

THE FORMS HAD A FUNCTION:
RULE 84 AND THE APPENDIX OF FORMS
AS GUARDIANS OF THE LIBERAL ETHOS
IN CIVIL PROCEDURE

A. Benjamin Spencer*

TABLE OF CONTENTS

INTRODUCTION.....	1114
I. THE DEVELOPMENT OF RULE 84 AND THE OFFICIAL FORMS.....	1115
A. <i>Origins</i>	1115
B. <i>Purpose</i>	1118
II. EARLY EXPERIENCE UNDER THE FORMS.....	1120
A. <i>Early Invocations of the Forms</i>	1120
B. <i>Challenges to the New Regime</i>	1122
III. THE FORMS IN MODERN TIMES	1125
A. <i>Stating an Ordinary Claim</i>	1125
B. <i>Pleading Special Claims</i>	1126
C. <i>Pleading Jurisdiction</i>	1130
D. <i>Other Uses</i>	1131
IV. CONTEMPORARY CHALLENGES TO THE FORMS	1133
A. <i>Judicial Questioning of the Forms</i>	1133
B. <i>The Abolition of the Forms</i>	1136
CONCLUSION	1138

* Earle K. Shawe Professor of Law, University of Virginia School of Law. Copyright © 2015 A. Benjamin Spencer. Thanks to Erin Shaver and Krystal Swendsboe for their research assistance. Thanks also to the Reference Librarians at the UVA Law Library for their research assistance.

INTRODUCTION

*“The appendix of forms accompanying the rules illustrates how simply a claim may be pleaded and with how few factual averments.”*¹

The Appendix of Forms that, from the time of their adoption have accompanied the Federal Rules of Civil Procedure, are a seeming anachronism, more appropriate for a much simpler time that hardly characterizes modern day federal civil litigation. Perhaps the form for a negligence complaint is the most striking in this regard, offering only that at a certain time and place “the defendant negligently drove a motor vehicle against the plaintiff,” causing harm.² Not only does such a complaint fail to typify the negligence claims one might find on any federal docket, but it also fails to reflect the much greater complexity that characterizes modern litigation and life in general.

What, then, could be the continuing point of having the forms at all? Indeed, that is the question the Advisory Committee on Civil Rules (“Advisory Committee”) has asked and answered quite recently: it has concluded that the Official Forms no longer serve any useful purpose³ and may therefore be discarded into the waste bin of history. Seemingly without much further thought, the Standing Committee promptly concurred,⁴ as did the Judicial Conference,⁵ and the U.S. Supreme Court.⁶

Might it be true that the forms have outlived their usefulness? And if no longer of any use, were the forms ever of any real utility? On the occasion of the abrogation of the Official Forms, this article takes the opportunity to review the history and use of the forms, finding that they had more value than the current rulemakers cared to acknowledge: The principal function of the forms was to reify the liberal vision of the Federal Rules and to guard against deviations therefrom. Unfortunately, as that liberal vision has given way to a more restrictive view⁷ in what Stephen Subrin refers to as the “fourth era” of civil proce-

¹ Sparks v. England, 113 F.2d 579, 581 (8th Cir. 1940).

² FED. R. CIV. P. Form 11.

³ See Proposed Amendment to Fed. R. Civ. P. Rule 84, Committee Note (“The purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled Accordingly, . . . Rule 84 and the Appendix of Forms are no longer necessary. . . .”).

⁴ Patricia W. Moore, *Standing Committee Approves Proposed FRCP Amendments*, CIV. PROC. & FED. CTS. BLOG (June 7, 2014), <http://lawprofessors.typepad.com/civpro/2014/06/standing-committee-approves-proposed-frcp-amendments.html> (“The Standing Committee met on May 29–30, 2014 in D.C. and unanimously approved the amendments as they were modified by the Advisory Committee at its meeting in April.”).

⁵ The Judicial Conference approved the proposed amendments on September 16, 2014, forwarding them to the Supreme Court for its consideration.

⁶ See Order Approving Amendments to the Federal Rules of Civil Procedure, H.R. Doc. No. 114-33 (2015).

⁷ See A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 353–54 (2010) (explaining that “a ‘restrictive ethos’ prevails in procedure today, with many rules being developed, interpreted, and applied in a manner that frustrates the

dure,⁸ the unyielding simplicity and permissiveness of the forms became too much for the otherwise changing system to bear. Below, then, is a eulogy of the forms.⁹

I. THE DEVELOPMENT OF RULE 84 AND THE OFFICIAL FORMS

A. *Origins*

Appending forms to rules of court was a common practice at the time the Federal Rules of Civil Procedure were first adopted. The practice of including exemplary forms appears to have been a legacy of period when the legal system was characterized by the forms of action, which, in their day, required rigid and precise formulations of a claim in a writ from the Crown to gain access to the legal system and obtain a remedy.¹⁰ For example, the *writ of right*—which was the writ used by a tenant (call him “A”) who claimed that another (call him “B”) was in wrongful possession of land—would be addressed by the king to the landowner (call him “C”) in the following form:

I command you that without delay you hold full right to A . . . concerning a virgate of land in Middleton which he claims to hold of you by such and such free service, and unless you do it my sheriff of Northamptonshire shall do it, that I may hear no further complaint about this matter for default of justice.¹¹

A tenant out of possession had to obtain such a writ and seek relief from his immediate lord or the judges of his lord’s feudal court.¹² However, if the claimant to the property purported to be the owner of the land and not a mere tenant, the writ of right would have been inappropriate. Instead, the owner—referred to as a “tenant in chief” because he claimed the land directly from the king—would need a different writ, referred to as a *Praeceptum quod reddat*, which employed the following language:

Command B that justly and without delay he render to A a hide of land in Middleton, whereof A complains that B unjustly deforces him, and if he will not

ability of claimants to prosecute their claims and receive a decision on the merits in federal court”).

⁸ Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839 (2014).

⁹ I use the term eulogy only to signify the impending elimination of the forms. At the time of this writing, Congress had yet to weigh in on the matter (this piece may be published after the time for them to do so expires); however, there is no prospect that Congress will intervene to block their abrogation.

¹⁰ F.W. MAITLAND, *EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW* 314 (A.H. Chaytor & W.J. Whittaker eds., 1909) (“From time to time he [the king] interferes with ordinary litigation; at the instance of a litigant he issues a writ commanding a feudal lord or a sheriff to do justice . . .”).

¹¹ *Id.* at 317.

¹² *See id.* at 307.

do it, summon him that he be before my justices at such a place and time to answer why he has not done it.¹³

Use of the wrong writ meant that the defendant was not obliged to respond, which would prevent the claimant from receiving any relief.¹⁴ Thus, it was important that the proper form be used for the writ when commencing an action.

Given their significance, it was beneficial for the proper formulations for the various forms of action to be documented and compiled for use by lawyers representing persons with various claims. This was done quite early in English legal history by Ranulf de Glanvill, the “Chief Justiciar” (roughly akin to a prime minister) of England during the reign of King Henry II.¹⁵ Circa 1188, Glanvill produced the first treatise on the laws of England.¹⁶ This work included an explanation of the then extant legal process and systematic reference to the writs available at that time for a wide variety of circumstances, from a tenant in wrongful possession of land¹⁷ to disputes over proper entitlement to a church.¹⁸

Much later, we see extensive compilations of forms illustrating how to plead certain actions. For example, the widely used and highly regarded nineteenth century *Treatise on Pleading* by Joseph Chitty contained an entire volume of forms that served as a compendium of pleading examples covering every conceivable type of claim or request that needed to be presented to a court.¹⁹ Reviewing Chitty’s forms reveals detailed fill-in-the-blank forms for matters as diverse as “Writ of Entry to recover the Possession of Land,”²⁰ “Declarations in Action Removed from Inferior Courts,”²¹ “Commencement of a Plea in Bar,”²² and “Action to recover a Penalty of £100 for bribing a Voter at a Parliamentary Election.”²³ By the 1930s when the Federal Rules of Civil Procedure were under development, the practice guides for many American states as well as for England included an appendix of forms spelling out how to state the myriad claims one might assert.²⁴

¹³ *Id.* at 317.

¹⁴ *Id.* at 315 (“There is good reason to believe that Henry, in some ordinance lost to us, laid down the broad principle that no man need answer for his freehold without royal writ. Every one therefore who demands freehold land must obtain a writ; otherwise his adversary will not be bound to answer him.”).

¹⁵ F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 13 (1908).

¹⁶ RANULF DE GLANVILL, *TRACTATUS DE LEGIBUS ET CONSUECUDINIBUS REGNI ANGLIAE* (ca. 1188).

¹⁷ *See id.* at 5.

¹⁸ *See id.* at 80.

¹⁹ *See* 2 JOSEPH CHITTY, *CHITTY’S TREATISE ON PLEADING* (16th American ed. 1879).

²⁰ *Id.* at 118.

²¹ *Id.* at 6.

²² *Id.* at 19.

²³ *Id.* at 92.

²⁴ *See, e.g.*, English Annual Practice (1937) Appendix A to M inclusive; 2 Mass. Gen. Laws (Ter. Ed., 1932) ch. 231, § 147, Forms 1–47; Conn. Practice Book (1934) Rules, 47–68, pp. 123–427.

Thus, it is not surprising that the drafters of the Federal Rules would follow suit by appending official forms to their work. This was achieved through a rule that referenced the forms, coupled with an Appendix containing the forms. What ultimately became Rule 84 initially appeared as Rule 86 and read as follows:

Rule 86. Use of Forms. The forms attached to these rules in the Appendix of Forms, with appropriate changes as circumstances may require, shall be considered sufficient under these rules.²⁵

By November of 1937, proposed Rule 86 had been revised substantially:

Rule 86. Forms. The forms contained in the Appendix of Forms are intended to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate.²⁶

The note accompanying this revision explained that “[t]his change is to make it clear that the rules control the forms, and that the forms do not supersede the rules.”²⁷ In presenting the forms, the Committee led with an “Introductory Statement” that announced, “The following forms are intended for illustration only. They are limited in number. No attempt is made to furnish a manual of forms.”²⁸ This limitation—there were only twenty-seven forms²⁹—was an innovation, as predecessor form compilations on which the Official Forms in the Federal Rules were based were voluminous and seemingly comprehensive.³⁰

Turning to the original Official Forms themselves, their content reflects their lineage in the predecessor forms discussed above. When one consults Chitty’s treatise and flips to the form for a complaint “Against the Owner of a Carriage for negligent driving,” one finds the following allegation:

For that the defendant . . . so negligently drove his horse and carriage, that the same struck against the carriage and horse of the plaintiff, whereby the plaintiff was hurt and prevented from following his business, and incurred expense in endeavoring to be cured.³¹

²⁵ REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE 215 (Apr. 1937).

