of New York carried out what then Chief Judge Clark described as "something bordering on a revolt" against the use

---

hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars and costs.

Id.

22. *See id.*

23. *See* FED. R. CIV. P. 9(g) ("When items of special damage are claimed, they shall be specifically stated.").

24. *See* FED. R. CIV. P. FORM 9.

25. FED. R. CIV. P. FORM 11.

26. FED. R. CIV. P. FORM 12.

27. 139 F.2d 774 (2d Cir. 1944). While Dean of Yale Law School, Judge Clark served as the Reporter of the Supreme Court Advisory Committee that drafted the Rules. *See* Subrin, *supra* note 4, at 961. Judge Clark is widely regarded as the Rules' principle architect, *see id.*, giving his interpretation of the Rules' pleading requirements in *Dioguardi* special salience.

28. *Dioguardi*, 139 F.2d at 775.

29. *Id.*

30. *Id.* The Supreme Court subsequently cited Judge Clark's holding as representing "the accepted rule." Conley v. Gibson, 355 U.S. 41, 45 (1957).

of notice pleading in large, antitrust cases.[31] Writing for the Second Circuit, Chief Judge Clark rebuffed these judicial attempts to create a fact pleading requirement in antitrust cases.[32] A more direct challenge came in 1952, when the Ninth Circuit Judicial Conference passed a resolution endorsing the amendment to Rule 8(a)(2) to read "a short and plain statement of the claim showing that the pleader is entitled to relief, which statement shall contain the facts constituting a cause of action."[33] The Ninth Circuit's proposed amendment was never adopted, and today, Rule 8(a)(2) retains its original 1938 language.[34]

II. THE SUPREME COURT'S NOTICE PLEADING HOLDINGS

The Supreme Court has repeatedly and unanimously affirmed that the Federal Rules of Civil Procedure prescribe a notice pleading system that does not require plaintiffs to plead detailed factual support for their claims so long as defendants receive fair notice of the nature and basis of the claims against them.[35] The Court first established this interpretation of the Rules in *Conley v. Gibson*.[36] The Court has subsequently reiterated the Rules' notice pleading standard in *Leatherman v. Tarrant County Narcotics Intelligence &*

31. Charles E. Clark, *Special Pleading in the "Big Case"*, 21 F.R.D. 45, 49–50 (1957). Chief Judge Clark said of the district judges' actions that "[i]n asserting a special rule of pleading for antitrust cases, our brothers below have in terms rejected the 'modern 'notice' theory of pleading' as here insufficient and said that an antitrust complaint must 'state a cause of action instead of merely stating a claim.' " Nagler v. Admiral Corp., 248 F.2d 319, 324 (2d Cir. 1957) (footnote omitted).

32. *Nagler*, 248 F.2d at 322–23 (observing that "it is quite clear that the federal rules contain no special exceptions for antitrust cases" and that under the Rules "outright dismissal for reasons not going to the merits is viewed with disfavor in the federal courts").

33. Judicial Conference of the Judges of the Ninth Circuit, *Claim or Cause of Action: A Discussion on the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure*, 13 F.R.D. 253, 253 (1952). That the Ninth Circuit felt compelled to suggest such an amendment demonstrates that early critics of notice pleading understood the Rules as not requiring plaintiffs to plead facts supporting each element of a claim.

34. *See* FED. R. CIV. P. 8(a)(2).

35. Of course, a court must also dismiss a complaint when the law does not recognize a cause of action in the situation alleged. *See, e.g.*, Neitzke v. Williams, 490 U.S. 319, 326 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law."); Ibarra v. United States, 120 F.3d 472, 474–76 (4th Cir. 1997) (holding the plaintiff failed to state a claim because her suit was barred as a matter of law pending the completion of her administrative appeal); Schatz v. Rosenberg, 943 F.2d 485, 489–94, 498 (4th Cir. 1991) (rejecting the plaintiffs' contention that defendants had a duty to disclose certain misrepresentations under federal securities laws and Maryland common law and, therefore, affirming a dismissal for a failure to state a claim).

36. 355 U.S. 41, 47–48 (1957).

Coordination Unit[37] and *Swierkiewicz v. Sorema N.A.*[38]

A. Conley v. Gibson

The plaintiffs in *Conley* were a class of black railroad workers who alleged that their union discriminated against them.[39] In their complaint, the plaintiffs identified a specific incident during which the union protected white members' jobs at the expense of black members; however, the complaint also included conclusory, generalized allegations that the union failed to represent black and white members equally and in good faith.[40] The defendants filed motions to dismiss for lack of subject matter jurisdiction, failure to join an indispensable party, and failure to state a claim.[41] The district court dismissed on the jurisdictional grounds and the Fifth Circuit affirmed.[42] After holding that the dismissal for lack of jurisdiction was error, the Supreme Court considered the other arguments for dismissal, which although not part of the lower courts' decisions, had been briefed and argued before the Court.[43]

In holding that the plaintiffs' complaint was sufficient to survive a Rule 12(b)(6) motion, the Court stated that the "accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[44] The Court explicitly rejected the defendants' argument that the complaint should be dismissed because it did not allege specific facts in support of its general allegations of discrimination and stated that the Rules "do not require a claimant to set out in detail the facts upon which he bases his claim."[45] Quoting Rule 8(a)(2), the Court explained that all that is required is " 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[46] The Court noted that the Forms

37. 507 U.S. 163 (1993).
38. 534 U.S. 506 (2002).
39. *Conley*, 355 U.S. at 42–43.
40. *Id.* at 43.
41. *Id.*
42. *Id.* at 43–44.
43. *Id.* at 44–45.
44. *Id.* at 45–46. At least one commentator has accused the Supreme Court in pronouncing this test of "conveniently overlook[ing]" the requirement in the second half of Rule 8(a)(2) that complaints "show[] that the pleader is entitled to relief." Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1755 (1998).
45. *Conley*, 355 U.S. at 47.
46. *Id.* (footnote omitted) (quoting FED. R. CIV. P. 8(a)(2)); *see also* Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (stating that a court's task in reviewing the sufficiency of

confirm the existence of a simplified, notice pleading standard and reiterated Rule 8(f)'s requirement that " 'all pleadings shall be so construed as to do substantial justice.' "[47]

B. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit

In 1993, the Supreme Court again addressed the Rules' pleading requirements in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*.[48] The plaintiffs in *Leatherman* alleged that local police had violated their Fourth Amendment rights by entering the plaintiffs' homes, assaulting one plaintiff, and killing the other plaintiff's two dogs.[49] In their complaints, the plaintiffs asserted that the defendant municipal corporations were liable for the officers' violations of the plaintiff's civil rights because the cities had not properly trained the officers.[50] The Fifth Circuit affirmed the district court's dismissal of the plaintiffs' § 1983 civil rights claims because the plaintiffs had failed to allege with factual detail and particularity why the defendant municipalities were liable for their employees' conduct.[51]

Citing *Conley*'s interpretation of Rule 8(a)(2), the Supreme Court unanimously reaffirmed the existence of a "liberal system of 'notice pleading' set up by the Federal Rules."[52] The Court noted that Rule 9(b) establishes an exception to this general rule by requiring parties alleging fraud or mistake to plead with particularity the circumstances constituting fraud or mistake.[53] However, the Court held that this particularity requirement existed only with respect to pleading those actions expressly enumerated in Rule 9(b) and did not, therefore, apply to alleging municipal liability for civil

---

a complaint "is necessarily a limited one" and concluding that "[t]he issue is not whether a plaintiff will ultimately prevail .... Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test"); Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 235 (1959) ("It may well be that petitioner's complaint as now drawn is too vague, but that is no ground for dismissing his action.").

