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A FOX IN THE HENHOUSE: APPLYING CALIFORNIA'S DELAYED DISCOVERY RULE IN FEDERAL COURT

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I. INTRODUCTION

A. Statutes of Limitations and the Delayed Discovery Rule

"'Statute of limitations' is the 'collective term . . . commonly applied to a great number of acts,' or parts of acts, that 'prescribe the periods beyond which' a plaintiff may not bring a cause of action" or claim.[1] As a general rule, plaintiffs are barred from asserting a claim after the statute of limitations applicable to that claim has run. The moment at which a statute of limitations begins to run, or "accrues," is particular to each claim. If, for example, the statute of limitations for a cause of action for breach of fiduciary duty is twelve months, a plaintiff will have twelve months (the prescribed time period) from the occurrence of the alleged breach (the "accrual" event) to file suit. If she fails to do so, the plaintiff's cause of action becomes stale, and she is thus precluded from asserting it.[2]

Courts interpret statutes of limitations strictly, and are loathe to alter the time period established by such a statute in a manner inconsistent with the will of the legislature.[3] However, many

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1. Norgart v. Upjohn Co., 981 P.2d 79, 86 (Cal. 1999); *see also Statute of Limitations*, *Black's Law Dictionary* (10th ed. 2014) (defining a statute of limitations as "a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)").

2. For a discussion of the general purposes of statutes of limitation, see James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 VA. ENVTL. L.J. 589, 590–92 (1996).

3. *See, eg.*, *Norgart*, 981 P.2d at 87 ("To establish any [particular limitations] period under any . . . statute belongs to the legislature alone subject only to Constitutional restraints."); Am. Pipe

jurisdictions recognize an exception to this general rule, commonly known as the "discovery rule," or the "delayed discovery rule."[4] Though federal courts apply the "delayed discovery doctrine" to various categories of federal claims,[5] the Supreme Court has rejected the notion that the discovery rule applies to all statutes of limitations in all contexts.[6]

In contrast to the federal judiciary, California courts have adopted a delayed discovery rule that is more broadly applicable.[7] Under California law, the delayed discovery rule "postpones [the] accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action."[8] California law also places the burden of proving the applicability of the discovery rule on plaintiffs.[9] In *Fox v. Ethicon Endo-Surgery, Inc.*,[10] the California Supreme Court held that to invoke the discovery rule, "[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence."[11]

Thus, under *Fox*, a plaintiff need only address the discovery rule at the pleading stage when his "complaint shows on its face that his

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& Const. Co. v. Utah, 414 U.S. 538, 559 (1974) (recognizing "the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose.").

4. *See Am. Pipe & Const. Co.*, 414 U.S. at 595.

5. *See* TRW Inc. v. Andrews, 534 U.S. 19, 27 (2001) (listing cases of fraud, latent disease, and medical malpractice as the "only [categories of] cases in which the Court has recognized a prevailing discovery rule").

6. SCA Hygiene Prod. Aktiebolag v. First Quality Baby Prod., LLC, 137 S. Ct. 954, 962 (2017) ("While some claims are subject to a 'discovery rule' under which the limitations period begins when the plaintiff discovers or should have discovered the injury giving rise to the claim, that is not a universal feature of statutes of limitations."). *But see* Lyons v. Michael & Assocs., 824 F.3d 1169, 1171 (9th Cir. 2016) (quoting Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d 1260, 1266 (9th Cir. 1998) ("[F]ederal law determines when the limitations period begins to run, and the general federal rule is that 'a limitations period begins to run when the plaintiff knows or has reason to know of the injury which is the basis of the action.'").

7. *See* KATHLEEN M. BANKE & JOHN L. SEGAL, CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL,STATUTES OF LIMITATIONS, Ch. 3 (2019) (listing sixteen "commonly-encountered claims for which, by statute or case law, accrual is delayed until plaintiff discovers the facts essential to the claim.").

8. *Norgart*, 981 P.2d at 88.

9. Fox v. Ethicon Endo-Surgery, Inc., 110 P.3d 914, 921 (Cal. 2005) (quoting McKelvey v. Boeing N. Am., Inc., 86 Cal. Rptr. 2d 645, 651 (Ct. App. 1999)).

10. 110 P.3d 914 (Cal. 2005).

11. *Id.* at 920–21 (alteration in original) (emphasis omitted) (quoting *McKelvey*, 86 Cal. Rptr. 2d at 651).

claim would" otherwise be barred by the statute of limitations.[12] In such a case, a plaintiff must allege two elements to invoke the delayed discovery rule: "(1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence."[13] And finally, at the pleading stage, a plaintiff must plead the facts that establish these two elements with specificity.[14]

B. Application of California's Delayed Discovery Rule in Federal Court

In *California Sansome Co. v. U.S. Gypsum*,[15] decided in 1995, the Ninth Circuit considered the application of California's delayed discovery rule in federal court. The court cited to a 1991 California Court of Appeals case that espoused an earlier version of the delayed discovery rule later adopted by the California Supreme Court in *Fox*. The *California Sansome Co.* court declared, without further discussion, that "California law makes clear that a plaintiff must allege *specific* facts establishing the applicability of the discovery-rule exception."[16] In short, the Ninth Circuit endorsed the "specific facts" pleading standard from *Fox* without critically engaging with the ramifications of that endorsement.[17]

Since *Fox*, the delayed discovery standard has been applied by federal district courts in California alone on more than 200 occasions.[18] Application of the *Fox* standard in federal court raises two important questions, both largely unanswered by the district courts that apply it. The first is whether a plaintiff in federal court is required to "*specifically plead facts*" pertaining to the delayed discovery rule in order to survive a 12(b)(6) motion to dismiss. The second is whether

12. *Id.* at 920–21.

13. *Id.* at 921 (emphasis omitted) (quoting *McKelvey*, 74 Cal. App. 4th at 160).

14. *Id.*

15. 55 F.3d 1402 (9th Cir. 1995).

16. *Id.* at 1407 (emphasis added) (citing CAMSI IV v. Hunter Tech. Corp., 282 Cal. Rptr. 80, 86–87 (Ct. App. 1991)).

17. Although California's delayed discovery rule jurisprudence predates 2005, *Fox*, decided that year, describes the contours of the rule in its modern form. For convenience, this Note uses "the *Fox* standard" to refer to the rule announced in *Fox*, even though California courts applied a similar standard prior to 2005.