²⁶ FINAL REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE 55 (Nov. 1937).

²⁷ *Id.* at 56.

²⁸ FED. R. CIV. P. Appendix of Forms, Introductory Statement (2006).

²⁹ That the forms were limited rather than comprehensive seemed to be lamentable to some, at least to the extent they left certain concepts within the Rules unilluminated. For example, in 1943 a proponent of having greater guidance regarding the grounds that could support a new trial motion under Rule 59 felt that because articulating all of the grounds would prove too difficult, the Official Forms could be enlisted to do the job: “I am inclined to believe that instead of attempting such an amendment, it would be better if illustrative forms of a motion for a new trial in a jury and in a non-jury case could be added to the Appendix of Forms.” *Open Forum: Practice and Procedure*, 10 INS. COUNSEL J. 33, 37 (1943).

³⁰ For example, the forms appended to Connecticut’s 1934 rules of practice were 680 in number. *THE CONNECTICUT PRACTICE BOOK OF 1934* (1934).

³¹ CHITTY, *supra* note 19, at 574–75.

The resonance of this form from Chitty with the form for a complaint for negligence in the 1938 Federal Rules of Civil Procedure—which alleged that “defendant negligently drove a motor vehicle against plaintiff” and was thus “injured [and] was prevented from transacting his business”³²—is not coincidental. Charles Clark, the reporter to the first Advisory Committee, revealed that original Form 9 was “copied directly from the official form in Massachusetts. . . . It in turn is copied directly from Chitty and is the common law form of the action of trespass on the case.”³³ Clark also acknowledged that other forms were direct descendants of the common law forms: “Forms 4, 5, 6, 7 and 8 are developed directly from the common law forms in the action of general assumpsit.”³⁴

B. Purpose

Although the forms trace their lineage to the common law forms used by the states and in England, the purpose of including the forms along with the new Federal Rules was not to perpetuate formalistic pleading but quite the opposite—to buttress the new vision of pleading espoused by the drafters of the rules. By now we should be quite familiar with the deliberate objective of the original Advisory Committee to eliminate the fact pleading that was prevalent in the codes at the time and move towards a simplified general form of pleading.³⁵ Charles Clark explained the rationale behind the abandonment of fact pleading on many occasions. During the road show presenting the rules to members of the American Bar Association in Cleveland, Ohio, Clark remarked:

I think that the idea that you can pin another fellow down by the pleadings so that he can not escape from it is just a dream that never was successful anywhere, and that the courts have wasted more time over the years in trying to per-

³² FED. R. CIV. P. Form 9 (1938).

³³ See RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND PROCEEDINGS OF THE INSTITUTE OF FEDERAL RULES, CLEVELAND, OHIO 222–23 (William W. Dawson ed., 1938) [hereinafter CLEVELAND INSTITUTE PROCEEDINGS]; see also 2 Mass. Gen. Laws (Ter. Ed., 1932) ch. 231, § 147, Form 13 (“[T]he defendant so negligently and unskillfully [*sic*] drove a motor vehicle in a public highway, called _____ street, in Boston, that by reason thereof the said motor vehicle struck the plaintiff . . .”).

³⁴ FEDERAL RULES OF CIVIL PROCEDURE AND PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C., AND OF THE SYMPOSIUM AT NEW YORK CITY 43 (Edward H. Hammond ed., 1938) [hereinafter WASHINGTON & NEW YORK FRCP PROCEEDINGS]; see also Ralph C. Barnhart, *Pleading Reform in Arkansas*, 7 ARK. L. REV. 1, 24 (1952–1953) (“Here will be seen evidence of the Federal Rules as lineal descendants of common law pleading for some of the forms are clearly taken from common law declarations in assumpsit and trespass on the case.”); CLEVELAND INSTITUTE PROCEEDINGS, *supra* note 33 at 227 (“Some of you who may have felt we are getting a little too far away from the common law ought to feel rather better by this, since it shows that . . . in the most ordinary, simple cases—contracts, debts and negligence—are based . . . on the common law forms, which have been found useful and . . . adequate for years.”).

³⁵ CLEVELAND INSTITUTE PROCEEDINGS, *supra* note 33, at 220 (“These pleadings do call for what we should fairly term rather general pleadings.”).

fect allegations which make narrow issues than any possible gain can ever be worth.³⁶

To back up this goal, the drafters offered the forms as illustrations of the simplified pleading that they contemplated more so than as documents intended for actual use in pleading. Clark described the forms early on as “examples of procedure to be followed” but “not . . . a lawyer’s manual or form book.”³⁷ He later remarked,

Those forms are not intended to be a desk manual so that whenever you have a case you won’t have to do any thinking about it. . . . That is not the purpose. The purpose is to illustrate the rules. These are the pictures that we hope will make the rules alive to you.³⁸

Given the predecessor fact-pleading regime to which many contemporary practitioners were accustomed, some were not enamored with forms that seemed over-simplified and devoid of facts. In response to the argument that the statement contained in Form 9 (the negligence complaint) was too thin, Clark defended the sufficiency of its simplicity when he stated,

[I]f you are not looking for admissions or for something that will take the place of proof, if you are looking for a general statement which will send the case through the proper channels of the court and eventually provide for *res adjudicate*, how could you ask for anything more? You have the case here differentiated from all other situations giving rise to legal relations requiring court action. It is the case of the pedestrian-automobile accident.³⁹

Elaborating on the same theme at a New York symposium on the new rules, Clark expanded:

[A]n allegation which says simply that the defendant did injure the plaintiff through his negligence is too general and would not stand, for really that tells you no differentiating features about the case whatsoever . . . while on the other hand . . . the statement of the act in question in a general way, and with the characterization that it is negligent, is sufficient. That is the allegation in this form (Form 9). Here, instead of saying defendant’s negligence caused the injury, you say that the defendant negligently drove his automobile against the plaintiff, who was then crossing the street, and you have then the case isolated from every other kind of case of the same character, really from every other case. . . . At the pleading stage, in advance of the evidence, before the parties know how the case is going to shape up, that is all, in all fairness, you can require.⁴⁰

For Clark—and presumably for the other drafters as well—the pleadings were not intended to serve additional functions beyond informing the defendant

³⁶ *Id.* at 220.

³⁷ Charles E. Clark, *Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 451 & n.43 (1936).

³⁸ WASHINGTON & NEW YORK FRCP PROCEEDINGS, *supra* note 34, at 42.

³⁹ *Id.* at 44.

⁴⁰ *Id.* at 241.

of the nature of the action and distinguishing it from others.⁴¹ Obtaining further information was the office of the discovery devices the drafters created:

[J]ust send around a series of questions to your opponent and ask him to answer them, and he is expected to do it. That isn't part of the pleading; that is Deposition and Discovery, and is mainly there for the purpose of giving you information to prepare your case. . . . That is the way to clear up points of dispute, not by the pleadings proper.⁴²

Thus, we see a clear intention that the Official Forms be regarded as the examples of the new simplified pleading regime, a message the drafters felt would not be sufficiently clear or embraced were lawyers left to the guidance of the rules alone.

II. EARLY EXPERIENCE UNDER THE FORMS

A. *Early Invocations of the Forms*

From the beginning of the life of the Federal Rules, we see the forms fulfilling the function envisioned by the drafters, as they were invoked by courts and litigants on many occasions to confirm that the new rules did not require particularized pleading in the ordinary case. For example, in *Sierocinski v. E.I. Du Pont de Nemours & Co.*⁴³ the plaintiff alleged that the defendant was negligent in manufacturing a dynamite cap but did not specify what actions of the manufacturer were negligent in particular. As a result, the district court granted the defendant's "motion to strike" the complaint because it failed to set forth any specific act of negligence.⁴⁴ The Third Circuit reversed, citing Form 9 as supporting the notion that a general allegation of negligence sufficed, and added, "[i]f defendant needs further information to prepare its defense it can obtain it by interrogatories."⁴⁵ Similarly, in *Sparks v. England*,⁴⁶ a defendant complaining that the plaintiff had failed to plead specific facts showing that the alleged tort was "willful" was rebuffed by the court with a reference the Official Forms:

The Rules of Civil Procedure do not require that a plaintiff shall plead every fact essential to his right to recover the amount which he claims. The requirement is, "a short and plain statement of the claim showing that the pleader is entitled to relief," and "a demand for judgment for the relief to which he deems himself entitled." The appendix of forms accompanying the rules illus-

⁴¹ Charles E. Clark, *Summary Judgments*, 2 F.R.D. 364, 366 (1941) ("The essence of modern pleading is the generalized form of statement which gives fair notice of opposing claims, but avoids the detailed particularization of the old special pleading. . . . Hence the trend is to such simple forms of allegation and denial as are shown by the forms attached to the new federal rules . . .").

⁴² WASHINGTON & NEW YORK FRCP PROCEEDINGS, *supra* note 34, at 42.

⁴³ *Sierocinski v. E.I. Du Pont de Nemours & Co.*, 103 F.2d 843 (3d Cir. 1939).

⁴⁴ *Id.* at 843.

⁴⁵ *Id.* at 844.