47. *Conley*, 355 U.S. at 47–48 (quoting FED. R. CIV. P. 8(f)).

48. 507 U.S. 163 (1993).

49. *Id.* at 165.

50. *Id.*

51. *Id.* at 165–67.

52. *Id.* at 168. For early discussions of *Leatherman*'s effect, see McArdle, *supra* note 14, at 38–42; and Eric Harbrook Cottrell, Note, *Civil Rights Plaintiffs, Clogged Courts, and the Federal Rules of Civil Procedure: The Supreme Court Takes a Look at Heightened Pleading Standards in* Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 72 N.C. L. REV. 1085, 1099–112 (1994).

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

rights violations under § 1983.[54] In reversing the Fifth Circuit's dismissal, the Supreme Court cautioned that "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later."[55]

C. Swierkiewicz v. Sorema N.A.

The Supreme Court's most recent consideration of pleading standards and Rule 12(b)(6) dismissals is *Swierkiewicz v. Sorema N.A.*[56] The plaintiff in *Swierkiewicz* alleged that Sorema N.A. terminated his employment on account of his national origin and age.[57] In his complaint, the plaintiff listed his age, his nationality, his qualifications, his boss's nationality, and the date of his termination.[58] The plaintiff also asserted that prior to his termination he had been demoted and isolated in favor of a younger individual of his boss's nationality.[59] The district court ruled that the plaintiff had failed to allege a prima facie case of discrimination under *McDonnell Douglas Corp. v. Green*[60] and dismissed the complaint.[61] The Second Circuit affirmed the district court's dismissal on the ground that the plaintiff had not alleged facts establishing a prima facie case of discrimination.[62] Specifically, the Second Circuit held that the plaintiff failed to allege the fourth *McDonnell Douglas* element, circumstances supporting an inference of discrimination.[63] The court held that the plaintiff's "conclusory allegation that his termination was motivated by national origin discrimination" was "insufficient as a matter of law to raise an inference of discrimination."[64]

After explaining that the *McDonnell Douglas* requirements for a prima facie case were not intended or suited to serve as a pleading

54. *Id.*
55. *Id.* at 168–69.
56. 534 U.S. 506 (2002).
57. *Id.* at 509.
58. *Id.* at 508–09.
59. *Id.*
60. 411 U.S. 792 (1973).
61. *Swierkiewicz*, 534 U.S. at 509.
62. Swierkiewicz v. Sorema, N.A., 5 Fed. Appx. 63, 64–65 (2d Cir. 2001), *rev'd*, 534 U.S. 506 (2002).
63. *Id.* The four elements required to establish a prima facie case of discrimination under the *McDonnell Douglas* framework are (1) the plaintiff is a member of a protected class, (2) the plaintiff was available and qualified for the job, (3) the plaintiff suffered an adverse employment action, and (4) there were circumstances supporting an inference of discrimination. *Swierkiewicz*, 534 U.S. at 510; *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (establishing the standard for proving a prima facie case of racial employment discrimination in the absence of direct evidence of discrimination).
64. *Swierkiewicz*, 5 Fed. Appx. at 64.

standard, the Supreme Court considered general pleading requirements and reaffirmed its holdings in *Conley* and *Leatherman*.[65] The Court again refused to tolerate any extension of particularity requirements beyond the limited and explicitly enumerated exceptions, such as those for fraud and mistake in Rule 9(b).[66] The Court observed that the Forms demonstrate how little is required in most cases and cited the complaint for negligence in Form 9 as an example of how simple and brief notice pleadings can be.[67]

With respect to the specific pleading before it, the Court held that the complaint "easily satisfie[d] the requirements of Rule 8(a) because it [gave] respondent fair notice of the basis for [plaintiff's] claims."[68] The Court rejected the defendant's argument that "lawsuits based on conclusory allegations" should be dismissed and explicitly held that a pleading's sufficiency must be determined "without regard to whether a claim will succeed on the merits."[69] Unmeritorious claims should be handled through summary judgment pursuant to Rule 56.[70] The Court also instructed that where a complaint "fails to specify the allegations," a defendant's proper response is to "move for a more definite statement under Rule 12(e) before responding."[71] Confronted with a vague complaint, a defendant should demand adequate notice, not challenge the complaint's legal sufficiency under Rule 12(b)(6).

---

65. *Swierkiewicz*, 534 U.S. at 510–14.

66. *Id.* at 513.

67. *Id.* at 513 n.4.

68. *Id.* at 514.

69. *Id.* at 514–15.

70. *Id.* at 514. Rule 56 authorizes any party to move for summary judgment and states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. CIV. P. 56(c).

71. *Swierkiewicz*, 534 U.S. at 514; *see also* Crawford-El v. Britton, 523 U.S. 574, 597–98 (1998) (instructing trial judges to use motions under Rule 12(e) to protect public officials against insubstantial claims). Rule 12(e) provides:

> If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

FED. R. CIV. P. 12(e).

The Court in *Swierkiewicz* reaffirmed the basic Rule 12(b)(6) standard set out in *Conley*: " '[A] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' "[72] Under this standard, a court can grant a motion to dismiss only where the plaintiff either has mistakenly pled himself out of court by alleging specific, detrimental facts that affirmatively preclude all legal relief, or where the plaintiff has lost on a question of law that has left him with no legal remedy for the situation his complaint describes. Absent these circumstances, defendants must address any failures of omission or vagueness in a complaint through a Rule 12(e) motion for a more definite statement. The Court's holdings require plaintiffs to allege the elements of their claims only to the extent necessary to give notice of what the suit is about. If the plaintiff responds to the Rule 12(e) motion by alleging specific facts inconsistent with any valid theory of recovery, then the court can grant a motion to dismiss. If the plaintiff's response does not preclude recovery as a matter of law but nonetheless appears factually implausible with respect to a necessary element of the claim, then the court can allow limited discovery regarding that element and grant a motion for summary judgment if the plaintiff's proof is lacking.[73]

Through its unanimous opinions in *Conley*, *Leatherman*, and *Swierkiewicz*, the Supreme Court has consistently affirmed the existence of a simple notice pleading standard under the Federal Rules of Civil Procedure. Under these decisions and the language of the Rules, a plaintiff need only meet two modest conditions to survive a Rule 12(b)(6) motion: his complaint must give the defendant fair notice of the nature and grounds of claim against him, and there must exist the possibility of some set of facts that could be proved consistent with the plaintiff's allegations upon which relief could be granted. This approach rests upon the rationale that summary judgment and the trial judge's broad control of discovery, not dismissal on the pleadings, are the proper mechanisms for controlling and disposing of claims lacking factual merit.

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

73. *See Crawford-El*, 523 U.S. at 598–99.

