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Elevated Pleading in Environmental Litigation

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INTRODUCTION

The recent United States Supreme Court opinion in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*[1] is critical to parties and attorneys who participate in environmental litigation. *Leatherman* proscribed the imposition of pleading requirements that are stricter than those ordinarily applied under Federal Rule of Civil Procedure 8(a). Such heightened pleading requirements compel plaintiffs to plead more facts, and courts can dismiss claims that fall short of the mark.

The *Leatherman* court considered civil rights actions alleging that municipalities are liable under 42 U.S.C. § 1983.[2] Although *Leatherman* might seem of limited relevance to environmental lawsuits, its holding and reasoning appear sufficiently broad to encompass environmental litigation.[3] Numerous federal circuit and district courts have recently required that plaintiffs plead with particularity in environmental actions, principally cases pursued under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA).[4] *Leatherman* may prohibit elevated pleading in environmental litigation. This article analyzes whether the Supreme Court has proscribed heightened pleading in environmental lawsuits in *Leatherman* and the consequences of that prohibition.

Part I examines the origins and development of elevated pleading requirements in certain types of cases. This Part considers the rise of heightened pleading in civil rights actions and its extension to environmental suits, emphasizing the leading case of *Cash Energy v. Weiner*.[5] Part II evaluates the Supreme Court's opinion in *Leatherman* and finds that the decision is expansive enough to include environmental actions. The final Part assesses *Leatherman*'s implications for environmental litigation.

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[1] 113 S. Ct. 1160 (1993).

[2] *Id.* at 1161. *Leatherman* has been applied by courts in subsequent environmental cases. *See* Warwick Admin. Group v. Avon Products, 820 F. Supp. 116, 120 (S.D.N.Y. 1993) (refusing to apply heightened pleading standards in CERCLA case). In an unreported opinion, another court applied *Leatherman* to defeat a heightened pleading request in a case seeking recovery for hazardous waste cleanup costs. PMC, Inc. v. Sherwin-Williams, No. 93-C-1379, 1993 U.S. Dist. LEXIS 9286, at *9 (N.D. Ill. July 7, 1993).

[3] *See Warwick Admin. Group*, 820 F. Supp. at 120; *PMC*, 1993 U.S. Dist. LEXIS 9286, at *9.

[4] 42 U.S.C. §§ 9601-9675 (Supp. 1990).

[5] 768 F. Supp. 892 (D. Mass. 1991).

I. Origins And Development Of Elevated Pleading

A. The Adoption of Rule 8 and the Imposition of Elevated Pleading in Civil Rights Cases

Federal Rule of Civil Procedure 8, which governs pleading, requires that a plaintiff submit a "short and plain statement of the claim showing that the pleader is entitled to relief."[6] The members of the Advisory Committee on the Civil Rules that suggested this Rule in 1938 intended the rule to clarify and simplify prior common law and code pleading while deemphasizing the importance of the pleadings.[7] During the mid-1950s, the Civil Rules Committee refused to implement recommendations of judges in the Ninth Circuit that would have revived earlier forms of pleading. No substantive recommendations for change in pleading have been adopted.[8]

The Supreme Court subscribed to the flexible, liberal pleading system incorporated in the Federal Rules, stating in *Conley v. Gibson* that a "[c]omplaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[9] The Court, therefore, repudiated fact pleading and adopted notice pleading. The Court stated that the Rules required only "a short and plain statement of the claim" to give the defendant fair notice of the plaintiff's claim and its grounds.[10]

Although the Supreme Court opinion in *Conley* might have seemed to sound the death knell for pleading practice, defendants persisted in filing motions to dismiss and judges continued granting them.[11] Since the 1970s, many judges have demanded stricter pleading of plaintiffs bringing specific types of suits. The preemi-

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6 Fed. R. Civ. P. 8(a). If plaintiff's complaint does not satisfy Rule 8, defendant can file a motion to dismiss under Rule 12(b)(6). I rely substantially in this subsection on Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433 (1986); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 Cornell L. Rev. 270, 296-301 (1989).

7 *See* Marcus, *supra* note 6, at 439-40; David M. Roberts, *Fact Pleading, Notice Pleading and Standing*, 65 Cornell L. Rev. 390, 396 (1980).

8 *See* Marcus, *supra* note 6, at 445; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 983-84 (1987).

9 Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (citations omitted).

10 *Id.* at 47. *See generally* Marcus, *supra* note 6, at 442-46 (discussing encouragement of flexible pleading practices by federal courts).

11 *See* Marcus, *supra* note 6, at 434.

nent examples are civil rights cases. As early as 1984, the United States Court of Appeals for the District of Columbia Circuit proclaimed that all of the circuit courts had "articulated a requirement of particularity in pleading for civil rights complaints."[12] Courts' requirements differ substantially, especially in the specificity demanded.[13]

B. Elevated Pleading in Areas Other than Environmental Cases

Federal courts have required heightened pleading primarily in civil rights cases.[14] Nonetheless, judges have recently extended the concept to other substantive areas, for two major reasons. First, the escalating expense of litigation has made the threat of false claims or defenses powerful weapons of intimidation, increasing the temptation to invoke them.[15] Second, judges have been concerned that additional frivolous claims or defenses impair the system-wide quality of justice, particularly in light of the litigation explosion.[16] Important fields in which judges have expanded heightened pleading include securities, Racketeer Influenced and Corrupt Organizations Act (RICO), Federal Torts Claims Act, and antitrust litigation.[17]

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12 Hobson v. Wilson, 737 F.2d 1, 30 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *accord* Elliott v. Perez, 751 F.2d 1472, 1479 (5th Cir. 1985).