18. *See Fox v. Ethicon Endo-Surgery, Inc.*, *Citing References*, WESTLAW, https://1.next.westlaw.com/Link/RelatedInformation/DocHeadnoteLink?docGuid=Ic636cfb326c311daaea49302b5f61a35&headnoteId=200656713601320100105001014&originationContext=document&docSource=24c5cd58636b4f3fb026b04a4831abd9&rank=6&transitionType=CitingReferences&contextData=(sc.History*oc.UserEnteredCitation) (last visited Mar. 12, 2018).

it is ever appropriate to require a plaintiff in federal court to plead compliance with the statute of limitations. Generally, in federal court, a complaint need only include a "short and plain statement of the claim" to survive a motion to dismiss,[19] and the burden of raising the statute of limitations defense is on the defendant.[20]

Strong v. Cochran,[21] a recent case from the United States District Court for the District of Utah, considered both of these questions. In *Strong*, the plaintiff asserted various claims, including a California securities law claim.[22] One of the defendants moved to dismiss that claim, arguing that the it was time-barred by the statute of limitations, and that the plaintiff had failed to plead the elements of the delayed discovery rule with the specificity required by *Fox*.[23] The court flatly refused to apply the *Fox* standard for two reasons. First, the court found that *Fox*'s requirement that a plaintiff "specifically plead facts" amounted to a heightened pleading standard, and thus, application of the *Fox* standard violates the *Erie* doctrine.[24] Second, the court found that "expiration of the statute of limitations is an affirmative defense," and thus should not be considered at the pleading stage.[25] This Note uses *Strong* as a point of departure, and asserts that the *Strong* court was correct as to its application of the *Erie* doctrine, but incorrect as to its conclusion that the applicability of the discovery rule should not be considered at the pleading stage.

Part II of this Note illustrates the differences between California's code pleading system and the federal notice pleading system. It also provides a brief survey of federal cases in which courts applied California's delayed discovery rule. Part III demonstrates that under the *Erie* doctrine, *Fox*'s "specifically plead facts" requirement does not apply in federal court. Part III also demonstrates that the federal pleading standard in Rule 8(a)(2) is not susceptible to ad hoc judicial alteration. Part IV argues that under the *Erie* doctrine, the Delegation

19. FED. R. CIV. P. 8(a)(2); *see also* Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (noting that Rule 8 governs all pleadings in federal court, with limited exception).

20. *See* FED. R. CIV. P. 8(c) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense."); Gomez v. Toledo, 446 U.S. 635, 640 (1980) (refusing to "impos[e] on the plaintiff an obligation to anticipate . . . a defense . . . in his complaint").

21. No. 2:14-cv-788-TC, 2017 WL 4620984 (D. Utah, Oct. 13, 2017).

22. *Id.* at *5

23. *Id.*

24. *Id.*

25. *Id.*

doctrine, and United States Supreme Court precedent, *Fox*'s pleading standard has no place in federal court. Part V argues that, although federal courts should not follow *Fox*'s pleading standard, they should follow *Fox* in placing the burden of pleading the elements of the delayed discovery rule on plaintiffs. Part VI offers concluding remarks.

II. THE DIFFERENCE BETWEEN CALIFORNIA'S CODE PLEADING SYSTEM AND THE FEDERAL NOTICE PLEADING SYSTEM

Although this Note's primary focus is on the pleading standard applicable to California's delayed discovery rule in federal courts, a brief overview of the fundamental differences between California's general pleading standard and the federal pleading standard embodied in Rule 8(a)(2) of the Federal Rules of Civil Procedure provides a helpful framework for the analysis.

A. Code Pleading and the Delayed Discovery Rule

The California Supreme Court has established that, in order to rely on the discovery rule for delayed accrual of a "cause of action, '[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence.'"[26] The *Fox* court also held that "conclusory allegations will not withstand demurrer."[27] These judge-made rules operate in relation to the California Rules of Civil Procedure.

Section 425.10(a)(1) of the California Civil Procedure Code instructs that a complaint must contain "a statement of *facts* constituting the *cause of action*, in ordinary and concise language."[28] Further, under California's code pleading system, a plaintiff must state ultimate facts, i.e. "those factual propositions on which liability will be directly established," in order to state a cause of action.[29] Although California's code pleading system is less formalistic and demanding than the pure fact-pleading systems that used to be common

26. Fox v. Ethicon Endo-Surgery, Inc., 110 P.3d 914, 920–21 (Cal. 2005) (alteration in original).

27. *Id.* at 921.

28. CAL. CIV. PROC. CODE § 425.10(a)(1) (emphasis added).

29. *See* ALLAN IDES ET AL., CIVIL PROCEDURE CASES AND PROBLEMS 20 (5th ed. 2016).

throughout the country,[30] its focus on pleading "ultimate facts" continues to distinguish it from the less demanding notice pleading system upon which the Federal Rules are premised.

B. The Federal Pleading Standard

Pleadings in the federal system are governed by a more lenient notice pleading standard. The adoption of the Federal Rules of Civil Procedure in 1938 was, in large part, a rejection of the rigid, formalistic fact pleading systems that were prevalent among state and federal courts at the time.[31] At the center of the notice pleading system is the claim. The definition of a "claim," as understood by the authors of the Federal Rules, is "a group of operative facts giving rise to one or more rights of action."[32] The purpose of pleadings in a notice pleading system, as the name implies, is to put the defendant on notice of the plaintiff's claim.[33] This purpose is reflected in Rule 8(a)(2)'s straightforward declaration that, to state a claim, a complaint need only contain "a short and plain statement of the claim."[34]

Thus, there are, at least in theory, significant differences between California's code pleading system and the federal notice pleading system. The former puts the onus on the plaintiffs to plead ultimate facts, whereas the latter is designed to ensure that plaintiffs provide defendants with notice of the nature of the suit against which they must defend. Preserving the federal notice pleading system requires that federal courts not blur the lines between notice pleading and code pleading. To this end, longstanding Supreme Court precedent mandates that federal courts apply the federal pleading standard in almost every conceivable case.

III. THE UNYIELDING NATURE OF NOTICE PLEADING

Rule 8(a)(2) generally applies to all federal claims,[35] with but a few exceptions.[36] This section discusses three fundamental reasons

30. *See id.* at 21.

31. *See id.* at 31.

32. *See id.* at 13 (quoting CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 477 (2d ed. 1947)).

33. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("[Rule] 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'").

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

35. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 (2002).

36. *See infra* text accompanying notes 89–92.

why Rule 8(a)(2), not the *Fox* pleading standard, governs discovery rule pleadings in federal court. The first is rooted in the *Erie* doctrine, the second in the Delegation doctrine, and the third in the Supreme Court's opinion in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*.[37]

A. The Erie *Doctrine and Notice Pleading*

In *Strong v. Cochran*, the court concluded that, "under standard *Erie* doctrine, state pleading requirements, so far as they are concerned with the degree of detail to be alleged, are irrelevant in federal court even as to claims arising under state law."[38] The following discussion of the *Erie* doctrine and analysis of the conflict between the *Fox* standard and Rule 8(a)(2) demonstrate that the *Strong* court was correct.