⁴⁶ *Sparks v. England*, 113 F.2d 579 (8th Cir. 1940).

trates how simply a claim may be pleaded and with how few factual averments.⁴⁷

Other courts were in accord with this view.⁴⁸ Commentators of the day, too, regularly invoked the forms to support the assertion that fact pleading had been slayed by the new Federal Rules.⁴⁹ Clark himself would continue to reiterate this point as well, writing that the abandonment of code pleading's emphasis on pleading facts "is shown more clearly in the federal Appendix of Forms."⁵⁰

Although the Official Forms were intended to illustrate the drafters' vision, early understanding of the forms was that they also were sufficient if used.⁵¹ In *Connecticut General Life Insurance Co. v. Cohen*,⁵² a New York court rejected a challenge to the sufficiency of a jurisdictional allegation because the plaintiff had simply invoked the language found in Form 2—"the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000."⁵³ Specifically, the court wrote, "[t]his is sufficient under Rule 84. . . . Jurisdiction is sufficiently alleged if Form 2 in the Appendix of Forms is followed."⁵⁴ The court in *Corcoran v. Royal Development Co.*⁵⁵ similarly acknowledged the sufficiency of the forms: "The complaint alleges: 'Third: The matter in controversy exceeds, exclusive of interest and costs, the sum of Three thousand (\$3,000.00) Dollars.' This allegation standing alone is all that the pleader need allege. See Form 2."⁵⁶ One court went as far as to strike specific allegations of negligence because under "the New Rules" and Form 9, "a mere general charge of negligence is sufficient" and thus "the allegations contained in the third paragraph of the petition have now no place therein."⁵⁷ Although this approach would be at odds with the generally accepted view that the forms were not mandatory, it confirms the contemporaneous treatment of the Official Forms as more than hortatory.

⁴⁷ *Id.* at 581 (citations omitted).

⁴⁸ *See, e.g.,* *Swift & Co. v. Young*, 107 F.2d 170, 172 (4th Cir. 1939) (citing then-Form 9 to beat back a pleading sufficiency challenge).

⁴⁹ *See, e.g.,* Marlyn E. Lugar, *Common Law Pleading Modified Versus the Federal Rules*, 53 W. VA. L. REV. 195, 251 (1951) ("The official forms in the appendix to the Federal Rules indicate that the rule requiring one to plead according to the legal effect has been abolished and that those rules require no verbalism to state a claim."); Walter G. Schwartz, Comment, *Negligence Pleading: Alleging Defendant's Breach of Duty*, 35 CAL. L. REV. 267, 268 (1947) ("[A]s against a general demurrer . . . it is sufficient to allege that the defendant negligently did some act, without specifying the exact means or manner. California cases and the Federal Rules of Civil Procedure are in accord.") (citing then-Form 9, now Form 11).

⁵⁰ Charles E. Clark, Book Review, 62 YALE L.J. 292, 296 (1953).

⁵¹ *See, e.g.,* *The Official Forms*, 4 FED. R. SERV. 954, 954 (1941) ("Nevertheless, the forms should normally be considered sufficient as against a motion to dismiss for failure to state a claim.").

⁵² *Connecticut Gen. Life Ins. Co. v. Cohen*, 27 F. Supp. 735 (E.D.N.Y. 1939).

⁵³ *Id.* at 736.

⁵⁴ *Id.*

⁵⁵ *Corcoran v. Royal Dev. Co.*, 35 F. Supp. 400 (E.D.N.Y. 1940).

⁵⁶ *Id.* at 401.

⁵⁷ *Hardin v. Interstate Motor Freight Sys., Inc.*, 26 F. Supp. 97, 97 (S.D. Ohio 1939).

Although a major function of the forms was to disabuse observers of the notion that the fact pleading of old survived the advent of the Federal Rules, they also illuminated the nature of practice under the new rules in other ways. For example, one question raised early on was whether the proper motion in response to a defective summons or an insufficient service of process was a motion to quash or a motion to dismiss—the term “motion to quash” did not appear in the Rules but was theretofore the typical method of responding to a deficient service of process. Although one court concluded “[u]nder the new Rules of Civil Procedure . . . the motion to dismiss on the ground of insufficiency of process is the proper procedure,”⁵⁸ one commentator at the time pointed out that Form 19 contemplated the use of a motion to quash. Form 19 then read:

To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds (a) that the defendant is a corporation organized under the laws of Delaware and was not and is not subject to service of process within the Southern District of New York, and (b) that the defendant has not been properly served with process in this action.⁵⁹

The commentator thus concluded that the motion to quash remained available under the new rules. To cite another example, in support of his view that it was permissible to have “speaking motions” that included facts in support of a motion, original Advisory Committee member Edson Sunderland wrote, “[i]t is obviously contemplated that facts may be set forth as grounds of the motions presenting most of these [Rule 12] defenses” and cited Form 19 as support.⁶⁰

B. *Challenges to the New Regime*

Notwithstanding the clear message of the drafters regarding their intent to depart from the formalized pleading under the codes—as illustrated by the Official Forms—resistance to liberal pleading remained. Although, as just discussed, the forms were invoked in response to such resistance, it appears their illustrative—rather than authoritative—status provided some courts with a basis for disregarding them. Several facts demonstrated that the forms could be regarded as merely illustrative. Recall that Charles Clark stated that the forms did not provide a manual but rather “[t]he purpose is to illustrate the rules.”⁶¹ Further, the “Introductory Statement” that appeared before the forms read, “The

⁵⁸ *Smith v. Belmore*, 1 F.R.D. 633, 634 (E.D. Wash. 1941).

⁵⁹ Claude H. Brown, *Some Problems Concerning Motions Under Federal Rule 12(b)*, 27 MINN. L. REV. 415, 417 (1943) (quoting Form 19).

⁶⁰ EDSON R. SUNDERLAND, *JUDICIAL ADMINISTRATION: A STUDY OF THE ORGANIZATION AND JURISDICTION OF COURTS* 878 n.88 (2d ed. 1948).

⁶¹ WASHINGTON & NEW YORK FRCP PROCEEDINGS, *supra* note 34, at 42; *see also* JAMES WILLIAM MOORE & JOSEPH FRIEDMAN, *MOORE'S FEDERAL PRACTICE UNDER THE NEW FEDERAL RULES* § 84.01 (1938) (“They are limited in number . . . and, therefore, are mainly illustrative.”).

following forms are intended for illustration only.”⁶² Finally, a prior version of Rule 84 that would have provided that the forms “shall be considered sufficient under these rules” was rejected in favor of the version of Rule 84 that ultimately was promulgated, pronouncing the rules as indicative rather than sufficient.⁶³

Two early decisions were notable for their espousal of the “merely illustrative” view. In *Washburn v. Moorman Manufacturing Co.*,⁶⁴ a California court rejected the plaintiff’s use of one of the Official Forms by stating, “[t]hese forms are merely to indicate the simplicity and brevity of statement which the rules contemplate. . . . In the instant case no fact is stated to support the conclusion of ‘implied contract’ to pay.”⁶⁵ More dramatic, perhaps, was the court’s rejection of the sufficiency of the forms in *Employers’ Mutual Liability Insurance Co. of Wisconsin v. Blue Line Transfer Co.*:

It is contended, however, by the plaintiff that its complaint is in substantial compliance with the form prescribed by the Supreme Court in adopting the New Rules of Civil Procedure. An examination of the form supports plaintiff in its contention. However, these forms do not dispense with the necessity, as occasion may require, for a statement of certain details or particulars which would enable the defendant more readily to prepare and file a responsive pleading.⁶⁶

The response to these cases was a 1946 proposal to amend Rule 84 to make explicit what the preponderance of courts had already recognized: that the Official Forms were sufficient and could be relied upon if used to withstand challenge. This was achieved by amending Rule 84 to read as follows:

The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate, ~~subject to the provisions of these rules~~, the simplicity and brevity of statement which these rules contemplate.⁶⁷

Thus, the 1946 amendment resurrected the abandoned language from the April 1937 proposed Rule 86, retaining the last clause added in November of that same year. More than that, the amendment deleted the language subjecting the forms “to the provisions of these rules,” a move that placed them on par with the Rules themselves rather than subordinate to them.⁶⁸ The note accompanying this change explained that the change was made “to discourage isolated results

⁶² FED. R. CIV. P. Appendix of Forms, Introductory Statement (2006).

⁶³ FED. R. CIV. P. 86 (Apr. 1937 draft).

⁶⁴ *Washburn v. Moorman Mfg. Co.*, 25 F. Supp. 546 (S.D. Cal. 1938).

⁶⁵ *Id.* at 546.

⁶⁶ *Employers’ Mut. Liability Ins. Co. v. Blue Line Transfer Co.*, 2 F.R.D. 121, 123 (W.D. Mo. 1941).

⁶⁷ ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 118 (June 1946).

⁶⁸ Some members of the bar were not supportive of this change. See, e.g., *First Report of Special Committee of the District of Columbia Bar Regarding Draft of Proposed Amendments to Federal Rules of Civil Procedure*, 11 J. B. ASS’N D.C. 439, 450 (1944) (“[I]t is deemed unwise to bind a court in advance to any crystallized form of pleading which may or may not fit the particular claim to which it is sought to be applied.”).

such as those found in *Washburn v. Moorman Mfg. Co.* [and] *Employers Mutual Liability Ins. Co. of Wisconsin v. Blue Line Transfer Co.*,⁶⁹ the cases discussed above. Although the amendment neglected to revise the Introductory Statement that seemed to limit the forms to illustrative status,⁷⁰ the revised language of Rule 84 left no doubt about the matter.⁷¹

Nevertheless, resistance to liberal pleading endured in many quarters—something that the Supreme Court stepped in to address in its 1957 decision in *Conley v. Gibson*.⁷² Rejecting the defendants' assertion that the plaintiffs were obliged to plead the facts underlying their discrimination claims, the Court wrote,

The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is 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. To the contrary, all the Rules require 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. The illustrative forms appended to the Rules plainly demonstrate this.⁷³

Contemporaneous academic commentary echoed the connection between the forms and the looser approach to pleading sanctioned under the Rules and affirmed by *Conley*.⁷⁴ Indeed, the great Jack Weinstein valorized the Official Forms not too long after this time when he noted that practice under the 1962 New York Civil Practice Law and Rules ("CPLR") would have been enhanced by preparation of an official set of forms to avoid the inevitable pleading disputes that would arise under those rules.⁷⁵

⁶⁹ ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, *supra* note 67, at 119.

⁷⁰ MOORE'S FEDERAL RULES AND OFFICIAL FORMS 176 (1947).

⁷¹ At the same time Rule 84 was amended as described, Rule 12(e) was amended to eliminate the motion for a bill of particulars, a device whose existence was in tension both with the liberal pleading standard of Rule 8(a) and the provision for expansive discovery in the Federal Rules. See FED. R. CIV. P. 12(e), 1946 Advisory Committee Note.

⁷² *Conley v. Gibson*, 355 U.S. 41 (1957).

⁷³ *Id.* at 47.