III. THE FACTUAL PLEADING REQUIREMENTS IN THE FOURTH CIRCUIT

Although a clear majority of the courts of appeals now acknowledge and follow the Supreme Court's notice pleading decisions,[74] the Fourth Circuit has not. Instead, the Fourth Circuit's prevailing approach to Rule 12(b)(6) motions requires plaintiffs to plead facts supporting the existence of each element of a valid cause of action, often with sufficient factual details to establish, if proven, a prima facie case of the claim alleged.[75] This factual pleading standard,

---

74. *See* Phillip v. Univ. of Rochester, 316 F.3d 291, 298 (2d Cir. 2003) (acknowledging the impact of *Swierkiewicz* and holding conclusory allegations of discriminatory intent sufficient to survive a Rule 12(b)(6) motion); Goad v. Mitchell, 2002 FED App. 0250P, ¶ 7 (6th Cir.), 297 F.3d 497, 501 (describing a requirement to plead specific, factual allegations as imposing an invalid, heightened pleading standard); Walker v. Thompson, 288 F.3d 1005, 1007 (7th Cir. 2002) (citing *Swierkiewicz*, 534 U.S. at 508, for the proposition that "there is no requirement in federal suits of pleading the facts or the elements of a claim"); Pryor v. NCAA, 288 F.3d 548, 564 (3d Cir. 2002) (citing *Swierkiewicz*, 534 U.S. at 512–13, for the proposition that a complaint need "not [contain] a detailed recitation of the proof that will in the end establish such a right"); Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002) ("A complaint that complies with the federal rules of civil procedure cannot be dismissed on the ground that it is conclusory or fails to allege facts."); Everett-Dicko v. Ogden Entm't Servs., 36 Fed. Appx. 245, 247 (9th Cir. 2002) (mem.) (holding that the conclusory statements in the plaintiffs' complaint that "the defendants acted as they did 'because of [Everett-Dicko's] race or color' " and " 'because [the plaintiffs] opposed racial or color discrimination' " were sufficient allegations of discrimination under *Swierkiewicz*); Roe v. Aware Woman Ctr. for Choice, Inc., 253 F.3d 678, 683 (11th Cir. 2001) ("[T]he liberal 'notice pleading' standards embodied in Federal Rule of Civil Procedure 8(a)(2) do not require that a plaintiff specifically plead every element of a cause of action."); Krieger v. Fadely, 211 F.3d 134, 136 (D.C. Cir. 2000) ("[C]omplaints 'need not plead law or match facts to every element of a legal theory . . . .' " (quoting Bennett v. Schmidt, 153 F.3d 516, 518 (7th Cir. 1998))); Ring v. First Interstate Mortgage, Inc., 984 F.2d 924, 926 (8th Cir. 1993) ("Dismissal is appropriate 'as a practical matter . . . only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.' " (alteration in original) (quoting Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974))). *But see* Torres-Viera v. Laboy-Alvarado, 311 F.3d 105, 108 (1st Cir. 2002) (requiring plaintiffs to plead facts sufficient to permit the court to draw a "reasonable inference" as to the existence of necessary elements, such as malicious intent).

For discussion of early attempts by courts of appeals to impose heightened, factual pleading requirements in conflict with *Conley*, see McArdle, *supra* note 14, at 31–36; and Cottrell, *supra* note 52, at 1094–97. For an account of the Fifth Circuit Court of Appeals's use of Rule 7(a) in *Schultea v. Wood*, 47 F.3d 1427, 1429–33 (5th Cir. 1995), to impose heightened pleading by requiring plaintiffs to make a detailed reply to defendants' answers, see Eric Kugler, *A 1983 Hurdle: Filtering Meritless Civil Rights Litigation at the Pleading Stage*, 15 REV. LITIG. 551, 561–66 (1996).

75. *See, e.g.*, Duckworth v. State Admin. Bd. of Election Laws, 332 F.3d 769, 772 (4th Cir. 2003) (stating the Rule 12(b)(6) standard as "whether [the plaintiff's] pleadings

exemplified by cases such as *Migdal v. Rowe Price-Fleming International, Inc.*,[76] *Iodice v. United States*,[77] and *Dickson v. Microsoft Corp.*,[78] contradicts established Supreme Court case law and the example set by the Federal Rules of Civil Procedure Forms. Some Fourth Circuit panels have, however, appeared to deviate from the circuit's factual pleading standard by reversing the granting of motions to dismiss based on a standard closer to the notice pleading standard that the Supreme Court has identified.[79]

A. Migdal v. Rowe Price-Fleming International, Inc.

Migdal v. Rowe Price-Fleming International, Inc.[80] is representative of the line of Fourth Circuit opinions in which the court has required plaintiffs to plead a prima facie case.[81] The plaintiffs in *Migdal*, shareholders of several mutual funds, sued their funds' investment advisers for breach of their fiduciary duties under the Investment Company Act ("ICA").[82] The plaintiffs alleged breach in two respects: (1) the advisers took excessive fees, and (2) the fund directors received compensation for serving on other boards

---

adequately state a set of facts, which, if proven to be true, would entitle [the plaintiff] to judicial relief"); Bass v. E.I. DuPont de Nemours & Co., 324 F.3d 761, 765 (4th Cir. 2003) ("[A] plaintiff *is* required to allege facts that support a claim for relief."); Iodice v. United States, 289 F.3d 270, 280–81 (4th Cir. 2002) (holding that the plaintiffs failed to allege "facts sufficient to state the substantive elements of their claim"); Migdal v. Rowe Price-Fleming Int'l, Inc., 248 F.3d 321, 327–30 (4th Cir. 2001) (holding that "a plaintiff must allege facts that, if true, would support a claim"); Chisolm v. TranSouth Fin. Corp., 95 F.3d 331, 338 (4th Cir. 1996) ("Inasmuch as the appellants did not specifically plead reliance, we can hardly fault the district court for faithfully applying our precedents and dismissing the complaint."); Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 220–21 (4th Cir. 1994); *see also* Keene v. Thompson, 232 F. Supp. 2d 574, 579 (M.D.N.C. 2002) ("[I]f a complaint fails to sufficiently state facts to support each element of the claims asserted therein, dismissal . . . is proper."); N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs., 200 F. Supp. 2d 551, 554 (E.D.N.C. 2001) ("A complaint may be dismissed for failure to state facts sufficient to allege all elements of a claim."); Falwell v. Executive Office of the President, 158 F. Supp. 2d 734, 741 (W.D. Va. 2001) (stating that to survive a Rule 12(b)(6) motion, a plaintiff "must allege facts that, if proven, would sustain a . . . claim").

76. 248 F.3d 321 (4th Cir. 2001).

77. 289 F.3d 270 (4th Cir. 2002).

78. 309 F.3d 193 (4th Cir. 2002).

79. *See* Byrd v. Baltimore Sun Co., 43 Fed. Appx. 702 (4th Cir. 2002) (per curiam); Edwards v. City of Goldsboro, 178 F.3d 231, 243–44 (4th Cir. 1999); Jordan by Jordan v. Jackson, 15 F.3d 333, 338–40 (4th Cir. 1994).

80. 248 F.3d 321 (4th Cir. 2001).

81. The defendant in *Swierkiewicz* unsuccessfully cited *Migdal* to the Supreme Court as authority supporting dismissal of the plaintiff's conclusory complaint. Brief for Respondent at 14–15, Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) (No. 00-1853).