In the seminal case of *Erie Railroad Co. v. Tompkins*,[39] the Supreme Court held that, "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."[40] This statement is at the core of what came to be known as the *Erie* doctrine. The *Erie* doctrine stands for a simple and practical proposition: "a federal court sitting in diversity should apply state substantive law to the resolution of the state claims presented to it."[41] A related and similarly straightforward proposition is that federal courts are to apply constitutionally valid federal procedural law, regardless of the source of the underlying substantive law.[42]

Thus, when a state law and a federal procedural law conflict, the federal procedural law will apply unless it is unconstitutional. This result is required by both practical and constitutional concerns. As a practical matter, the application of a unified body of procedural law in federal courts is conducive to the fair and efficient adjudication of cases. Such uniformity promotes fairness insofar as it puts litigants in federal court on notice of the procedural rules that will govern their

37. 507 U.S. 163 (1993).

38. Strong v. Cochran, No. 2:14-cv-788-TC, 2017 WL 4620984, at *5 (D. Utah, Oct. 13, 2017) (emphasis omitted) (quoting Andresen v. Diorio, 349 F.3d 8, 17 (1st Cir. 2003)).

39. 304 U.S. 64 (1938).

40. *Id.* at 78.

41. *See* IDES ET AL., *supra* note 29, at 465.

42. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996) ("Under the Erie doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.").

cases, and promotes efficiency insofar as it saves federal courts from having to consider which body of procedural law applies on a case by case basis. And as a matter of constitutional law, the Supremacy Clause[43] dictates that where a state law and a valid federal law conflict, the latter must prevail.[44]

1. The Scope of the *Erie* Doctrine

When an *Erie* issue arises, a federal court should resolve the issue by asking: "First, is there truly a conflict between the federal procedural law at issue and some provision of state law? And, second, assuming there is such a conflict, is the federal law valid?"[45] If there is no conflict, then both the state law and the federal procedural law apply. However, if the court finds a conflict, it must then determine whether the federal procedural rule is constitutionally valid. The nature of this inquiry depends on the source of the procedural rule in question.[46] To determine whether a Federal Rule of Civil Procedure is valid, the court must decide whether the rule in question is in compliance with the Rules Enabling Act, discussed below.

2. *Erie* Applied

a) Is there a conflict?

To determine whether federal district courts should apply the *Fox* standard when considering California's discovery rule, the first step is to determine whether there is a conflict between the *Fox* standard and Rule 8(a)(2). The *Fox* standard requires a plaintiff seeking to invoke the discovery rule to "specifically plead facts" to show that the discovery rule applies with respect to a given cause of action.[47] Rule 8(a)(2), on the other hand, requires only that a plaintiff's complaint contain "a short and plain statement of the claim."[48] Clearly there is a potential conflict between the two rules: the former requires

43. U.S. CONST. art. VI, § 2.

44. *See, e.g.*, Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 31 (1988) (discussing "the supremacy of federal law" in the case of a collision between state law and federal law).

45. IDES ET AL., *supra* note 29, at 479.

46. *See id.* at 478.

47. Fox v. Ethicon Endo-Surgery, Inc., 110 P.3d 914, 921 (Cal. 2005).

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

specifically pled facts, while the latter requires only a short and plain statement of a claim.[49]

The issue then becomes whether a plaintiff is required to specifically plead facts pertaining to the delayed discovery rule in order to survive a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. Rule 8(a)(2) is broad enough to resolve this dispute, as it applies to all claims in federal court,[50] with but a few exceptions.[51] In short, there is a real conflict between Rule 8(a)(2) and the *Fox* standard—the standards differ, and thus, both cannot govern the pleading requirements in federal court.

b) Is Rule 8(a)(2) Constitutionally Valid?

Resolving this conflict between the *Fox* standard and Rule 8(a)(2) requires an analysis of whether Rule 8(a)(2) is constitutionally valid. The Federal Rules of Civil Procedure are promulgated pursuant to the Rules Enabling Act (REA), and must comply with the requirements of that statute to be valid.[52] In section 2072(a) of the REA, Congress granted the Supreme Court the authority to promulgate the rules of "practice and procedure" for cases in lower courts.[53] However, Congress also imposed a limit on the Court's power to create procedural rules. Section 2072(b) of the Act states that "[s]uch rules shall not abridge, enlarge or modify any substantive right."[54] Accordingly, to be valid, such a rule must (1) be "reasonably-classifiable" as a rule of practice or procedure, and (2) must not abridge, enlarge, or modify a substantive right.[55] A Federal Rule of Civil Procedure that is valid under the REA is constitutional, and thus, applicable in federal court.[56]

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49. Even in *Ashcroft v. Iqbal*, in which the Supreme Court applied something akin to a heightened pleading standard, the Court rejected a specificity requirement. 556 U.S. 662 (2009). The Court held that "absent overriding considerations pressing for a specificity requirement, as in the case of averments of fraud or mistake, the general 'short and plain statement of the claim' mandate in Rule 8(a) . . . should control." *Id.* at 687 (quoting CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 5A FEDERAL PRACTICE AND PROCEDURE § 1301, at 291 (3d ed. 2004)). Thus, although *Iqbal* imposes a "plausibility" requirement on plaintiffs in federal court, the Court has not gone so far as to impose a "specificity" requirement. *Id.* at 663.

50. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 (2002).

51. *See infra* text accompanying notes 89–90.

52. 28 U.S.C. § 2072 (2012).

53. *Id.* § 2072(a).

54. *Id.* § 2072(b).

55. *Id.*

56. *See supra* text accompanying notes 39–42.

Rule 8(a)(2) is reasonably classifiable as a rule of practice or procedure. In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[57] the Court held that a rule "really regulat[es] procedure" when it "governs only 'the manner and the means' by which the litigants' rights are 'enforced.'"[58] Rule 8(a)(2) governs the means and the manner by which a litigant's rights are enforced by establishing the level of specificity with which plaintiffs must plead the substantive elements of their claims.

Whether Rule 8(a)(2) "abridges, enlarges, or modifies" a substantive right presents a more complex question. In fact, the bounds of the analysis under section 2072(b) remains an open question in Supreme Court jurisprudence. In *Shady Grove*, Justice Scalia and Justice Stevens advanced differing interpretations of the analysis under section 2072(b).[59] However, regardless of which is the correct standard, the analysis demonstrates that Rule 8(a)(2) is constitutionally valid.

Under Justice Scalia's approach from *Shady Grove*, Rule 8(a)(2) passes the validity test, as "it governs . . . 'the manner and the means' by which litigants' rights are 'enforced.'"[60] In Justice Scalia's view, the analysis ends there, and Rule 8(a)(2) is valid. It is noteworthy that no formal Federal Rule of Civil Procedure has ever failed to satisfy the "rule of practice or procedure" requirement of the REA.[61]

Under Justice Stevens's approach, after determining that the rule arguably governs procedure, the question becomes whether an application of Rule 8 would abridge, enlarge, or modify any substantive right in a significant manner,[62] that is, whether the rule changes the litigants' claims, or alters the available "remedies, including any applicable time limitations, available for that claim's

57. 559 U.S. 393 (2010).

58. *Id.* at 407 (quoting Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445 (1946)).