13 The majority and specially concurring opinions of Judge Goldberg in Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 954 F.2d 1054, 1055, 1058 (5th Cir. 1992), review much relevant case law. Two circuits seem to have opposed heightened pleading. *See* Elliott v. Thomas, 937 F.2d 338, 345 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1242 (1992); Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 624 (9th Cir. 1988). *But see* Branch v. Tunnell, 937 F.2d 1382, 1386 (9th Cir. 1991).

14 *See* Cash Energy v. Weiner, 768 F. Supp. 892, 898 (D. Mass. 1991). *See generally* Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935 (1990) (analyzing heightened pleading requirements for civil rights actions); Tobias, *supra* note 6, at 297-301 (discussing heightened pleading requirement, its effect on civil rights litigants); C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677 (1984) (discussing imposition of stricter pleading requirements for civil rights cases).

15 *See Weiner*, 768 F. Supp. at 898; *accord* United States v. Pole No. 3172, 852 F.2d 636, 638 (1st Cir. 1988); Ross v. A.H. Robins Co., 607 F.2d 545, 557 (2d Cir. 1979), *cert. denied*, 466 U.S. 946 (1980).

16 *Weiner*, 768 F. Supp. at 898; *accord* Sutliff Inc. v. Donovan Co., 727 F.2d 648, 654 (7th Cir. 1984).

17 *Weiner*, 768 F. Supp. at 898-99 (discussing other areas and relevant cases). *See generally* Marcus, *supra* note 6, at 439; Tobias, *supra* note 6, at 296-301.

C. Elevated Pleading in Environmental Cases

1. *Weiner*

Since the 1980s, many federal judges have imposed elevated pleading in environmental cases, most of which involved CERCLA.[18] *Cash Energy v. Weiner* is important, because Judge Robert E. Keeton, its author, comprehensively treated numerous relevant issues. Keeton then served as Chair of the Committee on Rules of Practice and Procedure (Standing Committee) of the Judicial Conference, which has substantial responsibility for revision of all Federal Rules.[19] Given *Weiner*'s thorough analysis and its author's role in the civil procedure area, a close examination of the decision enhances understanding of the issues posed by heightened pleading requirements.

Judge Keeton in *Weiner* fully reviewed the pertinent history of the requirement that plaintiffs plead with particularity.[20] Judge Keeton first acknowledged the flexible, liberal pleading regime created in the original 1938 Rules. He recognized that the Supreme Court had stamped its imprimatur on this system and on notice pleading in *Conley*.[21] Judge Keeton observed, however, that even the Federal Rules sow the "seeds of a countervailing tendency."[22] He specifically invoked Rule 9(b), which expressly requires particularized pleading in cases involving fraud and mistake; Rule 8(f), which provides that pleadings are to be interpreted to promote substantial justice; and

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18 A few of the cases involved other environmental statutes, such as the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992 (1988). *See, e.g.*, McGregor v. Industrial Excess Landfill, 856 F.2d 39, 43 (6th Cir. 1988); Supporters to Oppose Pollution v. Heritage Group, 760 F. Supp. 1338, 1340 (N.D. Ind. 1991), *aff'd*, 973 F.2d 1320 (7th Cir. 1992).

19 *See Weiner*, 768 F. Supp. at 897-900. The Standing Committee is a thirteen-member body comprised of federal judges, law professors, and practitioners, which Congress has authorized to study the Federal Rules and to formulate proposals for change as needed. *See* 28 U.S.C. § 2073 (Supp. 1993). *See generally* Harold S. Lewis, Jr., *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507 (1987) (discussing rule revision entities); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 797 n.2 (1991) (citing sources that discuss composition and role of Advisory Committee).

20 *See Weiner*, 768 F. Supp. at 897-99; *see also supra* notes 6-13 and accompanying text (similar history).

21 *Weiner*, 768 F. Supp. at 897 (citing Conley v. Gibson, 355 U.S. 41 (1957)); *see also supra* notes 9-10 and accompanying text (similar history).

22 *Weiner*, 768 F. Supp. at 897.

Rule 12(e), which prescribes motions for more definite statements and the possibility of striking deficient pleadings.[23]

Judge Keeton remarked that courts needed the elevated requirements for pleading fraud under Rule 9(b) to help prevent abuse of legal processes.[24] Moreover, courts have extended this exception for fraud to similar statutory causes of action because analogous considerations apply.[25] Courts have also created new exceptions in fields that present compelling reasons for elevated pleading. Finally, Keeton stated that courts demand particularity in pleading to promote substantial justice and to address due process concerns over a plaintiff's request for a drastic remedy.[26]

Judge Keeton in *Weiner* explained that the imposition of heightened pleading in civil rights cases was a response to litigants filing unfounded claims.[27] He found that courts have increasingly required particularity because of fears about false claims and defenses and the threat that frivolous litigation poses for the federal court system.[28] He also observed that these concerns had fostered the 1983 amendments to Rules 11 and 26 that place enhanced responsibilities upon lawyers and parties for the representations that they make in pleadings and in discovery papers.[29]

Judge Keeton summarized this history by stating that the pleading strictures have become less forgiving, that judges have demanded particularity more frequently, and that courts have permitted reduced discovery before requiring that pleaders allege sufficient facts to "support a claim on which relief can be granted or a defense

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[23] *Id.*; *see also* FED. R. CIV. P. 9(b), 8(f), 12(e).

