

## POLICIES BEHIND THE HEIGHTENED PLEADING STANDARD UNDER FRCP 9(B)



Maximillian W. Hirsch

Under Federal Rule of Civil Procedure 9(b), in “alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.” But many attorneys are unfamiliar with the reasons behind this requirement. This article briefly reviews the history of the heightened pleading standard for fraud, examines several policy reasons behind it, and compares the federal rule with the California rule. In short, while courts have put forward several different rationales for the heightened pleading standard, the rule appears to be an artifact of history—and one which perhaps should be revisited.

### English Common Law

The requirement that fraud be pled with particularity is traceable to English common law, which “allowed the defense of fraud to be raised under a general denial or by special pleading.” 5a Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1296 (4th ed. 2017) (quoting 1 Chitty, *Pleading & Parties to Actions*, 12th Amer. Ed. 1855, 476, 479, 536, 581-82.). This heightened pleading standard reflected “the reluctance of English courts to reopen settled transactions” or disrupt established relationships. *Id.* History suggests that it probably came to courts of law from equity courts after the two were merged. See William M. Richman et al., *The Pleading of Fraud: Rhymes Without Reason*, 60 S. Cal. L. Rev. 959, 967 (1987). The Advisory Committee, along with numerous federal courts, have

acknowledged the influence that the English common law has had on the federal pleading standard for fraud, which explains why the heightened pleading standard exists, while similar causes of action do not have a similar heightened pleading standard.

### Federal Policy Rationales for the Heightened Pleading Standard of Rule 9(b)

Aside from a reliance on English common law, federal courts have given a wide variety of policy explanations for why a plaintiff must plead fraud with particularity. First, courts have acknowledged that fraud claims are generally disfavored, thus the heightened pleading standard. See *Mallozzi v. Zoll Med. Corp.*, 94-11579-NG, 1996 WL 392146, at \*3 (D. Mass. Mar. 5, 1996) (“the history of Rule 9(b) suggests that it was added to the rules to deal with the historically disfavored claims of common law fraud”). Second, one of the reasons that fraud claims are generally disfavored is that courts have identified a “concern that potential defendants be shielded from lightly made public claims or accusations charging the commission of acts or neglect of duty which may be said to involve moral turpitude.” *McFarland v. Memorex Corp.*, 493 F. Supp. 631, 638 (N.D. Cal. 1980). This is especially true when the “potential defendants are professionals whose reputations in their field of expertise are most sensitive to slander.” *Id.* at 638; see also, e.g., *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 (9th Cir. 1996) (Rule 9(b) serves to “protect professionals from the harm that comes from being subject to fraud charges.”); *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 663 (2d Cir. 1997) (“Rule 9(b) is designed [to] . . . safeguard a defendant’s reputation from improvident charges of wrongdoing.”). Of course, it is worth noting that other claims that could “involve moral

turpitude”—including allegations persons might find far more troubling than fraud—are not assigned the same heightened pleading standard.

Third, courts have acknowledged that the heightened pleading standard is necessary to protect against a “plaintiff with a largely groundless claim . . . simply tak[ing] up the time of a number of people by extensive discovery” in an attempt to “increase the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence.” *In re Leslie Fay Cos., Inc. Sec. Litig.*, 918 F. Supp. 749, 767 (S.D.N.Y. 1996). Similarly, the heightened pleading standard also serves to thwart baseless complaints and fishing expeditions.” *Gutierrez v. Givens*, 989 F. Supp. 1033, 1044 (S.D. Cal. 1997); *see also In re Stac Elecs. Sec. Litig.*, 89 F.3d at 1405 (Rule 9(b) serves to “deter the filing of complaints as a pretext for the discovery of unknown wrongs.”). Of course, fraud causes of action are not the only “largely groundless claims” that are brought by plaintiffs, so this too does not offer an adequate explanation for the heightened pleading standard.

Finally, courts have stated that Rule 9(b) “serves to give defendants adequate notice to allow them to defend against the charge.” *In re Stac Elecs. Sec. Litig.*, 89 F.3d at 1405; *Gutierrez*, 989 F. Supp. at 1044 (same). Again, it is unclear why defendants facing fraud claims need more notice than defendants defending other kinds of claims.

### California Law and Policy

California, which has a slightly different pleading standard for fraud claims, shares many of these policy rationales. In California, unlike under federal law, courts have set the standard for pleading fraud through case law. Under their precedent, fraud must be pled in the complaint specifically, and general and conclusory allegations are not sufficient. Specifically, a plaintiff must plead “facts which show how, when, where, to whom, and by what means the representations were tendered.” *Stansfield v. Starkey*, 220 Cal. App. 3d 59, 73 (1990). When a plaintiff fails to meet that standard, demurrers are routinely sustained.

California state courts have given several policy

rationales for this heightened pleading standard, all of which have also been expressed by the federal courts. First, California state courts have explained that a rationale for their heightened pleading standard is to “allow [a] defendant to understand fully the nature of the charge made.” *Stansfield*, 220 Cal. App. 3d at 73 (quoting *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 57 Cal. App. 3d 104, 109 (1976)). Second, California state courts have stated that the pleading standard for fraud should be heightened in accordance with the seriousness of the offense and to adequately prepare defendants. *See Stansfield*, 220 Cal. App. 3d at 73 (“The idea seems to be that allegations of fraud involve a serious attack on character, and fairness to the defendant demands that he should receive the fullest possible details of the charge in order to prepare his defense.”). Finally, California courts have also characterized fraud actions as “disfavored,” which leads to the “strict requirements of particularity in pleading.” *Vaughn v. Certified Life Ins. Co. of Cal.*, 238 Cal. App. 2d 177, 181 (1965). Again, just as in federal court, none of these justifications seem unique to fraud causes of action.

In sum, although California’s pleading standard for fraud is derived from case law, while the federal pleading standard is a rule of civil procedure, both require more from a plaintiff to proceed with a case to protect defendants, and both of these heightened pleading standards are based on English common law. And, while both California and federal courts have offered justifications for the heightened pleading standard in addition to legal history, because those justifications also would apply to other causes of action, it seems that fraud owes its heightened pleading standard to history. As a result, it might be time to reexamine the heightened pleading standard for fraud, either to see if other serious causes of action also merit a heightened pleading standard, or alternatively to treat fraud like any other cause of action.

*Maximillian W. Hirsch* is an associate at Pierce Bainbridge Beck Price & Hecht LLP.