59. *Compare id.* at 410 (Justice Scalia concluded that if a Federal Rule of Civil Procedure does in fact regulate procedure, the analysis ends there: "it is authorized by [the REA] and is valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights."), *with id.* at 424–25 (Stevens, J., concurring in part and concurring in the judgment) (Justice Stevens read the REA to require a court to engage in an analysis of whether a given procedural rule abridges, enlarges, or modifies any substantive rights in order to determine its validity.).

60. *Shady Grove*, 559 U.S. at 407.

61. IDES ET AL., *supra* note 29, at 483–84.

62. *Id.* at 484.

enforcement."[63] With regard to California's delayed discovery rule, Rule 8 does no such thing.

The delayed discovery rule's function is to extend the window in which a plaintiff can sue to enforce a right in cases where the plaintiff does not discover the grounds for her claim until after the otherwise applicable statute of limitations has run.[64] The only difference between *Fox*'s pleading standard and Rule 8(a)(2) is that the former requires a plaintiff to plead facts with specificity, whereas the latter requires only a short and plain recitation of the grounds on which he is invoking the delayed discovery rule. Viewed in this light, altering the pleading standard applicable to the delayed discovery rule does not abridge, enlarge, or modify any substantive rights. Nor does Rule 8(a)(2) extend the time limit available for the enforcement of a claim. Rather, Rule 8(a)(2) merely governs "'the manner and the means' by which litigants' rights are 'enforced'"[65] by establishing the level of specificity with which plaintiffs must plead the substantive elements of their claims.

In summary, Rule 8(a)(2) is valid under the *Erie* doctrine. The rule was enacted pursuant to the REA, it is "a rule of practice or procedure," and finally, it does not abridge, enlarge, or modify any substantive rights. Thus, application of the *Fox* standard in federal court violates the *Erie* doctrine. Federal courts should abandon the *Fox* standard, and instead apply the pleading standards found in Rule 8 of the Federal Rules of Civil Procedure, or in Rule 9 when applicable.

B. The Delegation Doctrine and Notice Pleading

There is another related and compelling reason why federal courts should not apply the *Fox* pleading standard: federal courts do not have the constitutional authority to alter the rules of procedure in an ad hoc manner. As discussed above, the Supreme Court's power to promulgate the Federal Rules of Civil Procedure derives from the REA.[66] Section 2072(b) of the Act, in addition to the "abridge, enlarge or modify" clause, contains a suppression clause that reads: "All laws in conflict with such rules shall be of no further force or effect after

63. *Id.*
64. *See* Fox v. Ethicon Endo-Surgery, Inc., 110 P.3d 914, 920 (Cal. 2005).
65. *Shady Grove*, 559 U.S. at 407.
66. 28 U.S.C. § 2072 (2012).

such rules have taken effect."[67] This delegation of rulemaking power from Congress to the Court falls within the scope of the Delegation doctrine.[68]

The constitutionality of the Delegation doctrine has been a hot topic of debate among legal scholars and in Supreme Court jurisprudence.[69] A formalist critique of the Delegation doctrine is that the grant of quasi-legislative authority to the Court violates the separation of powers doctrine.[70] "To formalists, the constitutional text and intent of the drafters are controlling, and they consider it inappropriate to consider changed circumstances or policy concerns."[71] Functionalists, on the other hand, focus more "on the core functions of each branch to determine whether those functions are threatened by the intrusion of another branch."[72] With regard to the creation of federal procedural law, the functionalist approach makes sense as a practical matter. The rulemaking process established by the REA is an example of coequal branches of government working together to address an issue that is not directly considered in the Constitution: the creation of procedural rules for Article III courts. It is axiomatic that the power to legislate in our constitutional system is held by the legislature. However, Congress has been delegating procedural rulemaking power to the federal courts since the nation's founding.[73] The Supreme Court's promulgation of procedural rules pursuant to a delegation of congressional authority is well established,[74] and such rules bear the stamp of approval of both the judiciary and the legislature.[75] However, given that the Federal Rules of Civil Procedure are promulgated pursuant to a delegation of

67. *Id.* § 2072(b).

68. *See* Leslie M. Kelleher, *Separation of Powers and Delegations of Authority to Cancel Statutes in the Line Item Veto Act and the Rules Enabling Act*, 68 GEO. WASH. L. REV. 395, 412–13 (2000).

69. *See id.* for a thorough discussion of the evolution of the delegation doctrine and its relationship with the separation of powers doctrine.

70. *See id.* at 414–23.

71. *Id.* at 415.

72. *Id.* (citing Buckley v. Valeo, 424 U.S. 1, 122 (1976)).

73. *See* Alexander Volokh, *Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391, 1426 (2017) (citing the Judiciary Act of 1789 as an early example of Congressional delegation to the Court).

74. *See id.*

75. *See id.* (quoting United States v. Mazurie, 419 U.S. 544, 556-57 (1975)) ("[L]imitations on delegation are 'less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter.'")).

congressional authority rather than an enumerated power of the judiciary, alteration of the rules is not something to be taken lightly, and certainly is not within the province of the federal district courts and courts of appeals.[76]

C. Leatherman *and Notice Pleading*

In light of the debate over the constitutionality of the Delegation doctrine, it is little wonder that the Supreme Court has consistently held that the pleading standards set forth in Rule 8 and Rule 9 cannot be altered from the bench, and that they apply with equal force in all cases, regardless of the circumstances of the case or the source of the underlying law.[77] In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, the Supreme Court considered the heightened pleading standard applied by the Fifth Circuit in cases brought against government officials.[78] *Leatherman* came before the Court in 1993, amidst a movement by lower federal courts to create common law exceptions to Rule 8(a)(2) by imposing heightened pleading requirements in certain types of actions.[79] Given this historical context, the *Leatherman* Court's defense of the notice pleading system is all the more powerful.

In *Leatherman*, several plaintiffs sued a municipality under 42 U.S.C. § 1983, alleging civil rights violations by various local officials and police officers.[80] The District Court for the Northern District of Texas dismissed the complaint, because it found the plaintiffs failed to meet the "'heightened pleading standard' required by the decisional law of the Court of Appeals for the Fifth Circuit."[81] The Fifth Circuit affirmed the dismissal, the plaintiffs appealed, and the Supreme Court reversed.[82]

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76. *See* 28 U.S.C. § 2072 (2012) (granting "the Supreme Court" the "power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals").

77. *See, e.g.*, Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 (2002); Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993).

78. *Leatherman*, 507 U.S. at 165.

79. IDES ET AL., *supra* note 29, at 37 (noting that, "commencing in the 1970s and picking up steam thereafter, lower federal courts" throughout the country began applying heightened pleading requirements in actions "deemed disfavored," "in actions brought under 42 U.S.C. § 1983," and in other cases that were "deemed complex.").

80. *Leatherman*, 507 U.S. at 165.

81. *Id.*

82. *Id.*

The defendants in *Leatherman* argued that the District Court and the Fifth Circuit had not in fact applied a heightened pleading standard to the plaintiffs' complaints.[83] They further argued that "the degree of factual specificity required of a complaint by the Federal Rules of Civil Procedure varies according to the complexity of the underlying substantive law."[84] The Court flatly rejected both of these arguments.