[24] *Weiner*, 768 F. Supp. at 897.

[25] *Id.*; *see also id.* at 898-99 (citing securities, RICO, and labor litigation and relevant case authority). *See generally* Marcus, *supra* note 6, at 450-55 (noting heightened pleading requirements for conspiracy allegations).

[26] *Weiner*, 768 F. Supp. at 898-99; *accord* United States v. Pole No. 3172, 852 F.2d 636, 638 (1st Cir. 1988); *see also supra* note 23 and accompanying text (discussing promoting substantial justice).

[27] *Weiner*, 768 F. Supp. at 897-98. *But see* Rotolo v. Borough of Charleroi, 532 F.2d 920, 925, 927 (3d Cir. 1976) (Gibbons, J., dissenting); Wingate, *supra* note 14, at 688.

[28] *Weiner*, 768 F. Supp. at 898; *see also supra* notes 15-16 and accompanying text.

[29] *See Weiner*, 768 F. Supp. at 899. *See generally* Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485 (1988-89) [hereafter Tobias, *Rule 11*] (criticizing chilling effect of Rule 11 on civil rights litigation); Carl Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 933, 940-42, 946-48 (1991) [hereafter Tobias, *Discretion*] (discussing how Rules 11 and 26 disadvantage civil rights litigants).

on which judgment can be entered."[30] Judge Keeton candidly acknowledged the danger that this trend could be extended too far, and recognized the need to strike an appropriate balance among the various relevant interests.[31] He contended that an elevated standard should thwart frivolous allegations while providing parties access to the information they need to prove their cases.[32]

In a concluding paragraph, Judge Keeton asked whether CERCLA was another field in which courts would demand heightened pleading.[33] Keeton observed that CERCLA was difficult to analogize to fraud. Even so, he stated that CERCLA implicates numerous factors that prompt judges to require stricter pleading in cases other than fraud.[34] The most significant factor for Judge Keeton was the great expense of defending against a non-meritorious claim. He argued that particularized pleading would limit meritless claims.[35] Keeton, therefore, found it reasonable to predict that higher courts would extend elevated pleading requirements to CERCLA litigation, and would apply certain ameliorating factors to protect plaintiffs who need discovery.[36]

The principal difficulty with the *Weiner* opinion is that Judge Keeton premised his decision almost exclusively on public policy considerations relevant to the litigation explosion, abuses of the litigation process, and litigation costs.[37] The opinion did not allude to other policy factors, namely clear congressional intent to clean up the

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30 *Weiner*, 768 F. Supp. at 899-900. *See generally* Tobias, *Rule 11*, *supra* note 29, at 495-98 (discussing judicial application of Rule 11 in civil rights cases, procedural difficulties civil rights litigants confront).

31 *Weiner*, 768 F. Supp. at 900; *see also* New England Data Services v. Becher, 829 F.2d 286, 291 (1st Cir. 1987) (noting need to strike balance among conflicting interests, including plaintiffs' need for discovery).

32 *See Weiner*, 768 F. Supp. at 900. *See generally* Tobias, *Rule 11*, *supra* note 29, at 495-98 (discussing civil rights plaintiffs' access problems); Carl Tobias, *Rule 11 Reconsidered*, 46 U. MIAMI L. REV. 855, 867, 876, 891, 897 (1992) (discussing balancing of interests considered in Rule 11 reform).

33 *Weiner*, 768 F. Supp. at 900.

34 *Id.*

35 *Id.* Keeton also mentioned that the "consequences of individual liability for an environmental violation may be severe." *Id.*

36 *Id.* The court so ruled, "[u]nless and until guidance to the contrary appears in legislation or precedent." *Id.*; *see supra* note 31 and accompanying text.

37 *See, e.g.*, *supra* notes 35-36 and accompanying text; *see also* Tobias, *supra* note 6, at 287-89 (discussing litigation explosion and litigation abuse and citing relevant secondary authority).

environment, as expressed in the CERCLA statutory scheme.[38] These considerations are at least as relevant as the factors that Keeton considered.[39] The *Weiner* case also mentioned no opinions involving the environment,[40] although Judge Keeton examined a wealth of precedent requiring particularized pleading in a number of substantive fields of law.[41]

2. Additional Relevant Cases

a. Cases Imposing Elevated Pleading

Numerous federal district judges have required elevated pleading in CERCLA and other environmental cases. For example, a Northern District of Indiana judge stated that a Resource Conservation and Recovery Act (RCRA) complaint must include allegations regarding every material element of each asserted claim. This judge found deficient a pleading that contained only bare legal conclusions attached to narrated facts.[42] Judges in the District of Colorado and the Southern District of New York have similarly found that pleadings including conclusory allegations that merely track CERCLA's language are insufficient.[43]

Moreover, the United States Court of Appeals for the Sixth Circuit, in *McGregor v. Industrial Excess Landfill*, held that plaintiffs must specifically allege in complaints "either the costs they incurred . . . or the actions they took in response to the allegedly hazardous conditions."[44] The Middle District of Pennsylvania applied this ruling

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38 The major purpose of CERCLA is to clean up hazardous waste sites. *See, e.g.*, United States v. Fleet Factors, 901 F.2d 1550, 1553 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991); Ambrogi v. Gould, Inc., 750 F. Supp. 1233, 1237 (M.D. Pa. 1990); United States v. Price, 577 F. Supp. 1103, 1109 (D.N.J. 1983).