⁷⁴ See, e.g., Robert Kovach, *Problems of Plaintiff in Pleading Negligence*, 23 OHIO ST. L.J. 435, 449 (1962) (citing the forms as confirmation that the Rules approve of pleading negligence in the style permitted under the common law); Roy F. Shields, *Proceedings of the Seminar on Protracted Cases for United States Judges: Advantages to a Trial Lawyer of a Pre-Trial Conference*, 23 F.R.D. 319, 344 (1958) ("While I find no authority for notice pleadings in the body of the Federal Rules, there is support for them in the Appendix of Forms, 28 U.S.C.A. For example, Form 4 indicates that in an action on an account the complaint need allege only that 'defendant owes plaintiff ten thousand dollars according to the account hereto annexed as Exhibit A.'"); Note, *The Admission in Evidence of Pleadings Under the Codes and Under the Federal Rules of Civil Procedure*, 106 U. PA. L. REV. 98, 107 (1957) ("Examples annexed to the rules make clear that considerably less detail is required than in code jurisdictions. Emphasis is on the giving of notice, supplementary discovery procedures being available for exploration of fact.")

⁷⁵ Jack B. Weinstein, *Trends in Civil Practice*, 62 COLUM. L. REV. 1431, 1439-40 (1962) ("Much of the difficulty with pleading in New York could be avoided if an appendix of

III. THE FORMS IN MODERN TIMES

Since the 1960s through the present, the Official Forms have been used in ways similar to how they have been used from the beginning: as a source of instructional guidance for how to plead both ordinary and special claims like fraud and patent claims, as well as the pleading of jurisdiction and other matters. Below is a brief sampling of the more recent judicial output on this score.

A. *Stating an Ordinary Claim*

The Supreme Court's most recent invocation of the forms was in *Swierkiewicz v. Sorema*,⁷⁶ in which it rebuffed an attempt to require the plaintiff to plead additional facts supporting his claim of age and national origin discrimination by citing to the "simple requirements of Rule 8(a)."⁷⁷ In the Court's words, these "simple" requirements "are exemplified by the Federal Rules of Civil Procedure Forms, which 'are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.'"⁷⁸ Justice Stevens cited to the forms in his dissent in *Bell Atlantic Corp. v. Twombly*⁷⁹ as a basis for opposing the majority's reading of a fact-pleading "plausibility" requirement into Rule 8(a); he wrote, "The pleading paradigm under the new Federal Rules was well illustrated by the inclusion in the appendix of Form 9, a complaint for negligence," which clearly permits what "would have been called a 'conclusion of law' under the code pleading of old."⁸⁰ Lower courts have done what the *Swierkiewicz* court did with Form 9 (now Form 11)—deploy it to push back against urgings to impose fact-pleading requirements on plaintiffs.⁸¹ Obviously, the Supreme Court itself has not embraced

forms were promulgated by the Judicial Conference. This would follow the helpful practice in England, the federal courts, Connecticut, and other jurisdictions. While the legislature struck out of the CPLR all references to official forms, it was understood that there was no objection to preparation of an official set of forms. Standard, simple forms in pleading as well as other areas could greatly reduce the burden of paper work now weighing down lawyers, judges, and clerks."); see also Jack B. Weinstein & Daniel H. Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 COLUM. L. REV. 518, 523 (1957) ("An appendix of forms can be utilized to clarify the rules and to illustrate the specificity and simplicity desired.").

⁷⁶ *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002).

⁷⁷ *Id.* at 513.

⁷⁸ *Id.* at 513 n.4 (quoting Rule 84).

⁷⁹ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

⁸⁰ *Id.* at 575–76 (Stevens, J., dissenting).

⁸¹ See, e.g., *Ruffin v. Nicely*, 183 Fed. App'x 505, 513 (6th Cir. 2006) ("In light of *Swierkiewicz* and Form 9, Ruffin need not allege all elements of or all facts necessary for a prima facie claim under any of his theories of relief."). The court in *In re Initial Public Offering Securities Litigation*, did a particularly nice job of articulating the form-based argument against a requirement of heightened fact pleading:

Rule 8(a) does not require plaintiffs to plead the legal theory, facts or elements underlying their claim. There is *nothing* in Form 9, for example, to support plaintiff's accusation of negligence. "It does not say, for example, whether the hypothetical defendant was speeding, driving without lights, or driving on the wrong side of the road." *Atchinson v. District of Columbia*, 73

such a use of the forms given its revised approach to pleading in *Twombly* and *Ashcroft v. Iqbal*.⁸² Indeed, the Advisory Committee on Civil Rules has cited the tension between *Twombly* and *Iqbal* on the one hand and the Official Forms on the other as one justification for abolishing the forms.⁸³

B. Pleading Special Claims

1. Fraud Allegations

From the beginning, the Federal Rules have made special provision for the pleading of fraud allegations, requiring that “the circumstances constituting fraud or mistake shall be stated with particularity.”⁸⁴ What such particularity entailed has similarly been illustrated in the Official Forms since the inception of the Federal Rules in Form 13: “Defendant C. D. on or about . . . conveyed all of his property, real and personal [or specify and describe] to defendant E.F. for the purpose of defrauding plaintiff.”⁸⁵ Thus, courts took to citing Form 13 to reject assertions that fraud claims were insufficiently pleaded. For example, in *Powell, Inc. v. Abney*,⁸⁶ a Texas court used Form 13 in this way:

Union Carbide next contends that the Plaintiff’s third-party complaint should be stricken for failure to aver the circumstances of fraud with particularity as required by Rule 9(b). Rule 9(b), however, must be read in conjunction with the Rule 8(a), which merely requires “a short and plain statement of the claim.” Indeed, Official Form 13 of the Federal Rules of Civil Procedure clearly illustrates that the federal rules merely require notice pleading.⁸⁷

In *In re Longhorn Securities Litigation*,⁸⁸ another court did the same, rejecting the defendants’ challenge to the sufficiency of the plaintiffs common law fraud, securities fraud, and RICO claims by stating, “Rule 9(b) does not require detailed fact pleading of claims of fraud,” citing Form 13.⁸⁹ In 1991 we find an example of the invocation of Form 13 in a New York federal court:

[I]n a motion under Rule 9(b) “it is inappropriate to focus exclusively on the fact that Rule 9(b) requires particularity in pleading fraud.” Rather, a court must

F.3d 418, 423 (D.C.Cir.1996). Nor does it outline the four elements of negligence and explain how each is satisfied. “Form 9 thus treats the *mere allegation* of negligence as sufficient.” *Id.* (emphasis added). Form 9’s allegations are wholly conclusory: by simply describing the claim in a short and plain fashion, Form 9 satisfies the Federal Rules. *See* Fed.R.Civ.P. 84.

In re Initial Pub. Offering Sec. Litig., 241 F. Supp. 2d 281, 323 (S.D.N.Y. 2003).

⁸² *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

⁸³ COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE 276 (Aug. 2013) (“[T]he pleading forms live in tension with recently developing approaches to general pleading standards.”).

⁸⁴ FED. R. CIV. P. 9(b) (1938).

⁸⁵ FED. R. CIV. P. Form 13 (1938) (alteration in original).

⁸⁶ *Powell, Inc. v. Abney*, 83 F.R.D. 482 (S.D. Tex. 1979).

⁸⁷ *Id.* at 487 (citations omitted).

⁸⁸ *In re Longhorn Sec. Litig.*, 573 F. Supp. 255 (W.D. Okla. 1983).

⁸⁹ *Id.* at 263.

strike a “balance between the simplicity sought in Rule 8 and the particularity required by Rule 9.” An example of this balance “is demonstrated by the illustrative fraud claim set out in Official Form 13, which is expressly declared to be a sufficient pleading by Rule 84.” An examination of the complaint reveals that the plaintiff closely followed Form 13 in preparing the complaint. Accordingly, the Court finds that the complaint, as presently drawn, satisfies the requirements of Rule 9(b).⁹⁰

Many other instances of the same usage of Form 13 could be cited; a few additional such cases are referenced in the margin.⁹¹

After the 2007 restyling of the Federal Rules, Form 13 became Form 21. What is interesting is that the form continued to be cited in support of the minimal burden associated with fraud pleading, notwithstanding the fact that the *Twombly* and *Iqbal* decisions moved the ordinary pleading standard away from its notice pleading roots. For example, in 2011 the federal court in Minnesota wrote, “[i]f the somewhat bare-bones assertions in Form 21 suffice to plead a fraudulent-conveyance claim, then the Complaint here must similarly pass muster. And *Twombly* and *Iqbal* do not (and cannot) change that result.”⁹² Other courts continued to cite Form 21 post-*Twiqbal* as well.⁹³ However, such a view of Form 21 was not unanimous; *Kelleher v. Kelleher*⁹⁴ is illustrative here:

Plaintiff raises the argument that her fraudulent transfer claims are proper because they comply with the requirements of Federal Rule of Civil Procedure Form 21. Form 21, which is contained in the Appendix of Forms attached to the Federal Rules of Civil Procedure, requires Plaintiff merely to identify the underlying debt and the allegedly fraudulent transfer. However, the Court does not agree that Form 21 obviates the heightened pleading requirements for fraud un-

⁹⁰ *United States v. Gelb*, 783 F. Supp. 748, 757 (E.D.N.Y. 1991) (citations omitted) (quoting CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1298, at 621, 623, 624).

⁹¹ *See, e.g.*, *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1079 (7th Cir. 1997) (citing Form 13 to confirm that plaintiff pleaded the circumstances surrounding an alleged fraudulent transfer under Illinois state law with sufficient particularity to satisfy Rule 9(b)); *Kipperman v. Onex Corp.*, No. 1:05-CV-1242-JOF, 2007 WL 2872463, at *7 (N.D. Ga. Sept. 26, 2007) (“Although it arises in the context of federal joinder, this court agrees with the Seventh Circuit that Form 13 provides a good indication of what one must plead in a fraudulent conveyance claim under the Uniform Fraudulent Transfer Act to satisfy the purposes of Rule 9(b).”); *Sharp v. Chase Manhattan Bank USA, N.A. (In re Commercial Fin. Servs., Inc.)*, 322 B.R. 440, 449 (Bankr. N.D. Okla. 2003) (citing Form 13 as illustrating the sufficiency of the plaintiff’s fraud complaint); *Nielsen v. Mitchell*, No. S85-572, 1986 WL 31577 at *72 (N.D. Ind. May 5, 1986) (“Official Form 13, which is expressly declared sufficient by Rule 84, presents a model for pleading fraud Thus, very deferential review of a complaint is appropriate on a Rule 9(b) motion.”).