With regard to the respondent's first argument, the Court first examined the standard that the courts below had applied. That standard required plaintiffs in suits "against government officials involving the likely defense of immunity" to "state with *factual detail and particularity* the basis for the claim."[85] The standard's demand for "factual detail and particularity" is far more demanding than Rule 8(a)(2), which requires only a short and plain statement of the claim.[86] Furthermore, the standard's focus on "factual detail" is at odds with the liberal notice pleading system embodied in the Federal Rules, and seems to demand even greater specificity than Rule 9, which requires only that "a party must state with particularity the circumstances constituting fraud or mistake."[87] The stark difference between Rule 8(a)(2) and the Fifth Circuit's pleading standard prompted the *Leatherman* Court to conclude that "it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules."[88]

After finding the Fifth Circuit's pleading standard incompatible with the federal notice pleading standard, the Court proceeded to discuss the limited circumstances in which an exception to Rule 8(a)(2) will apply. The Court made clear that there are two sets of circumstances in which Rule 8 will not govern a complaint in federal court.[89] The first, when Rule 9 is triggered by allegations of fraud or mistake; the second, upon amendment of the Federal Rules.[90] The

83. *Id.* at 167.
84. *Id.*
85. *Id.* (emphasis added).
86. FED. R. CIV. P. 8(a)(2).
87. FED. R. CIV. P. 9(b).
88. *Leatherman*, 507 U.S. at 168.
89. *See id.*
90. *See id.* Although the *Leatherman* Court's discussion of amendment to the Rules focused on formal amendment by the Advisory Committee, Congress also maintains the authority to create statutory exceptions to the rule. *See* IDES ET AL., *supra* note 29, at 37 (noting that Congress has

Court rooted its conclusion that pleading standards should not be altered from the bench in the structure of the Federal Rules of Civil Procedure. The Court noted that the *sole* exception to Rule 8(a)(2) in the Federal Rules is embodied in Rule 9.[91] Accordingly, the Court found no basis in the Federal Rules for demanding that plaintiffs alleging municipal liability under section 1983 adhere to a heightened pleading standard. As the Court concluded, "*Expressio unius est exclusio alterius*."[92]

In sum, under *Leatherman*, federal courts may not impose a heightened pleading standard based on the nature of the substantive law at issue, nor can they alter the applicable pleading standard from the bench. Rule 8(a)(2) applies to all pleadings in federal court, unless (1) the plaintiff's complaint implicates Rule 9, or (2) Congress has provided a statutory exception to the rule. With regard to California's delayed discovery rule, no such exception applies.

IV. SOME EXAMPLES OF THE *FOX* STANDARD'S APPLICATION IN FEDERAL COURT

Despite the doctrines and Supreme Court precedents that preclude the application of the *Fox* pleading standard in federal court, district courts within the Ninth Circuit continue to wrestle with how to apply *Fox* when considering California's discovery rule. The confusion stems from the Ninth Circuit's 1995 opinion in *California Sansome Co. v. U.S. Gypsum*.[93]

A. California Sansome Co. v. U.S. Gypsum

In *Bonds v. Niccoletti Oil, Inc.*,[94] a district court in the Eastern District of California identified *California Sansome Co. v. U.S. Gypsum* as the reason that district courts within the Ninth Circuit sometimes apply a heightened pleading standard when considering California's delayed discovery rule.[95] In *California Sansome Co.*, the Ninth Circuit found that "California law makes clear that a plaintiff must allege specific facts establishing the applicability of the

created statutory exceptions to Rule 8(a) in several areas of law, most notably in the area of securities litigation).

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

92. *Id.*

93. 55 F.3d 1402, 1407 (9th Cir. 1995).

94. No. CV-F-07-1600 OWW/DLB, 2008 WL 2233511 (E.D. Cal. May 28, 2008).

95. *Id.* at *7 (citing *Cal. Sansome Co.*, 55 F.3d at 1407).

discovery-rule exception."[96] Within the last decade, several district courts within the Ninth Circuit have either questioned whether *California Sansome Co.* is good law, or refused to apply a heightened pleading standard to the delayed discovery rule altogether.

B. Bonds v. Nicoletti Oil, Inc.

For example, in 2008 the *Nicoletti* court found that "[i]t is unclear to what extent *California Sansome Co.* remains good law," as "it was decided years before *Swierkiewicz*."[97] In *Swierkiewicz v. Sorema N.A.*,[98] the United States Supreme Court reaffirmed that district courts lack the power to apply a heightened or altered pleading standard.[99] The *Nicoletti* court also noted that, unlike under California law, "[u]nder federal law, the primary aim of the pleading requirements is to give fair notice to the other party."[100] Yet despite its recognition that *Swierkiewicz*, the Federal Rules, and the very nature of notice pleading dictate that the *Fox* standard is inapplicable in federal courts, the *Nicoletti* court stopped short of expressly disavowing the *Fox* standard. The court concluded its discussion of the applicable pleading standard by noting that, "[d]espite th[e] tension between notice pleading under Rule 8 and code pleading under California law, the applicable law places the burden on Plaintiffs to plead facts to justify delayed discovery."[101]

C. Yamada v. Nobel Biocare Holding, AG

In 2011, a district court in the Central District of California went so far as to reject the *Fox* standard outright, albeit in a footnote.[102] In *Yamada v. Nobel Biocare Holding, AG*,[103] the defendant argued that the *Fox* standard applied to the plaintiff's attempt to invoke California's delayed discovery rule.[104] The court rejected this

96. *Cal. Sansome Co.*, 55 F.3d at 1407.

97. *Nicoletti*, 2008 WL 2233511 at *7 (citing *Cal. Sansome Co.*, 55 F.3d 1402; Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002).

98. 534 U.S. 506 (2002).

99. *Id.* at 513 ("Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake. This Court, however, has declined to extend such exceptions to other contexts.").

100. *Nicoletti*, 2008 WL 2233511 at *7.

101. *Id.* at *8.

102. Yamada v. Nobel Biocare Holding, AG, No. 2:10-cv-04849-JHN-PLAx, 2011 WL 13128155, *3 n.3. (C.D. Cal. Jan. 20, 2011).