39 *See supra* notes 35-36 and accompanying text.

40 Quite a few existed, however, at the time that Judge Keeton issued *Weiner*. *See, e.g.*, Supporters to Oppose Pollution v. Heritage Group, 760 F. Supp. 1338 (N.D. Ind. 1991); Cook v. Rockwell Int'l Corp., 755 F. Supp. 1468 (D. Colo. 1991); *see also infra* notes 42-52, 63-65 and accompanying text.

41 *Weiner*, 768 F. Supp. at 898-99; *see also supra* note 17 and accompanying text.

42 *See Heritage Group*, 760 F. Supp. at 1340. *But cf.* CBS v. Henkin, 803 F. Supp. 1426, 1432 (N.D. Ind. 1992) (rejecting elevated pleading in CERCLA cases).

43 *See Cook*, 755 F. Supp. at 1475; Bradley Indus. Park v. Xerox Corp., No. 88 CIV. 7574 (CSH), 1991 U.S. Dist. LEXIS 1492, at *31 (S.D.N.Y. Feb. 4, 1991).

44 *See* McGregor v. Industrial Excess Landfill, 856 F.2d 39, 42 (6th Cir. 1988).

in *Ambrogi v. Gould, Inc.*[45] The district judge in *Ambrogi* provided comparatively expansive treatment of several issues relevant to elevated pleading.

The court in *Ambrogi* analogized to Third Circuit civil rights cases[46] and invoked policy concepts, articulated in *Weiner*, that seek to protect defendants from meritless litigation.[47] The judge in *Ambrogi* declared that the large number of environmental actions could not justify the imposition of heightened pleading,[48] but that particularity in pleading would help eliminate frivolous claims and distinguish federal causes of action from state tort claims. Heightened pleading requirements would also give defendants adequate notice of plaintiffs' claims, thus permitting defendants to formulate appropriate responses.[49]

The United States Court of Appeals for the Ninth Circuit, however, followed a different approach in *Ascon Properties v. Mobil Oil Co.*[50] In *Ascon Properties*, the court distinguished the Sixth Circuit's *McGregor* holding on its facts.[51] The Ninth Circuit imposed a slightly elevated requirement in CERCLA cases by stating that a "claimant must allege at least one type of 'response' cost cognizable under CERCLA [in order] to make out a prima facie case."[52]

b. Cases Rejecting Elevated Pleading

Several judges have held that heightened pleading is not required in CERCLA cases. Judges in the Northern District of New York and in the Western District of New York observed that a CERCLA plain-

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45 750 F. Supp. 1233, 1251-53 (M.D. Pa. 1990).

46 The Third Circuit has a reputation as the foremost proponent of elevated pleading in civil rights cases. *See, e.g.*, Rotolo v. Borough of Charleroi, 532 F.2d 920, 922 (3d Cir. 1976) (requiring plaintiffs in civil rights cases to plead facts with specificity); Marcus, *supra* note 6, at 449 (noting Third Circuit is leader in movement to impose elevated pleading); *see also Ambrogi*, 750 F. Supp. at 1251-52 (discussing pleading sufficiency).

47 For instance, the *Ambrogi* court subscribed to the idea that elevated pleading "serves to protect . . . defendants who would be unduly burdened defending frivolous actions." *Ambrogi*, 750 F. Supp. at 1252; *see also Weiner*, 768 F. Supp. at 897-98; *supra* notes 15-16, 27-28 and accompanying text.

48 *Ambrogi*, 750 F. Supp. at 1252. *But cf. supra* notes 27-28 and accompanying text (noting that large number of frivolous civil rights claims is often cited as justification for elevated pleading).

49 *Ambrogi*, 750 F. Supp. at 1252.

50 866 F.2d 1149 (9th Cir. 1989).

51 *Id.* at 1156; *see also supra* note 44 and accompanying text (providing Sixth Circuit holding).

52 *Ascon Properties*, 866 F.2d at 1154.

tiff need not plead that it incurred particular costs. If the plaintiff alleges that it has incurred and will continue to incur expenses and costs, that pleading would suffice.[53] A Connecticut district judge relied on these two opinions to hold that a plaintiff must allege that it incurred response costs but is not required to particularize those expenses.[54] The Connecticut court also distinguished the Sixth Circuit's *McGregor* holding on its facts and remarked that the plaintiff had afforded the defendant fair notice of plaintiff's claim and the grounds on which it rested.[55]

A Northern District of Indiana judge refused to apply heightened pleading for similar reasons. This court distinguished *Weiner* because the plaintiff's pleadings accorded the defendant adequate notice of plaintiff's legal theory.[56] Moreover, the judge stated that numerous courts have held that Federal Rule of Civil Procedure 8, not Federal Rule 9, governs pleading in CERCLA litigation.[57]

Additional federal district judges have expressly or implicitly rejected heightened pleading under CERCLA. For example, one judge in the Maryland District declined to require that CERCLA plaintiffs plead with particularity analogous to Rule 9(b)'s requirements.[58] This court also stated that it would "continue to hold CERCLA claims to the traditional pleading standards embodied in Fed. R. Civ. P. 8(a)(2)."[59] The judge specifically rejected defendant's suggestion that it base elevated pleading on *Weiner*.[60] A Northern District of New York judge, writing before *Weiner*, similarly refused to impose heightened pleading.[61] This court declared that the defendant had not submitted, nor had the judge discovered, any

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53 *See* Alloy Briquetting Corp. v. Niagara Vest, Inc., 756 F. Supp. 713, 717 (W.D.N.Y. 1991); New York v. General Elec. Co., 592 F. Supp. 291, 298 (N.D.N.Y 1984).