⁹² *United States v. Bame*, 778 F. Supp. 2d 988, 991 (D. Minn. 2011).

⁹³ *See, e.g.*, *Travelers Cas. & Sur. Co. of Am. v. Bank of the Ozarks*, No. 4:11CV00280-JLH, 2011 WL 3444063, at *3 (E.D. Ark. Aug. 8, 2011).

⁹⁴ *Kelleher v. Kelleher*, No. 13-cv-05450-MEJ, 2014 WL 94197 (N.D. Cal. Jan. 9, 2014).

der Rule 9(b). Accordingly, the Court declines to hold that a claim sufficient to complete Form 21 satisfies Rule 9(b) as a matter of law.⁹⁵

Here we see the beginnings of the tension between the forms and the plausibility pleading requirements of *Twombly* and *Iqbal*, a tension that—as we will see below—persisted and became a source of concern for the rulemakers.

2. Patent Claims

Unlike claims of fraud, patent claims are not subject to a particularized pleading requirement but rather fall within the ordinary pleading standard of Rule 8(a). Nevertheless, the Official Forms offered a form dedicated to the pleading of patent infringement claims and have done so from the beginning. What began as Form 16 became Form 18 after the 2007 restyling of the Federal Rules. Both before and after the restyling the form was cited to support the sufficiency of patent claims. *R2 Technology, Inc. v. Intelligent Systems Software, Inc.*⁹⁶ exemplifies the use of Form 16 prior to 2007: “[T]he Rule 8 standard does not change in an action for patent infringement. Indeed, it is apparent from the form patent infringement complaint that a complaint need only identify the patent, not the specific claims, being asserted.”⁹⁷ Other instances of such use abound.⁹⁸

What is more interesting, however, is how Form 18 has been regarded by lower courts since the *Twombly* and *Iqbal* decisions called into doubt the de-

⁹⁵ *Id.* at *6 n.3 (citations omitted); *see also* Bank of Am., N.A. v. A & M Dev., LLC, No. 1:11-cv-00336-BLW, 2012 WL 1883460, at *3 (D. Idaho May 21, 2012) (“By its own terms, Form 21 is designed to illustrate a ‘Claim . . . to Set Aside a Fraudulent Conveyance. . . . Moreover, the advisory committee notes following Rule 84 suggest that the purpose of providing the Forms was to prevent litigants from having to guess the meaning of the language of Rule 8 regarding the form of the complaint. The Court can find no controlling authority indicating that the Forms were intended to address the heightened pleading standard set forth in Rule 9(b).”).

⁹⁶ *R2 Tech., Inc. v. Intelligent Sys. Software, Inc.*, No. 02-472-GMS, 2002 WL 31260049 (D. Del. Oct. 9, 2002).

⁹⁷ *Id.* at *3 (citations omitted).

⁹⁸ *See, e.g.*, *Nichia Corp. v. Seoul Semiconductor Ltd.*, No. C-06-0162 MMC, 2006 WL 1233148, at *1 (N.D. Cal. May 9, 2006) (“Here, Nichia’s allegation that Creative Defendants are infringing Nichia’s patents by selling consumer products containing a specific type of LED, the ‘902 series’ manufactured by SSC, is at least as specific, if not more so, than [the description of the patented invention in Form 16], and, consequently, is sufficient for purposes of Rule 8(a).”); *OKI Elec. Indus. Co. v. LG Semicon Co.*, No. CIV. 97-20310-SW, 1998 WL 101737, at *4 (N.D. Cal. Feb. 25, 1998) (“No allegation that infringing devices were made, used, or sold in, or imported into the United States is contained in Form 16, and yet the Form is ‘sufficient under the rules.’ Form 16 thus makes it clear that an explicit allegation of infringement in the United States is not necessary.” (quoting FED. R. CIV. P. 84)); *Ergobilt, Inc. v. Neutral Posture Ergonomics, Inc.*, No. CA3-77-CV-2548-R, 1998 WL 483626, at *1 (N.D. Tex. Aug. 10, 1998) (“Because the allegations in NPE’s patent infringement counterclaim conform to the Official Form, they withstand ErgoBilt’s motion to dismiss.”); *Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 960 (S.D. Cal. 1996) (stating that “[t]he Federal Rules do not require that the plaintiff plead with particularity the specific patent claims that have been infringed . . .”).

gree of simplicity with which one could articulate claims in a complaint. A multitude of courts have continued to affirm that, given Rule 84's proclamation that Form 18 is sufficient, they are bound to find that patent claims that comply with the form can withstand a motion to dismiss for failure to state a claim.⁹⁹ In doing so, many have noted the tension between *Twiqbal* and Form 18 explicitly before proceeding to affirm the sufficiency of Form 18-compliant complaints. For example, in *Intravisual Inc. v. Fujitsu Microelectronics America Inc.*, the court wrote:

[T]he pleading requirement set forth in *Twombly* and *Iqbal* do not require a patentee to specifically identify where in the United States the accused products are made or name an individual who has purchased, attempted to purchase, used, or imported one of the accused products in the United States. . . . A patent infringement complaint that pleads at least the facts in Form 18 must be sufficient to state a claim under Rule 8(a) because to hold otherwise would render Federal Rule of Civil Procedure 84 a nullity.¹⁰⁰

The court reached this conclusion in part based on the fact that after *Twombly* was decided, the Federal Circuit affirmed the sufficiency of the patent form in *McZeal v. Sprint Nextel Corp.*,¹⁰¹ although without acknowledgement or extensive analysis of the tension between the form and *Twombly*'s plausibility standard.¹⁰² A more definitive affirmation of the authoritativeness of Form 18 came later in *In re Bill of Lading Transmission and Processing System Patent Litigation*,¹⁰³ in which the Federal Circuit declared, "to the extent the parties argue that *Twombly* and its progeny conflict with the Forms and create differing pleadings requirements, the Forms control."¹⁰⁴ A multitude of other courts have expressed the view that Form 18 remains controlling notwithstanding *Twiq-*

⁹⁹ See, e.g., *Kelora Sys., LLC v. Target Corp.*, No. C-11-01548 CW, 2011 WL 2149085 (N.D. Cal. May 31, 2011) (evaluating a challenged patent claim against the elements found in Form 18); *Intravisual Inc. v. Fujitsu Microelectronics Am. Inc.*, No. 2:10-CV-90-TJW, 2011 WL 1004873, at *5 (E.D. Tex. Mar. 18, 2011) ("This Court has held that so long as a complaint complies with Form 18 in the Appendix of Forms to the Federal Rules of Civil Procedure, its claims for direct and indirect patent infringement will survive a motion to dismiss.").

¹⁰⁰ *Intravisual*, 2011 WL 1004873, at *3.

¹⁰¹ *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356 (Fed.Cir. 2007).

¹⁰² It is worth noting that in *McZeal*, there was a dissent by Judge Dyk in which he quarreled with the fact that Rule 84 would obligate compliant allegations to be approved notwithstanding their failure to provide sufficient notice and argued that patent claims under the so-called "doctrine of equivalents" should not be treated as being covered by the official patent form. *Id.* at 1361. Freed from the official form, Judge Dyk would have applied *Twombly* to rule that the statement of the patent claim in *McZeal* was insufficient. *Id.* at 1363 (Dyk, J., concurring in part and dissenting in part).

¹⁰³ *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323 (Fed. Cir. 2012).

¹⁰⁴ *Id.* at 1334.

*bal.*¹⁰⁵ As we will see below, however, dissenting views have recently emerged.¹⁰⁶

C. Pleading Jurisdiction

Beyond illustrating the standard for stating claims, the forms revealed the simplicity with which one may plead jurisdiction. This occurred in Form 7, merely requiring—for diversity jurisdiction—the statement of the citizenship of the parties and an affirmation that the amount in controversy exceeds the required value.¹⁰⁷ Alleging jurisdiction under a federal statute is even simpler: the allegation need only state “this action arises under,” followed by a citation to the relevant constitutional provision, treaty, or federal statute at issue.¹⁰⁸

Thus, courts have cited to Form 7 to reject urgings to impose more stringent pleading requirements on jurisdictional allegations.¹⁰⁹ The court’s statement in *Karazanos v. Madison Two Associates*¹¹⁰ is illustrative:

¹⁰⁵ See, e.g., *e-LYNXX Corp. v. InnerWorkings, Inc.*, No. 1-10-cv-02535, 2011 WL 3608642, at *4 (M.D. Pa. July 26, 2011) (“Since the Federal Rules cannot be changed by a judicial decision, Form 18 must necessarily demonstrate an acceptable way of stating a claim for direct infringement.”); *W.L. Gore & Assocs., Inc. v. Medtronic, Inc.*, 778 F. Supp. 2d 667, 675 (E.D. Va. 2011) (“It is difficult to reconcile the pleading standards set forth in *Twombly* and *Iqbal* with the legally conclusive form of pleading found in Form 18. However, the Court agrees with the post-*Twombly* holding in *McZeal* that a litigant who complies with the provisions of Form 18 has sufficiently stated a claim for direct infringement as contemplated by Rule 12(b)(6).”); *Petersen Indus., Inc. v. Hol-Mac Corp.*, No. 4:10-cv-152-CWR-FKB, 2011 WL 577377, at *3 (S.D. Miss. Feb. 9, 2011) (“Despite pre-dating *Twombly*, the logic of *McZeal* still stands.”); *Microsoft Corp. v. Phoenix Solutions, Inc.*, 741 F. Supp. 2d 1156 (C.D. Cal. 2010) (“Some district courts have concluded similarly that while the Court otherwise must apply the plausibility standard of *Twombly* and *Iqbal* to patent claims and counterclaims, for allegations of direct infringement, pleading in conformance with Form 18 is sufficient.”); *Realtime Data, LLC v. Stanley*, 721 F. Supp. 2d 538, 542 (E.D. Tex. 2010) (“The Supreme Court’s decisions in *Twombly* and *Iqbal* have not affected the adequacy of complying with Form 18. To hold otherwise would render Rule 84 and Form 18 invalid, which cannot be done by judicial action”); see also Richard A. Kamprath, Article, *Patent Pleading Standards After Iqbal: Applying Infringement Contentions as a Guide*, 13 SMU SCI. & TECH. L. REV. 301, 312 (2010) (noting that Rule 84 requires courts to accept as sufficient any pleading made in conformance with the forms and that Form 18 can still be used to plead patent infringement cases even though the form may appear to be incongruent with *Twombly* and *Iqbal*).