82. *Migdal*, 248 F.3d at 324.

and were not, therefore, disinterested parties as the ICA requires.[83] The district court granted a Rule 12(b)(6) dismissal with prejudice on the grounds that the plaintiffs had not pled sufficient facts.[84] The Fourth Circuit affirmed the dismissal because the plaintiffs had failed to "allege facts that, if true, would support a claim that the fees at issue are excessive" and "failed to allege any facts that, if true, would support a claim that the disinterested directors were actually interested."[85]

In *Migdal*, as in many other of its Rule 12(b)(6) opinions, the Fourth Circuit began by quoting *Conley* but went on to qualify or implement the standard to impose a factual pleading requirement that is inconsistent with the Supreme Court's binding interpretations of the Federal Rules of Civil Procedure.[86] Specifically, the Fourth Circuit repeatedly stated in *Migdal* that a plaintiff must allege facts to support his claim and cannot simply plead in a conclusory manner that he has a particular claim against a defendant.[87] The court explained that this requirement is necessary to control discovery costs[88] and stated that "plaintiffs cannot simply promise the court that once they have completed discovery, something will turn up."[89]

Both the holding and rationale in *Migdal* are in direct conflict with *Conley*, *Leatherman*, and *Swierkiewicz*. The *Migdal* court required "facts that, if true, would support a claim,"[90] while the *Conley* Court said that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."[91] Where the *Migdal* court reasoned that Rule 12(b)(6)

83. *Id.* at 325.
84. *Id.*
85. *Id.* at 327, 330.
86. *Id.* at 325–26.
87. *Id.* at 326–28. Although the *Migdal* court did not do so, in some Fourth Circuit opinions, such as *Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir. 2001), the court has supported its prohibition on conclusory allegations by citing the Supreme Court's observation in *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)), that "the court may insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive." This reliance is misplaced because the Court also stated in *Crawford-El* that the mechanisms by which a trial court can require the plaintiff to put forward more specifics are ordering a reply to defendant's answer under Rule 7(a) or granting a motion for a more definite statement under Rule 12(e). *See Crawford-El*, 523 U.S. at 597–98. The Court in *Crawford-El* does not hold that conclusory allegations are grounds for dismissal under Rule 12(b)(6).
88. *Migdal*, 248 F.3d at 326.
89. *Id.* at 328.
90. *Id.* at 327.
91. Conley v. Gibson, 355 U.S. 41, 47 (1957).

dismissals should be used to prevent costly discovery of unmeritorious claims,[92] the Supreme Court in *Swierkiewicz* explicitly rejected arguments that complaints "based on conclusory allegations" were inconsistent with the Rules' pleading standard.[93] In both *Leatherman* and *Swierkiewicz*, the Supreme Court stated that claims lacking merit should be dealt with through summary judgment.[94] In contrast to the Fourth Circuit's concern in *Migdal* about a plaintiff relying on the discovery process to turn up evidence, the Supreme Court's rejection of a heightened pleading standard in *Swierkiewicz* depended in part on the possibility that plaintiffs would uncover evidence through discovery that was not available to them at the pleading stage.[95]

B. Iodice v. United States

Despite the Supreme Court's clear instructions in *Swierkiewicz*, the Fourth Circuit has defiantly persisted in applying its factual pleading standard. In *Iodice v. United States*,[96] decided just two months after *Swierkiewicz*, a Fourth Circuit panel again required plaintiffs to plead facts supporting each element of their cause of action. The plaintiffs in *Iodice* alleged that the Department of Veterans Affairs had negligently dispensed narcotics to a third party with the proximate result that the third party killed the plaintiffs' decedents in a car wreck.[97] In examining North Carolina law, the Fourth Circuit concluded that a necessary element of the plaintiffs' negligence claim was that the defendant had knowledge that the third party was intoxicated and about to drive at the time the defendant supplied additional intoxicants.[98] With this in mind, the Fourth Circuit then held that the plaintiffs failed to allege such knowledge and that their negligence claims must, therefore, be dismissed.[99] The Fourth Circuit explained that "[d]ismissal of a complaint for failure to state facts supporting each of the elements of a claim is, of course,

92. *Migdal*, 248 F.3d at 326.

93. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002); *see also* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889 (1990) ("[A Rule 12(b) motion], unlike [a motion for summary judgment], presumes that general allegations embrace those specific facts that are necessary to support the claim." (citing Conley v. Gibson, 355 U.S. 41, 45–46 (1957))).

94. *Swierkiewicz*, 534 U.S. at 514; Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168–69 (1993).

95. *See Swierkiewicz*, 534 U.S. at 512–13.

96. 289 F.3d 270 (4th Cir. 2002).

97. *Id.* at 273.

98. *Id.* at 279–80.

99. *Id.* at 280.

proper."[100] As authority for this interpretation of federal procedural law, the Fourth Circuit cited a state court decision.[101] The court concluded by citing *Swierkiewicz* and explaining the Supreme Court's unanimous reaffirmation of liberal pleading requirements with the observation that "[e]ven in these days of notice pleadings, a complaint asserting a negligence claim must disclose 'that each of the elements is present in order to be sufficient.' "[102] Although recognizing the existence of *Swierkiewicz*, the Fourth Circuit thus persisted in setting a higher pleading standard than the Supreme Court.

As discussed above, the Rules themselves, through their attached Forms, belie the assertion that plaintiffs must specifically allege the presence of each element. Form 9, for example, stands on a simple, conclusory allegation that the "defendant negligently drove."[103] The plaintiffs' complaint in *Iodice* gave the defendant fair notice of the plaintiffs' claim and its grounds by informing the defendant that it was being sued for negligently supplying narcotics on a specified date to a named addict-patient who then collided with the plaintiffs' vehicle.[104] Dismissing a negligence complaint for failing to explicitly allege that the defendant knew the patient would be driving is an example of the formalistic, "game of skill" pleading approach the Supreme Court has explicitly rejected.[105] Not surprisingly, the *Iodice* court's decision was inconsistent with the Supreme Court precedent, and the court was unable to offer any Supreme Court authority to support its holding.

C. Dickson v. Microsoft Corp.

The Fourth Circuit recently reaffirmed the circuit's requirement

---

100. *Id.* at 281.

101. *Id.* (citing Winters v. Lee, 115 N.C. App. 692, 446 S.E.2d 123 (1994)); *cf.* Hanna v. Plumer, 380 U.S. 460, 465, 471 (1965) (reaffirming that in diversity cases "federal courts are to apply state substantive law and federal procedural law" and indicating that a Federal Rule of Civil Procedure is a valid federal procedural law unless it conflicts with the Rules Enabling Act, 28 U.S.C. §§ 2071–2075 (2000), or the Constitution).

102. *Iodice*, 289 F.3d at 281 (citation omitted) (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1249 (2d ed. 1990 & Supp. 2001) and citing Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002))).

103. *See* FED. R. CIV. P. FORM 9.

104. *Iodice*, 289 F.3d at 274.