54 *See* Arawana Mills Co. v. United Technologies Corp., 795 F. Supp. 1238, 1243 (D. Conn. 1992).

55 *Id.* at 1243-44; *see also supra* note 44 and accompanying text (discussing treatment of costs in *McGregor*).

56 CBS v. Henkin, 803 F. Supp. 1426, 1432 (N.D. Ind. 1992). *But cf.* Supporters to Oppose Pollution v. Heritage Group, 760 F. Supp. 1338, 1340 (N.D. Ind. 1991) (imposing elevated pleading in RCRA case).

57 *Henkin*, 803 F. Supp. at 1432. The court cited two cases treated below. *See infra* notes 58-62 and accompanying text. One case similar to *Henkin* is Quadion Corp. v. Mache, 738 F. Supp. 270, 275 (N.D. Ill. 1990). *See also infra* note 64 and accompanying text.

58 United States v. Azrael, 774 F. Supp. 376, 379 (D. Md. 1991).

59 *Id.* at 379 n.6.

60 *Id.*

61 Stilloe v. Almy Bros., 759 F. Supp. 95, 104-05 (N.D.N.Y. 1991).

rule or case authority to support an argument that CERCLA cases "must be pled with greater specificity than is required under Fed. R. Civ. Proc. 8(a)."[62]

A New Hampshire District Court judge proclaimed that the Federal Rules do not require specificity in CERCLA pleadings. This judge flatly rejected defendant's contention that the court dismiss plaintiff's CERCLA claim for failing to specify certain response costs.[63] A Northern District of Illinois judge acknowledged that the CERCLA test for holding corporate individuals liable is very fact-specific. This judge, however, held that the Federal Rules' pleading strictures do not "compel the specification of such facts in the complaint."[64]

In sum, a growing number of federal judges have required that plaintiffs plead with particularity in environmental cases, especially those involving CERCLA.[65] The *Weiner* case is representative of this trend, and provides analysis of many issues important to the imposition of elevated pleading. The Supreme Court's resolution of the heightened pleading issue in civil rights suits against municipalities also provides relevant analysis. This article next turns to the *Leatherman* opinion to examine its arguments against elevated pleading.

II. Analysis Of *Leatherman*

A. Leatherman

In *Leatherman*, the Supreme Court held that federal courts could not impose a pleading standard more stringent than the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure in civil rights cases alleging municipal liability under 42 U.S.C. Section 1983.[66] Chief Justice Rehnquist, writing for the Court, rejected the argument that normal pleading would expose municipalities to time consuming and costly discovery in all such actions, disrupting municipal functions and emasculating municipal immunity.[67] He

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62 *Id.* at 104.

63 Mesiti v. Microdot, 739 F. Supp. 57, 62 (D.N.H. 1989); *accord* New York v. Shore Realty Corp., 648 F. Supp. 255, 262 (E.D.N.Y. 1986).

64 Quadion Corp. v. Mache, 738 F. Supp. 270, 275 (N.D. Ill. 1990).

65 *See supra* notes 42-52 and accompanying text.

66 Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 113 S. Ct. 1160, 1161 (1993).

67 *Id.* at 1162. Numerous federal courts had relied on the disruption of municipal functions rationale in imposing elevated pleading. *See, e.g.*, Jones v.

observed that the contention improperly equated freedom from liability with immunity from suit. He also stated that municipalities do not possess absolute or qualified immunity under Section 1983. Municipalities could thus be found liable when their customs or policies cause the alleged constitutional injuries, regardless of the pleading standard.[68]

Rehnquist's opinion also refuted the suggestion that "heightened pleading" was a misnomer, because the degree of particularity that the Federal Rules requires varies with the complexity of the applicable substantive law.[69] The Court instead found elevated pleading well-named. Enhanced pleading requirements demand more to plead a complaint under Section 1983 than to plead other kinds of claims for relief.[70]

The Supreme Court then declared that it was impossible to reconcile heightened pleading with the liberal notice pleading system in the Federal Rules.[71] Chief Justice Rehnquist included a pair of classic, often-cited quotations from *Conley v. Gibson*[72] to defend notice pleading:

> Rule 8(a)(2) requires that a complaint include only "a short and plain statement of the claim showing that the pleader is entitled to relief." In *Conley v. Gibson*, we said in effect that the rule meant what it said: "[T]he 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."[73]

The Supreme Court next stated that Rule 9(b) requires particularized pleading for fraud and mistake.[74] Chief Justice Rehnquist remarked that the Federal Rules proscribe enhanced pleading requirements for certain claims. The Rules fail to include among these enumerated actions lawsuits against municipalities alleging liability under Section 1983. Therefore, following the maxim *expressio*

Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984); United States v. City of Philadelphia, 644 F.2d 187, 204-05 (3d Cir. 1980).

68 *Leatherman*, 113 S. Ct. at 1162.

69 *Id.*

70 *Id.* at 1162-63.