103. No. 2:10-cv-04849-JHN-PLAx, 2011 WL 13128155 (C.D. Cal. Jan. 20, 2011).

104. *Id.* at *3–4.

argument, holding that "the pleading requirements for a diversity case in federal court are governed by federal procedural law, not by state law."[105] However, the *Yamada* court's approach has not gained much traction among the district courts. In fact, its rejection of *Fox*, couched in footnote 3 of the unpublished opinion, has been cited only once to date.[106]

D. Yumul v. Smart Balance, Inc.

A third case that questions the applicability of the *Fox* standard in federal court is *Yumul v. Smart Balance, Inc.*[107] In *Yumul*, the district court sent mixed messages regarding the pleading standard that it applied. The court began its discussion of the applicable pleading standard by stating that, "[i]n order to invoke [the delayed discovery exception] to the statute of limitations, the plaintiff must *specifically* plead facts" in support of the rule's application.[108] The court went on to reject the defendant's argument that Rule 9(b) applies to allegations of delayed discovery, because "the [discovery] rule concerns no allegations of 'fraud or mistake,' and, . . . neither fraud nor mistake is required to prove delayed discovery."[109] Finally, without referencing its previous citation of the specifically-plead-facts standard, the court concluded that Rule 8(a)(2) applies to the pleading of delayed discovery.[110] While *Yumul* ultimately applied Rule 8(a)(2) to the pleading of delayed discovery, its reference to *Fox*'s specificity requirement at the pleading stage contributes to the uncertainty regarding the appropriate pleading standard in such cases.

Nicoletti, *Yamada*, and *Yumul* all criticize and reject use of the *Fox* standard to different degrees, but such cases are the exception within the Ninth Circuit rather than the norm. A majority of district courts within the Ninth Circuit that cite to *Fox*'s specifically-plead-

105. *Id.* at *3 n.3.

106. *See Yamada v. Nobel Biocare Holding, AG, Citing References*, WESTLAW, https://1.next.westlaw.com/RelatedInformation/I48b8b820979711e69e6ceb9009bbadab/kcCitingReferences.html?docSource=a18966b1695e430c90dae2caa68b3a98&facetGuid=h562dbc1f9a5f4b0c9e54031a19076b9c&originationContext=citingreferences&transitionType=CitingReferences&contextData=%28sc.DocLink%29 (last visited March 8, 2018).

107. 733 F. Supp. 2d 1134 (C.D. Cal. 2010).

108. *Id.* at 1141 (alteration in original) (emphasis added).

109. *Id.* at 1142.

110. *Id.*

facts standard continue do so without testing their approach against the *Erie* doctrine, the Delegation doctrine, and *Leatherman*.[111]

E. Recent Erosion of the Fox *Standard in Federal Court*

1. *Regter v. Stryker Corporation*

The Ninth Circuit has yet to address a challenge to the *Fox* standard in depth. The closest the Ninth Circuit has come to disapproving of the *Fox* standard was in *Regter v. Stryker Corp.*[112] The district court in *Regter* had dismissed the plaintiff's complaint "because of a failure to allege specific facts to make applicable the California" delayed discovery rule.[113] The Ninth Circuit's unpublished, single-page memorandum opinion in *Regter* cited the *Fox* standard, but omitted the "specifically plead fact" language.[114] However, the court reversed the district court's dismissal of the complaint, finding that the plaintiff had "adequately alleged that he was reasonably diligent in discovering the cause of his injury."[115]

In sum, the Ninth Circuit in *Regter* seems to have deliberately omitted the "specifically plead facts" language from the *Fox* standard. However, although the Ninth Circuit concluded that the plaintiff had "adequately alleged" the elements of the delayed discovery rule, the court did not disavow the district court's application of *Fox*'s heightened pleading standard. Thus, although the *Regter* court questioned the *Fox* standard implicitly, *Regter* by no means retires the *Fox* standard.

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111. *See, e.g.*, Bekins v. AstraZeneca Pharm. LP, 239 F. Supp. 3d 1220, 1225 (S.D. Cal. 2017) (applying the *Fox* standard to the plaintiff's attempt to invoke the delayed discovery rule); Prods. and Ventures Int'l v. Axus Stationary (Shanghai) Ltd., No. 16-cv-00669-YGR, 2017 WL 4536250, at *2 (N.D. Cal. Oct. 11, 2017) (noting that the court's previous order of dismissal was based on the plaintiff's failure to satisfy the *Fox* standard); Shamshina v. Anaco, No. 2:14-cv-01431-ODW, 2015 WL 12672091, at *2 (C.D. Cal. Mar. 30, 2015) (citing the *Fox* standard without further comment of the applicable pleading standard); Adams v. United of Omaha Life Ins. Co., No. SACV 12-969-JST (JPRx), 2013 WL 12113225, at *4–6 (C.D. Cal. Jan. 10, 2013) (dismissing the plaintiff's complaint with prejudice for failure to satisfy the *Fox* standard).

112. 607 F. App'x 732 (9th Cir. 2015).

113. Regter v. Stryker Corp., No. 8:13-cv-00014-R, 2013 WL 12129612, at *4 (C.D. Cal. Aug. 21, 2013).

114. *Regter*, 607 F. App'x at 733.

115. *Id.*

2. *Strong v. Cochran*

At the time of writing, *Fox* and its discovery rule pleading standard have been cited by federal district courts in no less than 218 cases.[116] Of those, 210 were within the Ninth Circuit; the remaining eight were from various district courts throughout the country.[117] Although a handful of cases from district courts within the Ninth Circuit that cite the *Fox* standard question or reject its specifically-plead-facts language,[118] perhaps the most thorough refutation of *Fox*'s pleading standard comes from outside the Ninth Circuit. In *Strong v. Cochran*, the District Court for the District of Utah found the *Fox* standard inapplicable in federal courts under the *Erie* doctrine.[119] As argued in Section III.B, *supra*, the *Strong* court's outcome under *Erie* is correct.

Of course, one benefit that the *Strong* court had that district courts within the Ninth Circuit do not is that it was free to disregard the Ninth Circuit's holding in *California Sansome Co.* As the district court in *Nicoletti* noted, the Ninth Circuit in *California Sansome Co.* effectively endorsed the *Fox* standard when it stated that California law makes clear that a "plaintiff must allege specific facts establishing the applicability of the discovery-rule exception."[120] However, as discussed *supra*, longstanding Supreme Court precedent demands that federal district courts adhere to the notice pleading system embodied in the Federal Rules, even when sitting in diversity.[121] Thus, in the future, district courts within the Ninth Circuit should follow *Strong* in disregarding the discussion of California's delayed discovery rule in *California Sansome Co.*, insofar as it promotes the application of a heightened pleading standard.

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116. *Fox v. Ethicon Endo-Surgery, Inc.*, *Citing References*, WESTLAW, https://1.next.westlaw.com/Link/RelatedInformation/DocHeadnoteLink?docGuid=Ic636cfb326c311daaea49302b5f61a35&headnoteId=200656713601320100105001014&originationContext=document&docSource=ba3864a5441146bb8b317a35ee53dec6&rank=10&transitionType=CitingReferences&contextData=(sc.History*oc.DocLink) (last visited Nov. 25, 2017).

117. *Id.*

118. *See* the discussion of *Nicoletti*, *Yamada*, and *Yumul*, *supra* at 116–117.

119. No. 2:14-cv-788-TC, 2017 WL 4620984, at *5 (D. Utah Oct. 13, 2017).

120. Bonds v. Nicoletti Oil, Inc., No. CV-F-07-1600 OWW, 2008 WL 2233511, at *7 (E.D. Cal. May 28, 2008) (quoting Cal. Sansome Co. v. U.S. Gypsum, 55 F.3d 1402, 1407 (9th Cir. 1995)).