105. Conley v. Gibson, 355 U.S. 41, 48 (1957); *see also* Walker v. Thompson, 288 F.3d 1005, 1007 (7th Cir. 2002) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002), for the proposition that "there is no requirement in federal suits of pleading the facts or the elements of a claim").

to plead facts in *Dickson v. Microsoft Corp.*[106] The plaintiffs in *Dickson*, Gravity, Incorporated, and its bankruptcy trustees, alleged that Microsoft Corporation, Compaq Computer Corporation, and Dell Computer Corporation violated the Sherman Act by entering into a licensing agreement with anticompetitive provisions.[107] The district court dismissed the plaintiff's First Amended Complaint pursuant to Rule 12(b)(6) and denied, on futility grounds, the plaintiff's motion to file a Second Amended Complaint.[108]

In affirming the dismissal, the *Dickson* majority first noted that as a matter of substantive law, the Sherman Act requires plaintiffs to "prove" or have "proof of" market power or share sufficient to show an unreasonable restraint on trade or anticompetitive effect.[109] Without acknowledging any difference between substantive and pleading requirements, the majority translated this proof requirement into a holding that the plaintiff's complaint "was required to allege facts which, if proven true, would demonstrate" market power or share of the personal computer market.[110] The majority faulted the plaintiff for not providing a sufficient factual basis in its complaint to support its allegations of anticompetitive effects.[111] In support of requiring factual allegations, the majority cited *Iodice* for the proposition that *Swierkiewicz* "did not alter the basic pleading requirement that a plaintiff set forth facts sufficient to allege each element of his claim."[112]

---

106. 309 F.3d 193 (4th Cir. 2002).

107. *Id.* at 198–99.

108. *Id.* at 200.

109. *Id.* at 202, 211.

110. *Id.* at 211.

111. *Id.* at 212–13.

112. *Id.* at 213. As discussed in Part II, this requirement to plead facts is fundamentally inconsistent with the notice pleading standards identified by the Supreme Court and the Rules. As a sign of the weakness of its position, the *Dickson* court relied in part on *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106–07 (7th Cir. 1984). *Dickson*, 309 F.3d at 212–13. Perhaps the *Dickson* court was tempted by the Seventh Circuit's strong factual pleading language in *Car Carriers*. The Seventh Circuit began by acknowledging *Conley*, but then observed, "Nonetheless, as this court has recognized, *Conley* has never been interpreted literally." *Car Carriers*, 745 F.2d at 1106 (citing Sutlif, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984)). The *Dickson* court failed to recognize, however, that the Seventh Circuit abandoned this line of thinking after the Supreme Court *did* interpret *Conley* literally in *Leatherman*. *See, e.g.*, Mid Am. Title Co. v. Kirk, 991 F.2d 417, 421 (7th Cir. 1993) (holding that dismissal is appropriate "only if the plaintiff can prove no set of facts that would allow for recovery" and observing that "[h]ere the defendants were put on notice that compilation was at issue and shall have abundant opportunity to pursue the matter in detail through the discovery process").

D. Dissenting Voices Within the Fourth Circuit

The factual pleading requirement displayed in *Migdal*, *Iodice*, and *Dickson* is not without dissent within the Fourth Circuit. In *Dickson*, Judge Gregory dissented from the majority opinion on the ground that the plaintiff had sufficiently stated its claims to survive a Rule 12(b)(6) motion.[113] Citing *Swierkiewicz*, Judge Gregory observed that "the Supreme Court has made crystal clear, just this past term, that an evidentiary standard does not determine the adequacy of a complaint. It is inappropriate, therefore, to require plaintiffs to plead facts going to that evidentiary standard in a complaint."[114] Turning to an evaluation of Gravity's pleading, Judge Gregory cited *Conley* and observed that the plaintiff's failure to plead market share did not deprive the defendants of notice of the claims pending against them and the grounds on which the claims rest.[115] Echoing the Supreme Court's statements in *Swierkiewicz*, Judge Gregory concluded, "It is not for us to change the rules of civil procedure mid-stream."[116]

In another post-*Swierkiewicz* pleading decision from the Fourth Circuit Court of Appeals, *Byrd v. Baltimore Sun Co.*,[117] the court reversed the dismissal of an employment discrimination complaint.[118] The district court granted a Rule 12(b)(6) motion on the ground that the plaintiff "failed to set forth sufficient facts to establish a prima facie discrimination claim."[119] The court vacated and remanded so that the district court could reconsider the complaint's sufficiency in light of *Swierkiewicz*.[120]

In addition to the per curiam holding in *Byrd* and Judge Gregory's dissent in *Dickson*, a small line of pre-*Swierkiewicz* cases exist in which panels of the Fourth Circuit Court of Appeals have applied a standard closer to notice pleading. The origin of this line, which includes *Edwards v. City of Goldsboro*[121] and *Cortez v. Prince*

113. *Dickson*, 309 F.3d at 216 (Gregory, J., dissenting).

114. *Id.* at 218 (Gregory, J., dissenting) (citation omitted) (citing Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002)).

115. *Id.* at 220 (Gregory, J., dissenting). Judge Gregory concluded that after reading the plaintiff's fifty-eight pages of detailed allegations, "[t]he defendants in this case know *exactly* what conduct is alleged to have violated the antitrust laws, which is all that Rule 8 requires." *Id.* at 221 (Gregory, J., dissenting).

116. *Id.* (Gregory, J., dissenting).

117. 43 Fed. Appx. 702 (4th Cir. 2002) (per curiam).

118. *Id.* at 703.

119. *Id.*

120. *Id.*

121. 178 F.3d 231 (4th Cir. 1999).

George's County Maryland,[122] is *Jordan by Jordan v. Jackson*.[123] *Jordan*, decided shortly after *Leatherman*, involved a § 1983 claim against a Virginia county and the Commissioner of the Virginia Department of Social Services.[124] At issue was the plaintiffs' failure to plead the existence of multiple incidents of misconduct in support of their allegation that county policies had caused a violation of their constitutional rights.[125] Citing *Leatherman*, the Fourth Circuit in *Jordan* observed that there is no requirement to "plead the multiple incidents of constitutional violations that may be necessary at later stages."[126] The court held that the plaintiffs in *Jordan* had given the county notice of the nature and grounds of the claim and reversed the district court's dismissal.[127] The court also cited *Leatherman*'s admonishment that control of discovery and summary judgment motions, not Rule 12(b)(6) dismissals, are the proper mechanisms for addressing unmeritorious suits.[128] Unfortunately, neither the extensive pleadings at issue in *Jordan*, nor those in its progeny, tested the Fourth Circuit's willingness to adopt a simple notice pleading standard where a plaintiff has entirely omitted an element. Thus, even these *Jordan* decisions can be read as consistent with other Fourth Circuit decisions, such as *Iodice*, that require plaintiffs to plead the existence of each element.[129]

Several district courts in the Fourth Circuit have, however, deviated from circuit precedent and applied the Supreme Court's notice pleading standard. In *Jennings v. University of North Carolina*,[130] for example, the Chief Judge of the Middle District of North Carolina denied a Rule 12(b)(6) motion and held that the plaintiffs' conclusory allegation did not warrant dismissal because the Rules do not require plaintiffs to plead specific facts.[131] The judge