¹⁰⁶ See *infra* Part IV; see also, e.g., *Wistron Corp. v. Phillip M. Adams & Assocs.*, No. C-10-4458 EMC, 2011 WL 4079231 (N.D. Cal. Sept. 12, 2011) (granting motion to dismiss notwithstanding compliance with Form 18).

¹⁰⁷ FED. R. CIV. P. Form 7.

¹⁰⁸ *Id.* But see *Gay v. United States*, 93 Fed. Cl. 681, 685 (Fed. Cl. 2010) (finding no requirement to plead specific section of a statute notwithstanding the inclusion of such citations in Form 7).

¹⁰⁹ See, e.g., *Mechler v. United States*, No. 12-1183-EFM-GLR, 2012 WL 5289627, at *2 n.20 (D. Kan. Oct. 23, 2012) (“[A]s shown in Form 7 of the Appendix of Forms of the Federal Rules of Civil Procedure, a statement of jurisdiction based on a specifically identified federal statute may be adequate to plead federal question jurisdiction.”).

¹¹⁰ *Karazanos v. Madison Two Assocs.*, 147 F.3d 624 (7th Cir. 1998).

We must therefore decide whether the hypothetical possibility that one of the “foreign citizen[s]” may be a permanent resident alien in Illinois is enough to render Madison Two’s jurisdictional allegations defective. In order to reach that conclusion, we would have to hold that the party seeking federal jurisdiction (here, the defendant, because the context is removal) must not only allege that certain parties are foreign citizens or subjects, but must also allege that they are not permanent residents of the United States. Nothing in the Appendix of Forms to the Federal Rules of Civil Procedure supports imposing this kind of pleading burden, see Fed.R.Civ.P. 84, Form 2. . . . Typically the party seeking jurisdiction pleads the jurisdictional facts required—A is a citizen of Idaho, the amount in controversy exceeds \$75,000, B is a citizen of France—and it is up to the party opposing federal jurisdiction to contest the facts as pleaded.¹¹¹

Since *Twombly* and *Iqbal*, Form 7 has been read as consistent with the standard imposed by those cases, since the form offers facts that form the basis for the plaintiff’s assertion of diversity jurisdiction.¹¹²

To take another example, the forms make clear that Rule 8(a)’s admonition to offer “a short and plain statement of the grounds upon which the court’s jurisdiction depends” does not refer to personal jurisdiction but rather only subject matter jurisdiction: “Any doubt that the term ‘jurisdiction’ in this context refers to subject matter rather than personal jurisdiction can be resolved by reference to Form 2 [now Form 7] of the Rules, which speaks only of subject matter jurisdiction.”¹¹³ In *Dunlop-McCullen v. Pascarella*, a third-party defendant sought summary judgment on the ground that the third-party plaintiffs failed to allege jurisdiction at all in their third-party complaints.¹¹⁴ The court rejected the challenge by stating, “It is instructive that Form 22-A [now Form 16] attached to the Federal Rules of Civil Procedure, which is a model for third-party complaints, does not include a jurisdictional statement.”¹¹⁵

D. Other Uses

In addition to providing guidance on pleading jurisdiction and claims, the Appendix of Forms also contained illustrations of how litigants should craft their answers to complaints. Former Form 21 (now part of Form 30) backed up

¹¹¹ *Id.* at 627–28; *see also, e.g.,* J. E. Sieben Const. Co., Inc. v. City of Davenport, 494 F. Supp. 1035, 1036 (S.D. Iowa 1980) (“Defendant city of Davenport seeks dismissal of the complaint for lack of subject matter jurisdiction, asserting that plaintiff has not pleaded sufficient facts to confer diversity jurisdiction under 28 U.S.C. § 1332. The court does not agree. The amended complaint is in conformity with [Form 2] which, by operation of Fed.R.Civ.P. 84, is sufficient.”).

¹¹² *Harris v. Rand*, 682 F.3d 846, 850 (9th Cir. 2012) (“In *Bell Atlantic Corp. v. Twombly* the Supreme Court reiterated that a complaint must include more than just conclusory allegations to survive a Rule 12(b)(6) motion to dismiss. . . . Form 7(a) requires more than just a recitation of the legal conclusion that the parties are diverse. It requires the assertion of facts regarding the location of a party’s principal place of business.”).

¹¹³ *Stirling Homex Corp. v. Homosote Co.*, 437 F.2d 87, 88 (2d Cir. 1971).

¹¹⁴ No. 97-Civ.-0195(PKL)(DFE), 2002 WL 31521012, at *22 (S.D.N.Y. Nov. 13, 2002).

¹¹⁵ *Id.* at *23 n.45.

the straightforward proposition in Rule 8(b) that all allegations must be admitted or denied, including jurisdictional allegations.¹¹⁶ Thus, when the defendant in *McKinney v. Chicago Mercantile Exchange* responded to a jurisdictional allegation by stating, “Defendant admits that Plaintiff purports to bring this action pursuant to Title VII and the claimed jurisdiction, but denies any implication that said statute has been violated or that Plaintiff is entitled to any relief,” the court cited former Form 21 to reject the response:

Both this Court and McKinney are entitled to know whether Exchange and its counsel see any jurisdictional flaw lurking in the Complaint. . . . There seems to be no reason whatever that Exchange should not simply admit the jurisdictional allegations (see, e.g., Form 21 in the Appendix of Forms following the Federal Rules of Civil Procedure, Rule 84 of which places an official imprimatur on such forms).¹¹⁷

Recourse to the forms has also been a component of the debate regarding the applicability of the plausibility standard of *Twombly* and *Iqbal* to the pleading of affirmative defenses, though by no means did such usage begin only after those cases.¹¹⁸ As litigants and courts have argued over whether affirmative defense allegations must meet the *Twiqbal* standard, Form 30’s example has been interpreted by both sides as supporting their respective positions. The court in *Tyco Fire Products LP v. Victaulic Co.* succinctly states the view of those who see Form 30 as confirmation of a slight pleading burden: “[A]s the undetailed recitations of affirmative defenses illustrated in Form 30 show, [it] is not an exacting standard even remotely approaching the type of notice required of a claim under *Twombly* and *Iqbal*.”¹¹⁹ On the other side, the court in *Hammer v. Peninsula Poultry Equipment Co.* has read Form 30 as indicative of a fact-pleading requirement for affirmative defenses: “a proper affirmative defense, as illustrated in Form 30, includes ‘not only the name of the affirmative

¹¹⁶ FED. R. CIV. P. Form 21 (2006) (stating that “Defendant admits the allegations stated in paragraph 1,” which referred to the allegation of jurisdiction in former Form 8).

¹¹⁷ *McKinney v. Chi. Mercantile Exch.*, No. 95-C-6560, 1996 WL 31181, at *1 (N.D. Ill. Jan. 24, 1996); see also, e.g., *Morgan v. Stringer*, No. 96-C-1107, 1996 WL 180074, at *1 (N.D. Ill. Apr. 12, 1996) (“It is not the province of any pleader to decline to respond to an allegation based on the pleader’s own opinion as to the propriety of that allegation—whether by characterizing it as ‘stat[ing] a legal conclusion’ or otherwise. Indeed, that type of self-help is especially inappropriate here, for the official Appendix of Forms that follows the Rules (see Rule 84) expressly contemplates a defendant’s admission of a complaint’s jurisdictional allegation (see Form 21 in that Appendix).”).

¹¹⁸ See, e.g., Donald K. Bjelke, *Pleading: Raising Defense of Limitations: California and Federal Practice Compared*, 43 CAL. L. REV. 724, 725–26 (1955) (citing Form 20 as a guide to how to plead a limitations defense sufficiently).

¹¹⁹ *Tyco Fire Prods. LP v. Victaulic Co.*, 777 F. Supp. 2d 893, 900 (E.D. Pa. 2011); see also, e.g., *Lane v. Page*, 272 F.R.D. 581, 594 (D.N.M. 2011) (“The forms appended to the rules bolster the Court’s analysis that rule 8(b) does not require defendants to provide factual allegations supporting defenses.”); *Wells Fargo & Co. v. United States*, 750 F. Supp. 2d 1049, 1051 (D. Minn. 2010) (“[N]othing in the text of the Federal Rules of Civil Procedure or in the Appendix of Forms even hints that a defendant must plead sufficient facts to establish the ‘plausibility’ of an affirmative defense.”).

defense, but also facts in support of it.’’¹²⁰ Reading Form 30 in this way has been particularly more prominent in light of *Twombly* and *Iqbal*, given the seeming incongruity (in the view of these courts) of requiring plaintiffs to plead more detail than defendants would have to offer in response.¹²¹ The debate is ongoing, with sound arguments being offered on both sides.¹²²

Finally, the forms have served various other miscellaneous functions, such as illustrating the appropriate contents of a request to waive formal service of process,¹²³ emphasizing the need for pleadings to be short and plain rather than prolix,¹²⁴ and buttressing the requirement of formal written consent to the authority of a magistrate judge.¹²⁵

IV. CONTEMPORARY CHALLENGES TO THE FORMS

Notwithstanding this long tradition of invoking the forms at all levels of the federal judiciary, there have been two distinct challenges to the forms in the past decade. The first is judicial questioning of the Official Forms in the wake of *Twombly* and *Iqbal*. The second is the impending 2015 abrogation of Rule 84 and the abolition of the forms altogether. Both of these challenges are discussed below.

A. Judicial Questioning of the Forms

Several courts have pushed back against the forms in light of the tension between their admonitions and the seemingly conflicting interpretations of the

¹²⁰ *Hammer v. Peninsula Poultry Equip. Co.*, No. RDB-12-1139, 2013 WL 97398, at *5 (D. Md. Jan. 8, 2013); *see also* *Aguilar v. City Lights of China Rest., Inc.*, No. DKC 11-2416, 2011 WL 5118325 (D. Md. Oct. 24, 2011) (finding that Form 30 does require compliance with *Twombly*).