121. *See* the discussions of the *Erie* doctrine and *Leatherman supra*.

F. The Importance of Applying the Correct Pleading Standard

There are undoubtedly some instances in which a district court's application of the *Fox* standard would lead to the same result as an application of Rule 8(a)(2). If, for example, a plaintiff's complaint clearly shows on its face that the statute of limitations would have otherwise run, but includes no allegations as to the applicability of the delayed discovery rule or some other tolling doctrine, the complaint would not survive a 12(b)(6) motion under any pleading standard. It is the close cases in which application of the *Fox* standard will do real harm—the cases in which a plaintiff's allegations regarding the delayed discovery rule fall somewhere within the gray void between plausible and implausible.[122] In such cases, the pleading standard that the court applies may determine whether a plaintiff with a meritorious claim but limited knowledge of the facts surrounding her case ever makes it past the pleading stage of litigation.

V. THE PLAINTIFF'S BURDEN TO PLEAD DELAYED DISCOVERY UNDER *FOX*

Although it is error for federal courts to demand that plaintiffs adhere to *Fox*'s pleading standard, placing the burden on plaintiffs to show that the discovery rule applies is appropriate. That federal courts sitting in diversity should apply federal procedural law is but one side of the *Erie* coin. The other is that federal courts sitting in diversity are to apply state substantive law in adjudicating a plaintiff's state law causes of action.[123]

An open question raised by the application of the *Fox* standard in federal court is whether placing the burden to plead the elements of the delayed discovery rule on the plaintiff is a matter of substantive law, or one of procedural law. Precedent and practicality suggest it is a matter of substantive law. As such, federal courts sitting in diversity should defer to *Fox*'s allocation of the burden of pleading and proving delayed discovery. However, before addressing the federal precedent, a brief look at the California Supreme Court's view of the relationship between statutes of limitation and the delayed discovery rule helps frame the analysis.

122. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (holding that complaints in federal court must adhere to a "plausibility" standard in order to survive a motion to dismiss).

123. Hanna v. Plumer, 380 U.S. 460, 465 (1965).

A. California's Balance of "Repose" and "Disposition on the Merits"

In the seminal case of *Norgart v. Upjohn Co.*,[124] the California Supreme Court engaged in a thorough analysis of the nature of statutes of limitations and their relationship to the delayed discovery rule. The court noted that "the affirmative defense based on the statute of limitations" has often "been approved by courts as 'favored.'"[125] This is because, the court explained, statutes of limitations "promote[] repose by giving security and stability to human affairs," in accord with public policy.[126]

The court also noted that, "[l]ess often, the affirmative defense based on the statute of limitations has been disparaged as 'disfavored' . . . because, contrary to 'public policy', it buys repose at the price of disposing of a cause of action 'on procedural grounds' rather than 'on the merits.'"[127] The court went on to state that "the affirmative defense based on the statute of limitations should not be characterized by courts as either 'favored' or 'disfavored,'" because the public policies in favor of "repose and [] disposition on the merits [] are equally strong, the one being no less important or substantial than the other."[128]

The court then described how the tension between these two important public policies is ameliorated by the availability of the discovery rule. The public policy in favor of repose is not eviscerated by the discovery rule, because once a plaintiff suspects he has a cause of action, "he must indeed seek to learn the facts necessary to bring the cause of action in . . . — he 'cannot wait for' them 'to find' him and 'sit on' his 'rights.'"[129] Furthermore, the burden is on the plaintiff to plead why the discovery rule applies.[130] At the same time, the public policy in favor of disposition on the merits is promoted by extending the date of accrual in cases where the plaintiff is "'blamelessly ignorant' of his cause of action."[131] Thus, the relationship between statutes of limitations and the discovery rule under California law

124. 981 P.2d 79 (Cal. 1999).
125. *Id.* at 87.
126. *Id.* (quoting Wood v. Carpenter, 101 U.S. 135, 139 (1879)).
127. *Id.* (citations omitted).
128. *Id.*
129. *Id.* at 88.
130. *Id.*
131. *Id.* at 93.

reflects a careful balancing of opposing public policies. As explained below, federal courts should honor that balance when adjudicating claims under California law, insofar as doing so does not conflict with federal procedural law.

B. The Error in Strong

In *Strong v. Cochran*, the district court found that it was inappropriate to place the burden of pleading the applicability of California's delayed discovery rule on plaintiffs.[132] The court held that the "*Fox* [standard] does not apply in federal courts" because "expiration of the statute of limitations is an affirmative defense, and [a plaintiff] does not have the burden to plead compliance with the statute of limitations."[133] The court concluded its discussion of *Fox* by stating that a "court may not hold [a plaintiff] to a rule requiring him to preemptively raise the statute of limitations in his complaint or otherwise affirmatively plead circumstances in anticipation of a statute of limitations defense."[134] As discussed below, there are several flaws in the *Strong* court's analysis.

1. *Palmer v. Hoffman* and Rule 8(c)

First, Rule 8(c) of the Federal Rules of Civil Procedure provides that "[i]n general[,] [i]n responding to a pleading, a party must state any . . . affirmative defense, including . . . statute of limitations."[135] Shortly after the Federal Rules of Civil Procedure were adopted, the Supreme Court considered the question of which party to a suit must bear the burden of establishing contributory negligence, another of the affirmative defenses listed in Rule 8(c).[136] In *Palmer v. Hoffman,*[137] the plaintiff/respondent argued that the courts below had been correct to place the burden of establishing contributory negligence on the defendant, "because of the fact that Rule 8(c) . . . makes contributory negligence an affirmative defense."[138] The Court disagreed.

132. No. 2:14-cv-788-TC, 2017 WL 4620984, at *5 (D. Utah Oct. 13, 2017).
133. *Id.*
134. *Id.*
135. FED. R. CIV. P. 8(c).
136. Palmer v. Hoffman, 318 U.S. 109 (1943); *see* FED. R. CIV. P. 8(c).
137. 318 U.S. 109 (1943).
138. *Id.* at 117.

Justice Douglas, writing for a unanimous court, held that "Rule 8(c) covers only the manner of pleading."[139] However, "[t]he question of the burden of establishing contributory negligence," the Court held, is one of state law, which federal courts sitting in diversity must apply.[140] Thus, while Rule 8(c) controls *the manner* in which contributory negligence must be pled, *the burden* of pleading and proving contributory negligence is controlled by state law.