122. 31 Fed. Appx. 123 (4th Cir. 2002) (unpublished per curiam).
123. 15 F.3d 333 (4th Cir. 1994).
124. *Id.* at 337.
125. *Id.*
126. *Id.* at 339.
127. *Id.* at 340.
128. *Id.*
129. *See* Cortez v. Prince George's County, Md., 31 Fed. Appx. 123, 129 (4th Cir. 2002) (unpublished per curiam) (dismissing with respect to those civil rights injuries where the plaintiff failed to allege that a county policy or custom produced the injuries); *Jordan*, 15 F.3d at 338 ("Section 1983 plaintiffs . . . must . . . adequately plead and prove the existence of an official policy . . . .").
130. Jennings v. Univ. of N.C., 240 F. Supp. 2d 492 (M.D.N.C. 2002).
131. *Id.* at 502; *see also* Smith v. Chambers, No. 2:02CV10152, 2002 WL 31906277, at *1 (W.D. Va. Dec. 31, 2002) (slip opinion) ("While the plaintiff has not described in his Complaint the facts surrounding such entrustment, the defendants have discovery available to them in order to ascertain such facts."); Miller v. SMS Schloemann-Siemag,

reasoned that "conclusory statements can provide fair notice to Defendants of alleged misconduct."[132]

IV. POSSIBLE MOTIVATIONS FOR REQUIRING FACTUAL PLEADINGS

On the rare occasions when it has given an explanation of its factual pleading requirements, the Fourth Circuit has asserted it believes that Rule 12(b)(6) "is not without meaning" and should operate as a screen against seemingly meritless claims.[133] The court's concern seems to stem primarily from its unwillingness to allow obviously futile suits to progress into discovery.[134] The court seems particularly unwilling to let weak cases go forward against defendants in situations where substantial discovery is likely to result.[135] In *Migdal*, for example, the Fourth Circuit stated, "This requirement [to plead facts] serves to prevent costly discovery on claims with no underlying factual or legal basis."[136] The court's concern about undeserved discovery costs is especially pronounced where the plaintiff has refused to plead factual details after the trial court has afforded the plaintiff an opportunity to amend his complaint.[137]

A desire to conserve judicial resources may also be motivating judges who have persisted in requiring factual pleadings.[138] When

---

Inc., 203 F. Supp. 2d 633, 640 (S.D. W. Va. 2002) (noting that "an element-by-element analysis is unnecessary under notice-pleading standards"); *cf.* Cockerham v. Stokes County Bd. of Educ., ___ F. Supp. 2d ___, 2004 WL 237754, at *3–7 (M.D.N.C. Feb. 3, 2004) (following Fourth Circuit precedent requiring plaintiffs to plead facts supporting each element of their claims but observing that this "heightened pleading standard" imposed by the Fourth Circuit Court of Appeals directly conflicts with the Supreme Court's "clear pronouncement" in *Swierkiewicz*).

132. *Jennings*, 240 F. Supp. 2d at 502.

133. Migdal v. Rowe Price-Fleming Int'l, Inc., 248 F.3d 321, 326 (4th Cir. 2001); *cf.* Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 960 (1990) (discussing the perception of many federal courts that a heightened pleading standard is necessary in civil rights cases because the vast majority of such actions are frivolous).

134. *See Migdal*, 248 F. 3d at 326.

135. *See generally* Brief for Respondent at 34–40, Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) (No. 00-1853) (discussing the costs of allowing conclusory allegations of discrimination to survive motions to dismiss).

136. *Migdal*, 248 F.3d at 326. The court continued that " '[c]onclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition.' " *Id.* (quoting DM Research, Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 55 (1st Cir. 1999)).

137. *See* Dickson v. Microsoft Corp., 309 F.3d 193, 209 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 2605 (2003) (observing critically that the district court gave the plaintiff "ample opportunity to allege facts," but the plaintiff "refused" to take advantage of that opportunity).

138. *See id.* at 212–13 (citing a section of *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106–07 (7th Cir. 1984), in which the Seventh Circuit discussed the costs of litigation

they believe a claim will not survive a summary judgment motion, some judges may feel that the Supreme Court's instruction to deny a motion to dismiss even where "recovery is very remote and unlikely"[139] is wasteful and absurd. Additionally, because most plaintiffs do file extensive pleadings,[140] some judges may have come to expect them.

V. HARMS OF FACTUAL PLEADING REQUIREMENT DECISIONS

Despite their apparent appeal to some judges, the Fourth Circuit Court of Appeals's factual pleading requirements are harmful and unjustified. The court's defiance of clear Supreme Court precedent and the plain language of the Federal Rules of Civil Procedure violates stare decisis and exceeds the court's constitutional authority to interpret legislation. The discrepancy between the Fourth Circuit's

---

and the increasing caseload of the federal courts).

139. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

140. *See generally* Marcus, *supra* note 44, at 1768–69 (discussing discovery scope, default judgment, and early resolution incentives for filing extensive pleadings).

In the Fourth Circuit, where courts still routinely dismiss complaints for failing to plead facts, plaintiffs' filing of detailed factual pleadings must be motivated in part by a desire to avoid a Rule 12(b)(6) dismissal under Fourth Circuit precedent. However, even without the Fourth Circuit's erroneous factual pleading requirement, several legitimate reasons remain for plaintiffs to file detailed factual complaints. Discovery is costly for all sides. Plaintiffs relying on uncertain legal theories can avoid a great deal of wasted effort and expense by pleading their case in detail and getting early rulings on their legal arguments. Attorneys may also wish to use their first court filing to impress their clients by demonstrating their thoroughness and advocacy skills. Laying out a factually detailed and persuasive case in the complaint may also serve a negotiation posturing function. Finally, by alleging each element of their claims in detail, plaintiffs may position themselves for a more searching discovery.

The main disincentive against filing detailed complaints is that plaintiffs may plead themselves out of court by needlessly alleging facts that turn out to be incompatible with any theory of recovery. *See, e.g.*, Thomas v. Farley, 31 F.3d 557, 558–59 (7th Cir. 1994) ("[I]f a plaintiff does plead particulars, and [the defendants] show that he has no claim, then he is out of luck—he has pleaded himself out of court."). This is especially a concern for plaintiffs who have brought a case primarily for its settlement value. Even if the parties know a case is sure to be dismissed at the summary judgment stage, clearing the pleading stage and gaining access to discovery increases a suit's settlement value. *See, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 740 (1975) (observing that suits unlikely to succeed at trial still have settlement value so long as they are able to survive a motion to dismiss); David A. Curran, Note, *Funds v. Big Tobacco and the Proximate-Cause Issue: A Framework for Derivative Injuries*, 80 TEX. L. REV. 393, 426 (2001) ("[S]imply surviving a motion to dismiss dramatically increases the settlement value of a claim."); Laurae Rossi, Note, *Choosing the Best Standard of Pleading Under the 1995 Private Securities Litigation Reform Act, and Why the Ninth Circuit's Standard Under* In re Silicon Graphics *Conquers the Battle of the Circuits*, 31 SW. U. L. REV. 263, 275 (2002) (noting a link between settlement value and survival of a motion to dismiss that is "irrespective of the merits of plaintiff's case").

pleading requirements and the Supreme Court's holdings creates uncertainty for litigants filing claims in the Fourth Circuit and deprives plaintiffs of their procedural rights under the Federal Rules of Civil Procedure. While potentially blocking some meritless claims, factual pleading requirements can also deny legitimate plaintiffs access to discovery and their day in court. Moreover, protecting defendants and judicial resources from meritless claims does not require heightened pleading standards given the Rules' existing mechanisms for sanctioning groundless pleadings, controlling discovery, and disposing of cases through summary judgment.