71 *Id.* at 1163; *see also supra* notes 6-10 and accompanying text.

72 355 U.S. 41 (1957); *see also Leatherman*, 113 S. Ct. at 1163; *supra* notes 9-10 and accompanying text (discussing *Conley*).

73 *Leatherman*, 113 S. Ct. at 1163 (citations omitted) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957).

74 *Id.*; *see also* FED. R. CIV. P. 9(b).

unius est exclusio alterius,[75] the Federal Rules do not impose heightened pleading for actions apart from fraud and mistake.[76]

The Supreme Court observed that claims which seek to impose liability on municipalities for asserted constitutional violations of their employees' rights dated from its 1961 opinion in *Monell v. New York City Department of Social Services*,[77] which construed Section 1983 to permit liability.[78] The Court suggested that Section 1983 litigation might be included in the list of claims subject to particularized pleading in Rule 9(b) if Federal Rules 8 and 9 were drafted today.[79] Rehnquist claimed, however, that this result must be secured through the rule revision process, rather than by judicial construction.[80] Without a Federal Rules amendment, Rehnquist stated that district courts and parties must depend on motions for summary judgment and control of discovery to eliminate meritless cases sooner in the litigation process.[81]

The Supreme Court properly rejected elevated pleading in *Leatherman* because that requirement violated the letter and spirit of the Federal Rules' pleading regime, additional features of the Rules, and other pronouncements of the Supreme Court.[82] Federal judges thus lack the authority to demand stricter pleading in civil rights

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[75] *Leatherman*, 113 S. Ct. at 1163. *Expressio unius est exclusio alterius* translates as "the expression of one thing is the exclusion of another." BLACKS LAW DICTIONARY 581 (6th ed. 1990). *See generally* SUTHERLAND STAT. CONST. § 47.23 (5th ed. 1992) (discussing use of phrase *expressio unius est exclusio alterius*).

[76] *Leatherman*, 113 S. Ct. at 1163.

[77] 436 U.S. 658 (1978); *see also Leatherman*, 113 S. Ct. at 1163.

[78] *See Monell*, 436 U.S. at 689-91; *Leatherman*, 113 S. Ct. at 1163.

[79] *Leatherman*, 113 S. Ct. at 1163; *see supra* notes 6-8 and accompanying text.

[80] *Leatherman*, 113 S. Ct. at 1163. The Supreme Court applied virtually identical phrasing and reasoning to its treatment of Rules 19 and 24 in Martin v. Wilks, 490 U.S. 755, 767 (1989). *See generally* Carl Tobias, *Civil Rights Procedural Problems*, 70 WASH. U. L.Q. 801, 802-03 (1992) (discussing *Martin v. Wilks*).

[81] *Leatherman*, 113 S. Ct. at 1163; *see also* Marcus, *supra* note 6, at 439-40 (discussing cited argument); *accord* Tobias, *supra* note 6, at 300. New proposals to amend certain discovery provisions in the Federal Rules would afford judges greater control over discovery. *See* Judicial Conference of the United States, Proposed Amendments to Federal Rules of Civil Procedure 26, 30(a)(2), 33(a) (Sept. 1992). *See generally* Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139 (1993) (examining conflicting procedural reform efforts); Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263 (1992) (discussing proposed amendments to rules regarding pretrial discovery).

[82] *See* Marcus, *supra* note 6; Tobias, *supra* note 6.

actions.[83] The Federal Rules' drafters provided for heightened pleading only in Rule 9(b) and refused to impose elevated requirements and fact pleading when recommending Rule 8 in 1938.[84] Subsequent rule revisions altered none of these original standards.[85]

Federal Rules amendments have preserved a flexible, pragmatic scheme of pleading intended to serve limited purposes. When judges dismiss civil rights actions at the pleading phase in the belief that plaintiffs will not succeed on the merits, the judges effectively require litigants to assemble evidence before they have taken discovery. That requirement contravenes traditional wisdom regarding the information that plaintiffs are required to produce and that judges may consider at this stage.[86]

The Supreme Court in *Leatherman* properly suggested that federal trial judges and parties could employ other procedures to eliminate meritless actions.[87] For instance, Chief Justice Rehnquist observed that judges and litigants can invoke summary judgment under Rule 56 and rely upon provisions in the discovery rules to "weed out unmeritorious claims sooner rather than later."[88] Judges can apply other mechanisms, such as Rule 16 procedures for pretrial conferences. Judges may seek guidance from the Eastern District of Virginia, which enjoys a reputation for its use of Rule 16 to resolve disputes promptly.[89] Judges and parties might also employ meas-

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[83] *See Leatherman*, 113 S. Ct. at 1163; Elliott v. Perez, 751 F.2d 1472, 1482 (5th Cir. 1985) (Higginbotham, J., concurring); Rotolo v. Borough of Charleroi, 532 F.2d 920, 925-27 (3d Cir. 1976) (Gibbons, J., dissenting).

[84] *See supra* notes 6-10 and accompanying text.

[85] *See* Elliott v. Perez, 751 F.2d at 1482 (Higginbotham, J., concurring); United States v. Gustin-Bacon Div., Certain-Teed Prods., 426 F.2d 539, 542-43 (10th Cir.), *cert. denied*, 400 U.S. 832 (1970); Thompson v. Village of Evergreen Park, 503 F. Supp. 251, 252 (N.D. Ill. 1980); FED. R. CIV. P. 9(b); Wingate, *supra* note 14, at 692.