In light of the principle announced in *Palmer*, placing the burden of pleading and proving the applicability of the delayed discovery rule on the plaintiff is permissible in federal court. Like contributory negligence, the statute of limitations defense is among the affirmative defenses listed in Rule 8(c).[141] As *Palmer* made clear, Rule 8(c) only governs *the manner of pleading* those defenses. Thus, if a defendant in federal court wishes to raise a defense based on the expiration of the statute of limitations, Rule 8(c) explains the proper procedure for doing so. However, allocation of the burden of pleading and proving the applicability of the delayed discovery rule is a matter of state law that federal courts sitting in diversity are bound to follow.[142]

2. The Function of the *Fox* Standard

Another flaw in the *Strong* court's analysis is that the court viewed the discovery rule as imposing a burden on plaintiffs to "preemptively raise the statute of limitations in his complaint or otherwise affirmatively plead circumstances in anticipation of a statute of limitations defense."[143] This is not the case. While a plaintiff is generally "not required to plead circumstances countering a defendant's affirmative defense,"[144] the delayed discovery rule is an exception to the general rule that takes the statute of limitation out of the realm of an affirmative defense.[145] This much is clear from the text of the *Fox* standard. Under *Fox*, a plaintiff's burden to plead the elements of the delayed discovery rule is only triggered when his "complaint shows on its face that his claim would be barred without

139. *Id.*

140. *Id.* (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)).

141. FED. R. CIV. P. 8(c).

142. *See* Cal. Sansome Co. v. U.S. Gypsum, 55 F.3d 1402, 1406 (9th Cir. 1995) (noting that under California law, "the burden is on [plaintiffs] to plead and prove the facts necessary to toll the limitations period once it is established that it would have otherwise commenced").

143. Strong v. Cochran, No. 2:14-cv-788-TC, 2017 WL 4620984, at *5 (D. Utah Oct. 13, 2017).

144. *Id.* (citing Gomez v. Toledo, 446 U.S. 635, 640 (1980)).

145. *See Cal. Sansome Co.*, 55 F.3d at 1406–07.

the benefit of the discovery rule."[146] This standard does not require a plaintiff to anticipate a potential statute of limitations defense; all it requires is that a plaintiff whose cause of action would otherwise be stale provide the court and the defendant notice as to why the delayed discovery rule should apply.

A hypothetical scenario helps illustrate this point. Imagine Plaintiff, a citizen of state X, files suit against Defendant, a citizen of state Y, for breach of fiduciary duty in a federal district court situated in state Y in January 2017. The federal district court applies state Y's substantive law, which dictates that the statute of limitations for a claim of breach of fiduciary duty is one year. In her complaint, Plaintiff alleges that Defendant breached his fiduciary duty to Plaintiff in January 2012: five years before she filed suit, and four years after the statute of limitations expired. The complaint does not mention the delayed discovery rule, nor does it mention the statute of limitations at all. Assuming that Rule 8(a)(2) applies to Plaintiff's complaint, can it be said that Plaintiff has stated a claim for breach of fiduciary duty upon which relief can be granted? The answer, it seems, is no.

A claim is a "group of operative facts giving rise to one or more rights of action."[147] Under the law of state Y, a plaintiff may bring a cause of action for breach of fiduciary duty when she sues within one year of the occurrence of that breach. Thus, in our hypothetical case, Plaintiff has not stated a claim upon which relief can be granted because under the applicable substantive law of State Y, relief can only be granted when a plaintiff sues within the one-year statute of limitations. This determination does not require the district court to consider a potential statute of limitations defense—it is based entirely upon a review of the plaintiff's complaint. Accordingly, absent some extended tolling of the statute of limitations, Plaintiff has failed to state a claim under Rule 8(a)(2).

Now assume that state Y has a delayed discovery rule identical to the one in California, and that the *Fox* standard governs the applicability of the rule. Plaintiff now has the chance to invoke the delayed discovery rule by alleging (1) when and how she discovered that Defendant breached his fiduciary duty, and (2) why she was unable to discover the breach earlier, despite reasonable diligence.[148]

146. Fox v. Ethicon Endo-Surgery, Inc., 110 P.3d 914, 920–21 (2005).
147. *See supra* text accompanying note 32.
148. *Fox*, 110 P.3d at 920–21.

Contrary to the *Strong* court's position, requiring a plaintiff to plead the elements of the delayed discovery rule is not the same as requiring a plaintiff to "allege that his claims were within the applicable statute of limitations."[149] Quite the opposite. The *Fox* standard requires a plaintiff to explain why, even though the face of her complaint shows that her claim was *not* filed within the applicable statute of limitations, she should be entitled to bring her claim nonetheless.

In sum, both *Palmer* and an assessment of the nature and function of the delayed discovery rule demonstrate that federal courts should follow California law (embodied in the *Fox* standard) when it comes to allocating the burden of pleading the applicability of the delayed discovery rule. As *Fox* and *California Sansome Co.* make clear, however, a plaintiff need only "plead and prove the facts necessary to toll the limitations period"[150] when her "complaint shows on its face that [her] claim would be barred without the benefit of the discovery rule."[151]

VI. CONCLUSION

The issues presented by application of the *Fox* standard in federal courts are complex on their face: the *Fox* standard contains a pleading standard, an allocation of the burden of pleading, and the elements that must be pled to meet that burden. As demonstrated above, breaking *Fox* down to its essential components and examining each in turn clarifies that parts of *Fox* apply in federal courts, and others do not.

Fox's pleading standard—which requires that plaintiffs "specifically plead facts"[152]—has no place in federal courts. As discussed *supra* in Part IV, despite *California Sansome Co.*'s apparent adoption of the specifically-plead-facts standard, federal courts should forgo application of *Fox*'s pleading standard under the Erie doctrine, the Delegation doctrine, and the principles announced in *Leatherman*.

With regard to *Fox*'s allocation of the burden of pleading and proving the applicability of the delayed discovery rule, however, federal courts are correct to apply the *Fox* standard. As discussed *supra* in Part V, placing the burden on the plaintiff is appropriate under

149. *Strong*, 2017 WL 4620984, at *5 (quoting Stewart v. Int'l Ass'n of Machinists & Aerospace Workers, 16 F. Supp. 3d 783, 794 (S.D. Tex. 2014)).

150. *Cal. Sansome Co.*, 55 F.3d at 1406.

151. *Fox*, 110 P.3d at 920–21.

152. *Id.* at 921.

Palmer and under an analysis of the function of *Fox*'s burden allocation in federal litigation.

In conclusion, when a federal district court is faced with a motion to dismiss a complaint for failure to sufficiently plead the elements of California's discovery rule, the court should proceed as follows. If the plaintiff's complaint does not indicate that the statute of limitations applicable to her cause of action has run, then the motion should be denied. However, if the court finds that the face of the complaint *does* indicate that the statute of limitations on her cause of action has run, then the court should require the plaintiff to plead the two elements of the *Fox* standard—"(1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence."[153] In considering whether the plaintiff has sufficiently pled these two elements, the court need only determine whether the plaintiff has satisfied Rule 8(a)(2). Thus, the complaint need only include a "short and plain statement" as to how and when the plaintiff discovered her claim, and why she was unable to discover it earlier, despite reasonable diligence.

153. *Id.* at 920–21 (emphasis omitted) (quoting McKelvey v. Boeing N. Am., Inc., 86 Cal. Rptr. 2d 645, 651 (Ct. App. 1999)).