A. Defiance of Rules and Court

The Constitution gives Congress the authority to regulate procedural practices in federal courts.[141] In the first instance, this legislative authority rests entirely with Congress.[142] However, Congress has exercised this power by delegating rule drafting responsibilities to the Supreme Court subject to a statutory process of congressional review.[143] As the Supreme Court has consistently observed, changes in federal pleading requirements " 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.' "[144]

By imposing a pleading standard contrary to the notice pleading prescribed by the Federal Rules of Civil Procedure, the Fourth Circuit Court of Appeals has intruded upon Congress's Article I legislative authority.[145] When a federal appeals court refuses to abide

---

141. Sibbach v. Wilson & Co., Inc., 312 U.S. 1, 9 (1941) ("Congress has undoubted power to regulate the practice and procedure of federal courts . . . ."); *see* U.S. CONST. art. I, § 8, cl. 9; *id.* art. III, § 2, cl. 2.

142. *See* Gibbons v. Ogden, 22 U.S. 1, 197 (1824) ("[T]he sovereignty of Congress, though limited to specified objects, is plenary as to those objects . . . .").

143. 28 U.S.C. § 2072(a) (2000) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . ."); *id.* § 2074(a) ("The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule."). *See generally* Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1041–73 (1993) (discussing the process by which Congress and the Supreme Court promulgate Federal Rules of Civil Procedure).

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

145. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 66 (1991) (Kennedy, J., dissenting) ("[T]he Federal Rules of Civil Procedure are 'as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule[s'] mandate than they do to disregard constitutional or statutory provisions.' " (alteration in original) (quoting Bank of N.S. v. United States, 487 U.S. 250, 255 (1988))).

by the requirements of federal law, the behavior undermines the integrity of the legal system as a whole.[146] Nor can the Fourth Circuit Court of Appeals claim that it is merely interpreting the language of the Rules since the Supreme Court has clearly settled the meaning of Rule 8(a)(2).[147]

Perhaps even more disturbing is the Fourth Circuit's refusal to follow repeated, unanimous Supreme Court precedent rejecting factual pleading requirements.[148] The court's actions violate fundamental stare decisis principles, sadly refuting Chief Justice Rehnquist's assertion that "[t]his principle is so firmly established in our jurisprudence that no lower court would deliberately refuse to follow the decision of a higher court."[149] As the Supreme Court noted in *Hutto v. Davis*,[150] "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."[151] The refusal of an inferior court to follow the decisions of the Supreme Court is an indefensible attack on the basic structure of the federal judicial system under Article III of the United States Constitution.[152]

B. Effect on Plaintiffs

The Fourth Circuit's refusal to abide by the directives of the Federal Rules of Civil Procedure and the Supreme Court puts litigants in the Fourth Circuit in a difficult and uncertain situation. Supreme Court precedent and the Rules provide that a plaintiff in federal court may file a "short and plain statement"[153] along the lines

146. *See* McArdle, *supra* note 14, at 37 ("This is not an insignificant point. . . . [I]n disregarding the Supreme Court's promulgated and congressionally approved Rule 8 by demanding fact pleading of certain plaintiffs, the subject federal courts were acting lawlessly, or surely beyond their constitutional and statutory authority; a matter of no small consequence.").

147. *See supra* Part II.

148. *Compare, e.g.*, Dickson v. Microsoft Corp., 309 F.3d 193, 212–13 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 2605 (2003) (refusing to accept "conclusory" assertions and affirming dismissal for failure "to allege facts which, if true, would establish [the plaintiff's claims]"), *with, e.g.*, *Swierkiewicz*, 534 U.S. at 512, 514 (holding that heightened pleading requirements conflict with Rule 8(a)(2) and allowing a lawsuit "based on conclusory allegations of discrimination to go forward").

149. Hubbard v. United States, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting).

150. 454 U.S. 370 (1982).

151. *Id.* at 375; *see also Hubbard*, 514 U.S. at 713 n.13 ("We would have thought it self-evident that the lower courts must adhere to our precedents.").

152. *See* U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one supreme court . . . .").

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

of the negligence complaint in Form 9.[154] However, a plaintiff who files such a complaint in the Fourth Circuit risks having his claim dismissed under contrary Fourth Circuit case law. Dismissals under Rule 12(b)(6) operate as adjudications upon the merits unless the district court expressly grants leave to file an amended complaint.[155] Even where a district court grants leave to amend, and the plaintiffs acquiesce to the loss to their statutory right to notice pleading by attempting to file an amended complaint that satisfies the Fourth Circuit's factual pleading requirement, there is still a risk that the plaintiffs will have their amended complaint dismissed because they inadvertently fail to allege every element to the court's satisfaction.

In the Fourth Circuit, pleading can become an end unto itself, in which one misstep can potentially deny a plaintiff his day in court and decision on the merits.[156] It is worth remembering that such "game of skill" pleading practices were found wanting under the Field Code and common law pleading systems and eliminated by the reforms of the Federal Rules of Civil Procedure.[157] Even if the courts allow plaintiffs leave to amend their complaints and all legitimate claims eventually go forward, the time wasted on pleading motions and responses in the Fourth Circuit as a result of the circuit's factual pleading requirement is not insubstantial.

The Fourth Circuit's factual pleading requirement inflicts its worst harm on plaintiffs who cannot plead facts sufficient to establish every element of their claims because much of the evidence they would need to do so is in the defendants' exclusive possession.[158] Where plaintiffs need discovery, a heightened pleading requirement is in practice dispositive of many claims.[159] Without the defendants'

154. FED. R. CIV. P. FORM 9.

155. *See* FED. R. CIV. P. 41(b). *But cf.* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503 (2001) (holding that an "adjudication upon the merits" under Rule 41(b) does not necessarily have claim-preclusive effects).

156. *Cf.* Conley v. Gibson, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome . . . .").

157. *See id.*; *supra* notes 3–24 and accompanying text.

158. Ironically, antitrust cases and discrimination cases, both of which courts have in the past targeted for heightened pleading requirements, are situations where much of the evidence is likely to be in the defendants' possession. *E.g.*, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (noting in an employment discrimination case that "the employer is in the best position to put forth the actual reason for its decision"); Poller v. Columbia Broad. Sys., 368 U.S. 464, 473 (1962) (noting in an antitrust case that "the proof is largely in the hands of the alleged conspirators").

159. *See, e.g.*, Blaze, *supra* note 133, at 962–63 (observing that requiring factual allegation before discovery "imposes an enormous burden that many civil rights plaintiffs find insuperable"); Main, *supra* note 19, at 330 ("Facts to support allegations of civil rights

evidence, plaintiffs cannot survive a motion to dismiss; and without surviving a motion to dismiss, they cannot conduct the discovery necessary to obtain evidence from the defendants. By precluding discovery and, thus, review on the merits, factual pleading requirements invert the basic spirit of the Rules and can operate to deny justice to plaintiffs with legitimate claims.[160]

C. *Unnecessary in Light of the Rules' Other Mechanisms*

As the Supreme Court has repeatedly observed, given the other mechanisms available under the Rules, factual pleading requirements are unnecessary.[161] The Rules' liberal notice pleading standard is only one part of a comprehensive procedural scheme[162] that includes pretrial case management,[163] control of discovery,[164] summary judgment,[165] motions for a more definite statement,[166] and good faith pleading[167] and discovery request[168] certifications. Through the use of these other mechanisms, courts can dispose of unmeritorious suits and protect defendants from unjustified discovery costs without resorting to heightened pleading requirements that deny justice to plaintiffs with legitimate claims.