[86] *See, e.g.*, Means v. City of Chicago, 535 F. Supp. 455, 460 (N.D. Ill. 1982) ("We are at a loss as to how any plaintiff . . . is supposed to allege with specificity prior to discovery acts to which he or she personally was not exposed . . . ."); Hill v. City of Atlanta, 91 F.R.D. 528, 532 (N.D. Ga. 1981); Marcus, *supra* note 6, at 462-71.

[87] *See Leatherman*, 113 S. Ct. at 1163; *see also* Tobias, *supra* note 6, at 300. This assumes that plaintiffs pursue too many meritless civil rights actions, a contention challenged by some. *See, e.g.*, *Rotolo*, 532 F.2d at 927 (Gibbons, J., dissenting); Wingate, *supra* note 14, at 688.

[88] *Leatherman*, 113 S. Ct. at 1163; *see also supra* note 81 and accompanying text.

[89] *See* FED. R. CIV. P. 16; *see also* Charles R. Richey, *Rule 16 Revisited: Reflections for the Benefit of Bench and Bar*, 139 F.R.D. 525 (1992). *See generally* Tobias, *supra*

ures covering, for example, case management and discovery under the Civil Justice Reform Act of 1990.[90]

The imposition of stricter pleading in civil rights litigation has significant consequences for plaintiffs. Heightened pleading contravenes precepts of basic fairness by demanding that some litigants satisfy more burdensome requirements without justification. Stringent pleading revives the repudiated notion of fact pleading and applies the rejected idea of "disfavored claims"[91] to a class of lawsuits that the Supreme Court has declared is fundamental to liberty.[92]

Elevated pleading also imposes onerous duties on a category of parties who have limited ability to fulfill them. For example, numerous civil rights plaintiffs have relatively few resources and comparatively little access to information relevant to their cases. Stricter pleading rules will require that they include information in their complaints which they lack the time or money to obtain or can secure only through discovery.[93] Finally, practically all of the factors reviewed above apply to environmental litigation. Lower courts should apply *Leatherman* to proscribe heightened pleading in environmental litigation.

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note 6, at 291-92 (noting Rule 16's ability to increase district courts' power to manage litigation); Tobias, *Discretion*, *supra* note 29, at 942-46 (same). For analysis of the Eastern District of Virginia and its expeditious dispute resolution, see Kim Dayton, *Case Management in the Eastern District of Virginia*, 26 U.S.F. L. REV. 445 (1992). *See generally* Carl Tobias, *Civil Justice Reform in the Fourth Circuit*, 50 WASH. & LEE L. REV. 89, 98-99 (1993) (discussing district's refusal to modify stringent control over civil docket).

[90] *See* Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-482 (Supp. 1992)). *See generally* Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992) (criticizing Civil Justice Reform Act's redistribution of procedural rulemaking power and impairment of federal courts' ability to control civil litigation); Carl Tobias, *Civil Justice Reform Roadmap*, 142 F.R.D. 507 (1992) (discussing civil justice reform in each federal government branch). Numerous courts had implemented some of these and other techniques through local rules. *See* Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770, 770-89 (1981). *See generally* Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1396-99 (1992) (discussing managerial judging and its codification by Federal Rules amendments).

[91] *See* Marcus, *supra* note 6, at 471-73; Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200-01 (1988).

[92] *See, e.g.*, Bounds v. Smith, 430 U.S. 817, 828 (1977); Newman v. Piggie Park Enters., 390 U.S. 400 (1968).

[93] *See, e.g.*, Tobias, *supra* note 6, at 300-01; Tobias, *Rule 11*, *supra* note 29, at 495-98.

B. Applicability of Leatherman *to Environmental Cases*

Whether *Leatherman* prohibits enhanced pleading in environmental litigation is not obvious from the Court's opinion. *Leatherman* proscribes heightened pleading for civil rights actions against a municipality. Moreover, the Court did not purport to address the imposition of elevated pleading in other types of lawsuits. The opinion stated that the case provided no occasion to examine whether the Court's "qualified immunity jurisprudence would require heightened pleading in cases involving individual government officials."[94] The Court, accordingly, may have been suggesting that it was leaving open for future resolution whether courts could require heightened pleading in other actions.

Nonetheless, the Court would probably reject elevated pleading in environmental litigation, if faced with a case presenting this issue. Many of the rationales that the Court employed in *Leatherman* apply to environmental lawsuits. For example, heightened pleading in environmental actions conflicts with the Rules' liberal, flexible scheme of notice pleading.[95] Environmental cases, like civil rights litigation, also do not involve fraud or mistake, so that Rule 9(b) does not require particularity in pleading.[96] Moreover, the Supreme Court, following *Leatherman*, would probably find that courts can only require particularized pleading in environmental lawsuits with an amendment to Rule 9(b), not through judicial construction. Thus, courts and parties must depend on summary judgment and control of discovery to resolve frivolous environmental actions earlier in the litigation process.[97]

III. Implications Of *Leatherman*'s Application To Environmental Cases

Federal judges should apply the holding and underlying rationales in *Leatherman* to environmental litigation. Plaintiffs who pursue environmental cases should not have to satisfy heightened pleading requirements. Such requirements effectively revive fact

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94 Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 113 S. Ct. 1160, 1162 (1993).

95 *Id.* at 1163; *see also supra* notes 6-10, 71 and accompanying text.