¹²¹ *See, e.g.,* *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 650 (D. Kan. 2009). (“In this case, the Court agrees with the reasoning of the courts applying the heightened pleading standard to affirmative defenses. It makes no sense to find that a heightened pleading standard applies to claims but not to affirmative defenses.”).

¹²² *See generally* Stephen Mayer, Note, *An Implausible Standard for Affirmative Defenses*, 112 MICH. L. REV. 275 (2013) (discussing the arguments offered by each side in support of its position respecting the applicability of *Twombly* to affirmative defenses).

¹²³ *See, e.g.,* *AIRFX.com v. AirFX LLC*, No. CV-11-01064, 2011 WL 5007919, at *5 (D. Ariz. Oct. 20, 2011):

Defendant first contends that plaintiffs’ failure to include an expected return date on the waiver form constitutes non-compliance. . . . Notably, nowhere in Form 6 is there a place to fill in a required return date. Plaintiffs’ waiver of service form copied the language of Form 6 exactly. Therefore, the absence of a return date on the waiver form did not constitute noncompliance with Rule 4(d)(1)(F).

¹²⁴ *See, e.g.,* *Raiser v. City of Los Angeles*, No. CV 13-2925 RGK (RZ), 2014 WL 794786, at *3 (C.D. Cal. Feb. 26, 2014) (referring the plaintiff to the Appendix of Forms for an understanding of what “short and plain” means in pleadings in light of the plaintiff’s excessively lengthy and uninformative complaint).

¹²⁵ *Hajek v. Burlington Northern R.R. Co.*, 186 F.3d 1105 (9th Cir. 1999) (Magistrate consent).

Federal Rules from the Supreme Court in *Twombly* and *Iqbal*.¹²⁶ This has been most pronounced in the patent context.¹²⁷ In *McZeal v. Sprint Nextel Corp.*,¹²⁸ Judge Dyk—concurring in part and dissenting in part—challenged the sufficiency of the patent claim form, Form 16 (now Form 18), when he wrote:

In my view, a bare allegation of literal infringement using the form is inadequate to provide sufficient notice to an accused infringer under a theory of literal infringement. The form fails to state which claims are asserted and which features of the accused device are alleged to infringe the limitations of those claims. In alleging that the “electric motors embod[y] the patented invention” the form fails to recognize that a patent is only infringed when the accused product satisfies all of the limitations of the claims. However, I agree that under Rule 84 of the Federal Rules of Civil Procedure, we would be required to find that a bare allegation of literal infringement in accordance with Form 16 would be sufficient under Rule 8 to state a claim. One can only hope that the rulemaking process will eventually result in eliminating the form, or at least in revising it to require allegations specifying which claims are infringed, and the features of the accused device that correspond to the claim limitations.¹²⁹

After Judge Dyk’s opening salvo against the patent form, other courts began to challenge the sufficiency of Form 18 in various ways. Some dismissed the form as not designed for more sophisticated design patents and as outdated, having been drafted prior to the *Twiqbal* decisions.¹³⁰ More common has been the judicial cabining of Form 18 to its strict terms as an exemplar of pleading direct infringement claims only, rather than indirect claims, thereby relieving those courts of the obligation to treat the form as sufficient.¹³¹ Not all courts have agreed, thus creating a split on the matter.¹³²

¹²⁶ See, e.g., *McCauley v. City of Chicago*, 671 F.3d 611, 623 (7th Cir. 2011) (Hamilton, J., dissenting) (noting that “*Iqbal* conflicts with the form complaints approved by the Supreme Court and Congress as part of the Federal Rules of Civil Procedure”); *Fink v. Burlington Coat Factory of Florida, LLC*, No. 13-62316-CIV, 2014 WL 2158416, at *3 (S.D. Fla. May 23, 2014) (“[A] tension exists between the sparse assertions found in Form 11 and the more stringent requirements of *Twombly* and *Iqbal*.”).

¹²⁷ See, e.g., *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1334 (Fed. Cir. 2012) (discussing continuing vitality of Form 18—the patent form—after *Twombly* and *Iqbal*).

¹²⁸ *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007).

¹²⁹ *Id.* at 1360 (Dyk, J., concurring in part and dissenting in part).

¹³⁰ See, e.g., *Colida v. Nokia, Inc.*, 347 Fed. App’x 568, 571 n.2 (Fed. Cir. 2009) (“Form 18 is a sample pleading for patent infringement, but is not tailored to design patents and was last updated before the Supreme Court’s *Iqbal* decision.”).

¹³¹ See, e.g., *Elan Microelectronics Corp. v. Apple, Inc.*, No. C-09-01531-RS, 2009 WL 2972374, at *2 (N.D. Cal. Sept. 14, 2009) (“Both types of indirect infringement include additional elements, none of which Form 18 even purports to address. In the absence of any other form that addresses indirect infringement and is made binding on the courts through Rule 84, the Court must apply the teachings of *Twombly* and *Iqbal*.”); see also, e.g., *e-LYNXX Corp. v. InnerWorkings, Inc.*, 2011 WL 3608642 (M.D. Pa. 2011) (finding that Form 18 is insufficient for indirect infringement claims); *Weyer v. MySpace, Inc.*, No. 2:10-cv-00499-MRP-FFMx, 2010 WL 8445305, at *4 (C.D. Cal. June 17, 2010) (same); *Tech. Licensing Corp. v. Technicolor USA, Inc.*, No. CIV-2:03-1329-WBS-EFB, 2010 WL

Outside of the patent infringement claim context, judges have noted the seeming incongruity between what *Twombly* and *Iqbal* require and the Official Forms.¹³³ For example, in *Tyco Fire Products LP v. Victaulic Co.*, the court held a patent invalidity counterclaim to the *Twombly* standard, noting that “[p]ut simply, the forms purporting to illustrate what level of pleading is required do not reflect the sea change of *Twombly* and *Iqbal*.”¹³⁴ Another approach has been to limit the forms to the simple types of claims they state, with the plausibility standard requiring more facts in the context of more complex matters such as those that were at issue in *Twombly* and *Iqbal*. This view was reflected in *Limestone Development Corp. v. Village of Lemont, Illinois*: “[H]ow many facts are enough will depend on the type of case. In a complex antitrust or RICO case a fuller set of factual allegations than found in the sample complaints in the civil rules’ Appendix of Forms may be necessary”¹³⁵ The court in *Zimmerman v. Paulsen* was more direct in making this point:

Plaintiffs argue that their Complaint is adequate because it comports with Form 13 contained in the Federal Rules of Civil Procedure Appendix of Forms for a “Claim for Debt and to Set Aside Fraudulent Conveyances Under Rule 18(b).” The Court finds this argument unpersuasive, however, because Form 13 is for claims alleging intentional fraud, whereas in Count II Plaintiffs are alleging constructive fraud.¹³⁶

In *Memory Control Enterprise, LLC v. Edmunds.com, Inc.*,¹³⁷ the court did not attribute the inapplicability of the forms to the complexity of the matter before it—a patent invalidity claim. Rather, the court simply distinguished between patent infringement claims—to which an Official Form applied—and patent invalidity claims, which lacked a specific, dedicated form: “[W]hile the Appendix of the Federal Rules of Civil Procedure includes a form for patent infringement, it includes no such form for patent invalidity. Until such a form is included, defendants must meet the pleading standard the Supreme Court announced in *Twombly* and *Iqbal*.”¹³⁸ As more courts have given voice to the clear tension between the plausibility pleading standard of those cases and the

4070208, at *2 (E.D. Cal. Oct. 18, 2010) (same); *Sharafabadi v. Univ. of Idaho*, No. C09-1043JLR, 2009 WL 4432367, at *3 (W.D. Wash. Nov. 27, 2009) (same).

¹³² See *Bluestone Innovations Tex., L.L.C. v. Formosa Epitaxy Inc.*, No. 2:10-cv-171-TJW-CE, 2011 WL 4591906, at *3 (E.D. Tex. Sept. 12, 2011) (discussing the split regarding the appropriate standard for pleading indirect infringement in light of Form 18).

¹³³ *Jacobs v. Tempur-Pedic Int’l, Inc.*, 626 F.3d 1327, 1348 (11th Cir. 2010) (Ryskamp, J., dissenting) (“Such a pleading [in Form 11] would likely be considered scant under the *Twombly* standard.”).

¹³⁴ *Tyco Fire Products LP v. Victaulic Co.*, 777 F. Supp. 2d 893, 905 (E.D. Pa. 2011).

¹³⁵ *Limestone Dev. Corp. v. Vill. of Lemont*, 520 F.3d 797, 803 (7th Cir. 2008).

¹³⁶ *Zimmerman v. Paulsen*, 524 F. Supp. 2d 1077, 1080–81 (N.D. Ill. 2007).

¹³⁷ *Memory Control Enter., LLC v. Edmunds.com, Inc.*, No. CV 11-7658 PA (JCx), 2012 WL 681765 (C.D. Cal. Feb. 8, 2012).

¹³⁸ *Id.* at *3.

simplicity of the longstanding forms, the Civil Rules Advisory Committee took notice, giving it a ground to call for their abolition.¹³⁹

B. *The Abolition of the Forms*

In 2013, the Committee on Practice and Procedure published for comment a proposal to abrogate Rule 84 and the Official Forms as unnecessary.¹⁴⁰ After conducting “informal inquiries” that confirmed their “initial impressions,”¹⁴¹ the Advisory Committee offered at least seven reasons to support its conclusion that the forms were no longer necessary: (1) “Lawyers do not much use these forms”;¹⁴² (2) “there is little indication that they provide meaningful help to pro se litigants”;¹⁴³ (3) “the pleading forms live in tension with recently developing approaches to general pleading standards”;¹⁴⁴ (4) “the amount of work that would be required to assume full responsibility for maintaining the forms”;¹⁴⁵ (5) the fact that “many alternative sources provide excellent forms”;¹⁴⁶ (6) “the ranges of topics covered by the pleading forms omit many of the categories of actions that comprise the bulk of today’s federal docket,”¹⁴⁷ and (7) “[t]he purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled.”¹⁴⁸

Although the reasons offered for abolishing the forms are many, none of them hold up under scrutiny.¹⁴⁹ The last of these reasons just mentioned can be dispensed with easily. In light of the numerous cases reviewed above in which courts and litigants invoked or relied on the Official Forms as illustrations of the proper interpretation or application of a Federal Rule, the illustrative function of the forms persists. Indeed, the cases reviewed also rebut the notion that litigants fail to use the forms; they certainly use them to make arguments about

¹³⁹ See Civil Rules Advisory Committee, Minutes 39–40 (Mar. 22–23, 2012) (“Questions about the role of Rule 84 forms arose with the perception that the pleading forms seem inconsistent with the pleading standards described in the *Twombly* and *Iqbal* decisions. . . . There is real concern that pleading forms—especially Form 18 for patent infringement cases—do not fit with *Twombly* and *Iqbal*. . . . Case law suggests that the pleading forms do not suffice under Rule 8, contrary to the statement in Rule 84. No one would think we should have Rule 84 if we were starting today. We should disavow it.”).