The Supreme Court has repeatedly instructed that summary judgment and control of discovery, not Rule 12(b)(6) dismissals, are the proper mechanisms for dealing with unmeritorious claims.[169] The Rules give trial judges broad discretion to control the scope, order,

---

violations are, however, more often than not, in the hands of the defendants. Accordingly, the imposition of a burden to plead specific factual allegations can be dispositive of many civil rights claims and have a chilling effect on still others.").

160. Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1023, 1026–27 (1989) (discussing the Federal Rules of Civil Procedure as a reform response to the Code system that unfairly required plaintiffs to plead facts before discovery).

161. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002); *Conley*, 355 U.S. at 47–48; McArdle, *supra* note 14, at 47 ("Detailed pleadings are wholly unnecessary in this scheme of procedure.").

162. *See Swierkiewicz*, 534 U.S. at 513 (observing that "[o]ther provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice pleading standard").

163. FED. R. CIV. P. 16.

164. FED. R. CIV. P. 26(b)(2).

165. FED. R. CIV. P. 56.

166. FED. R. CIV. P. 12(e).

167. FED. R. CIV. P. 11.

168. FED. R. CIV. P. 26(g).

169. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168–69 (1993); Conley v. Gibson, 355 U.S. 41, 47–48 (1957).

extent, and timing of discovery.[170] Where one or more elements of a plaintiff's claim are particularly suspect, judges can limit initial discovery to those suspect elements and allow the defendant to move for summary judgment on the basis of that limited discovery before the case moves into a full discovery period.[171] On such a motion for summary judgment, the burden of production is, of course, squarely on the plaintiff.[172]

For example, in *Dickson v. Microsoft Corp.*,[173] the trial court could have allowed limited discovery on the issue of market power and then granted a motion for summary judgment if the plaintiff could not meet its burden of production.[174] It seems unlikely that such an inquiry would have imposed an undue burden on the defendants. This procedure would have comparable efficiency and cost benefits to a factual pleading requirement without doing violence to the Federal Rules of Civil Procedure. Likewise, rather than denying the plaintiffs an opportunity to prove their claim because of a pleading failure, the trial court in *Iodice v. United States*[175] could have permitted the plaintiffs at least a few short interrogatories and limited depositions seeking information about whether the hospital's employees "knew or should have known" that their "patient was under the influence of alcohol or narcotics" and would be driving shortly.[176]

Rule 11 can also limit the burden that meritless claims impose. Specifically, Rule 11 requires attorneys to certify that "allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after... discovery."[177] Rule 26(g), in turn, requires sanction of parties who make discovery requests to harass or unreasonably burden the other party.[178] Entirely vague complaints can be dealt with through motions

170. *See* FED. R. CIV. P. 16, 26.

171. *See* FED. R. CIV. P. 16, 26, 56.

172. *See* FED. R. CIV. P. 56(e) ("[A]n adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (mandating summary judgment where after adequate time for discovery a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial").

173. 309 F.3d 193 (4th Cir. 2002).

174. *See id.* at 207; *supra* Part III.C.

175. 289 F.3d 270 (4th Cir. 2002).

176. *See id.* at 280; *supra* Part III.B.

177. FED. R. CIV. P. 11(b)(3).

178. *See* FED. R. CIV. P. 26(g)(2)–(3).

under Rule 12(e), compelling plaintiffs to produce more definite statements that give sufficient notice of the claims to enable defendants to respond.[179]

Moreover, the magnitude of the problems to which proponents address heightened pleading requirements—a docket crisis and crushing discovery burden—are somewhat overstated. In the period from 1984 to 1997, the number of civil filings in federal district courts remained nearly constant.[180] Between 1997 and 2000, the number of civil cases pending in federal courts actually decreased by eight percent.[181] And while discovery can undoubtedly be costly in particular suits, it is worth remembering that little or no discovery occurs in most federal cases.[182]

CONCLUSION

The plain language of the Federal Rules of Civil Procedure, history and intent of the Rules, and settled Supreme Court precedent establish that the requirements for surviving a motion to dismiss for failure to state a claim are modest.[183] First, a plaintiff's complaint must contain " 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[184] Second, " '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' "[185]

---

179. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002).

180. John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case out of It . . . in State Court*, 25 HARV. J.L. & PUB. POL'Y 143, 151 n.24 (2001) (citing EXAMINING THE WORK OF STATE COURTS, 1997: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 13 (Brian Ostrom & Neal Kauder eds., 1998)) (reporting that federal filings increased by only four percent compared to a twenty-eight percent increase in state trial courts during the same period).

181. *Id.* (citing L.R. MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2000 REPORT OF THE DIRECTOR 22 (2001)) (reporting that federal trial judges were assigned an average of 500 cases in 2000).

182. *See* Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794, 1798 (2002) ("Empirical studies of discovery have repeatedly disclosed that for most cases in federal court no discovery occurs, or only a few hours are devoted to it."). *See generally* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1393–445 (1994) (arguing that allegations of massive discovery abuse are largely myth, not fact).

183. *See supra* Parts I–II.

184. Conley v. Gibson, 355 U.S. 41, 47 (1957) (footnote omitted) (quoting FED. R. CIV. P. 8(a)(2)).

185. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

So long as notice is satisfied, conclusory allegations are sufficient at the pleading stage, and federal courts must evaluate complaints without regard to the likelihood that the plaintiffs will eventually be able to prove sufficient facts to succeed on the merits.[186]

The Fourth Circuit Court of Appeals, however, continues to defy the Federal Rules Civil Procedure and forty-five years of Supreme Court precedent by requiring plaintiffs to allege facts sufficient to support each element of their claims.[187] The court's decisions violate bedrock stare decisis and separation of powers principles and create uncertainty for plaintiffs filing claims in the Fourth Circuit.[188] The Fourth Circuit's factual pleading requirement deprives plaintiffs of their procedural rights and unfairly injures those plaintiffs who need discovery to obtain evidence.[189] The court's heightened pleading standard is particularly unjustified in light of the numerous alternative mechanisms for early and efficient disposition of unmeritorious claims under the Federal Rules of Civil Procedure.[190] Although several judges within the Fourth Circuit have begun to follow the Supreme Court's pleading precedent,[191] until all Fourth Circuit judges faithfully adhere to the Federal Rules of Civil Procedure, the circuit's heightened pleading standard will continue to harm plaintiffs and the integrity of the judicial system.

KOAN MERCER

186. *See id.* at 514–15.
187. *See supra* Parts III.A–C.
188. *See supra* Parts V.A–B.
189. *See supra* Part V.B.
190. *See supra* Part V.C.
191. *See supra* Part III.D.