96 *See Leatherman*, 113 S. Ct. at 1163; *see also* Fed. R. Civ. P. 9(b); *supra* notes 74-76 and accompanying text. Moreover, few environmental cases implicate the liability of municipalities or their employees.

97 *See Leatherman*, 113 S. Ct. at 1163; *supra* notes 79-81 and accompanying text.

pleading that the Civil Rules Committee rejected when drafting the original Federal Rules.[98] Judges should demand that these plaintiffs only meet Rule 8's notice pleading requirements. Notice pleading was intended to be liberal and general, and judges should flexibly and practically enforce these pleading requirements.[99]

Therefore, judges should rarely grant motions to dismiss when defendants argue that environmental plaintiffs have not pled sufficient facts. Judges should also grant plaintiffs leave to amend their pleadings or to refile.[100] For instance, the Western District of New York in *Alloy Briquetting Corp. v. Niagara Vest, Inc.* permitted the plaintiff to amend its complaint to include the dates response costs were incurred.[101] The New Jersey District Court judge in *United States v. Price* dismissed some of plaintiff's CERCLA claims without prejudice.[102] A Northern District of Texas judge allowed plaintiffs to replead, even though the judge sharply criticized the papers that plaintiffs initially filed.[103]

Judges should also recognize that a number of environmental plaintiffs, such as local citizens' groups and homeowners' associations, may possess comparatively limited resources and lack access to important material for pleading and proving their cases.[104] Judges, thus, should not dismiss these plaintiffs' suits early in the litigation. Judges should facilitate plaintiffs' discovery by, for instance, liberally granting plaintiffs' discovery requests so that litigants can have an opportunity to prove their claims. In short, judges should be solicitous of the needs of environmental plaintiffs. Congress has indi-

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98 *See supra* notes 6-10, 71 and accompanying text.

99 *See supra* notes 6-10, 71-73 and accompanying text.

100 *See Leatherman*, 113 S. Ct. at 1163; Foman v. Davis, 371 U.S. 178, 182 (1962); United States v. Hougham, 364 U.S. 310, 316 (1960); FED. R. CIV. P. 15. *See generally* Lewis, *supra* note 19, at 1511-39 (reviewing history of Rule 15(c) and its application to relation back principle in diversity and federal question cases).

101 *See* Alloy Briquetting Corp. v. Niagara Vest, Inc., 756 F. Supp. 713, 717-18 (W.D.N.Y. 1991); *supra* note 53 and accompanying text.

102 *See* United States v. Price, 577 F. Supp. 1103, 1110 (D.N.J. 1983); *supra* note 38 and accompanying text.

103 *See* Collin County v. H.A.V.E.N., 654 F. Supp. 943, 952-54 (N.D. Tex. 1987).

104 *See* Carl Tobias, *Environmental Litigation and Rule 11*, 33 WM. & MARY L. REV. 429, 453-57 (1992). Plaintiffs in some CERCLA cases may have substantial resources. *See, e.g.*, CBS v. Henkin, 803 F. Supp. 1426 (N.D. Ind. 1992). *See generally* Tobias, *Rule 11*, *supra* note 29, at 495-98 (noting that characteristics of civil rights cases, including parties' resource disparities, make litigants and counsel vulnerable to Rule 11 sanction motions).

cated in substantive, procedural and fee-shifting legislation that these types of plaintiffs should receive favorable judicial treatment, because they vindicate the statutory purpose of cleaning up the environment.[105]

Judges and environmental defendants should also invoke measures that respond to concerns otherwise addressed by elevated pleading requirements.[106] Judges and defendants should employ traditional devices, such as motions for summary judgment under Rule 56 and the discovery provisions of Rules 26 through 37, to eliminate frivolous or weak cases early in the litigation.[107] Judges and defendants can also rely on relatively new techniques, namely the prescriptions in Federal Rule 16 and the procedures that district courts are implementing under the Civil Justice Reform Act of 1990.[108]

CONCLUSION

A number of federal judges have imposed heightened pleading requirements on environmental plaintiffs since the mid-1980s, particularly on plaintiffs pursuing CERCLA actions. The Supreme Court's recent decision in *Leatherman* proscribes elevated pleading in civil rights cases against municipalities. The holding and reasoning in that opinion appear applicable to environmental cases. Federal judges, therefore, should cease demanding that environmental plaintiffs satisfy stricter pleading requirements and should only require that they satisfy the general, flexible notice pleading regime of the Federal Rules embodied in Rule 8.

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105 *See* 42 U.S.C. §§ 9613(i), 9622 (Supp. 1990) (providing examples of provisions for intervention and settlement in CERCLA); 33 U.S.C. § 1365 (Supp. 1990) (providing examples of provisions for citizen suits and fee shifting in Clean Water Act). *See generally* Tobias, *Discretion*, *supra* note 29, at 962 (suggesting similar ideas regarding civil rights litigation).

106 *See, e.g.*, Cash Energy v. Weiner, 768 F. Supp. 892, 898 (D. Mass. 1991); Ambrogi v. Gould, Inc., 750 F. Supp. 1233, 1251-52 (M.D. Pa. 1990); *see supra* notes 15-16, 27, 47, 49 and accompanying text.

107 *See* FED. R. CIV. P. 26-37, 56; *supra* notes 81, 87-88 and accompanying text.

108 *See supra* notes 89-90 and accompanying text.