¹⁴⁰ COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 83, at 275.

¹⁴¹ *Id.* at 276.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 329.

¹⁴⁹ Here I respond to arguments raised in favor of abrogation by the Advisory Committee. Professor Brooke Coleman, in her piece submitted for this symposium, addresses additional arguments against abrogating the forms. See Brooke D. Coleman, *Abrogation Magic: The Rules Enabling Act Process, Civil Rule 84, and the Forms*, 15 NEV. L.J. 1093, 1103–09 (2015).

the Rules and what they require. To the point that litigants do not use the forms as the model for their pleadings, such is not the purpose of the Official Forms. As the (now abandoned) “Introductory Statement” announced at the beginning of the Official Forms prior to 2007, “The following forms are intended for illustration only. They are limited in number. No attempt is made to furnish a manual of forms.”¹⁵⁰ Thus, the critique that lawyers and pro se litigants do not use the forms—which is untrue¹⁵¹—and that the forms are not comprehensive in their coverage are wholly inapt as the forms never purported to be the fill-in-the-blank variety that a litigant would complete and file verbatim, notwithstanding their sufficiency. Similarly, the Committee’s argument that other sources provide litigants with forms for their use is beside the point, since, again, the Official Forms were not meant to be “a manual of forms.” As such, the workload that the Committee feared having to undertake should it attempt to update and maintain the Official Forms to make them into such a manual is a straw man because no such work is necessary. The forms only need to change to reflect amendments to the Federal Rules they illustrate. More importantly, those alternative sources of forms do not provide forms that will be authoritative vis-à-vis the Federal Rules, thereby failing to make them a sufficient substitute for the Official Forms the Committee wishes to abandon.

That said, what of the argument that as interpretations of the Federal Rules change, the forms cannot be permitted to remain in tension with such interpretations? Ideally, because the forms themselves are authoritative, interpretations plainly inconsistent with them should be prohibited, meaning the tension is resolved by voiding the interpretation. However, when the High Court itself is the promulgator of the errant interpretation, this ideal collapses. Instead, the options are to (1) ignore the forms and allow the interpretation to trump (with the form serving only as a hortatory reminder of the impropriety of the interpretation); (2) reinterpret the forms as confined to their specific contexts; (3) amend the forms to bring them in conformity with the deviant interpretation; or (4) abolish the forms entirely. If it is true that the forms themselves are sufficient by command of the Federal Rules themselves, then it is wholly illogical for them to become insufficient by the passage of time or through judicial interpretation if the language of the forms is unchanged. Thus, permitting judicial in-

¹⁵⁰ FED. R. CIV. P. Appendix of Forms, Introductory Statement (2006).

¹⁵¹ The Committee did not attempt to establish the veracity of this claim empirically but offered it purely as its own ipse dixit. Indeed, courts have referred pro se plaintiffs to the Official Forms for guidance in stating their claims. *See, e.g.,* *Weymouth v. Ariz. Dept. of Liquor Licenses & Control*, No. CV-12-979-PHX-GMS, 2012 WL 4359073, at *3 (D. Ariz. Sept. 21, 2012) (“In preparing an amended complaint, the Weymouths [pro se plaintiffs] should consult Federal Rule of Civil Procedure 84 and the ‘Appendix of Forms’ referenced therein”); *Gharbi v. Flagstar*, Nos. A-10-CA-382 LY, A-11-CA-924 LY, 2012 WL 716150, at *2 (W.D. Tex. Mar. 5, 2012) (“For examples of how to write a complaint, Plaintiffs [who were proceeding pro se] should review the form complaints available in the Appendix to the Federal Rules of Civil Procedure.”); *Montano v. Medical Dept. of Solano State Prison*, No. CIV S-07-0800-LKK-EFB-P, 2007 WL 2199044, at * 2 n.4 (E.D. Cal. July 27, 2007) (referring a pro se plaintiff to Form 9 for pleading guidance).

interpretation to trump the forms would be illegitimate, since that would permit judicial amendment of them rather than amendment through the Rules Enabling Act process.¹⁵² Confining the forms to their context, however, is a permissible course of action, if not in keeping with their spirit. As illustrative forms, they indicate how the Federal Rules should be interpreted and applied. Limiting the form to the specific claim pleaded, for example, demotes them from their illustrative role to that of being a manual for use by practitioners in the particular case. But serving merely in such a capacity was never their intended purpose.¹⁵³ Nevertheless, it would be more appropriate to achieve this end by amending Rule 84 to announce the limitation—as Florida has done with its form rule¹⁵⁴—rather than via judicial cabinaging.

The most legitimate course of action, then, would have been to amend the forms to bring them in line with the prevailing interpretation of the Federal Rules. Although such a course may be objected to by those who disagree with the Court's novel interpretation of the general pleading standard, one cannot deny that an amendment to the forms that goes through the full Rules Enabling Act process is valid and authoritative. True, doing so would memorialize and embrace the judicial interpretation in question—namely, the pleading standard set forth in *Twombly* and *Iqbal*—dashing hopes of convincing the Court to revisit and revise its understanding of pleading doctrine. Nevertheless, if the rule-amendment process yields that result after going through all of the various levels of approval, so be it.¹⁵⁵

CONCLUSION

As has been shown, the principal function of the Official Forms throughout their history has been as an authoritative guarantor of a proper interpretation and application of the Federal Rules. More specifically, the forms have served as a bulwark against wayward and overly restrictive use of the rules against litigants seeking to access the federal courts. At a time when pleadings-based decisions are on the rise, litigants need a source of clarity and protection against such attacks. Unfortunately, in April 2014 the Advisory Committee recommended abrogation of Rule 84 and the elimination of most of the Official

¹⁵² *Fink v. Burlington Coat Factory of Fla., LLC*, No. 13-62316-CIV, 2014 WL 2158416, at *3 (S.D. Fla. May 23, 2014) (“But after *Twombly*, courts must walk a fine line between applying the heightened pleading standard of *Twombly* and *Iqbal*, while, at the same time, honoring the Supreme Court’s instruction that the Federal Rules, including Rule 84, not be amended by ‘judicial interpretation.’” (quoting *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993))).

¹⁵³ See FED. R. CIV. P. Appendix of Forms, Introductory Statement (2006) (“No attempt is made to furnish a manual of forms.”).

¹⁵⁴ See FLA. R. CIV. P. 1.900(b) (“The . . . forms are sufficient for the matters that are covered by them.”).

¹⁵⁵ Professor Coleman, in her piece submitted for this symposium, suggests a more comprehensive review and updating of the official forms may be necessary. See Coleman, *supra* note 149, at 1109–11.

Forms—save Forms 5 and 6, which pertain to waiver of service of process.¹⁵⁶ Then, in May 2014 the Judicial Conference Committee on Rules of Practice and Procedure—which is referred to as the Standing Committee—unanimously approved the proposed abrogation of Rule 84 and the forms.¹⁵⁷ The full Judicial Conference approved the amendments in September 2014¹⁵⁸ and the Supreme Court approved them in April 2015.¹⁵⁹ Because Congress is unlikely to veto the amendments,¹⁶⁰ it appears that abrogation of Rule 84 and the forms is a foregone conclusion.

Such an outcome is lamentable. Absent the forms, there will be little to hinder full application of plausibility pleading to the full range of allegations found within all complaints, requiring a level of factual detail not supported by the forms but purportedly mandated by plausibility. Litigants will have no source for challenging this move and courts may lack a foundation for resisting urgings to move in such a direction. Finally, in losing Rule 84 and the forms we will lose a source that expounds and exemplifies the simplified vision of the Federal Rules. Rule 84 unashamedly declares that the vision of the Rules is to produce a civil litigation process in the federal courts that is simple, and that pleading and other filings should be simple and brief, qualities that facilitate litigant access to justice. Abrogating Rule 84 may be symbolic (or symptomatic) of an attempt to depart from that liberal vision in this “fourth era” of civil procedure. Let us hope that is not so.

¹⁵⁶ See CENTER FOR CONSTITUTIONAL LITIGATION, PRELIMINARY REPORT ON COMMENTS ON PROPOSED CHANGES TO FEDERAL RULES OF CIVIL PROCEDURE 10 (2014), available at http://www.cclfirm.com/files/Report_050914.pdf (“At the April meeting of the Advisory Committee on Civil Rules, the Advisory Committee unanimously approved the recommendations of the Duke Subcommittee, the Discovery Subcommittee, and the Rule 84 Subcommittee that certain amendments to the Federal Rules of Civil Procedure be adopted.”); see also Civil Rules Advisory Committee, Minutes (Apr. 10–11, 2014).

¹⁵⁷ Moore, *supra* note 4 (“The Standing Committee met on May 29–30, 2014 in D.C. and unanimously approved the amendments as they were modified by the Advisory Committee at its meeting in April.”).

¹⁵⁸ David Sellers, *Judicial Conference Receives Budget Update, Forwards Rules Package to Supreme Court*, U.S. CTS. (Sept. 16, 2014), <http://www.uscourts.gov/news/2014/09/16/judicial-conference-receives-budget-update-forwards-rules-package-supreme-court>.

¹⁵⁹ Order Amending the Federal Rules of Civil Procedure (April 29, 2015), available at [http://www.supremecourt.gov/orders/courtorders/frcv15\(update\)_1823.pdf](http://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf).

¹⁶⁰ Congress would have to enact legislation blocking the proposed rule changes, which is unlikely given the House of Representatives is controlled by Republicans, who likely would support abrogation of the forms.

