

## Disrupting Frivolous Defenses

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*Judge Milton I. Shadur was a disrupter of frivolous defenses. In 2018, Judge Shadur died at the age of ninety-three after thirty-seven years as a judge of the United States District Court for the Northern District of Illinois. Sua sponte, Judge Shadur reviewed civil answers and disrupted the pleading of frivolous defenses. Sua Sponte Shadur—as some lawyers called him—rejected answers that departed from or ignored Rule 8 of the Federal Rules of Civil Procedure.*

*In 2001, Judge Shadur issued an Appendix to an order in State Farm v. Riley, 199 F.R.D. 276 (N.D. Ill. 2001). The Appendix presented his expectations regarding how defense lawyers should answer according to Rule 8. As the Appendix makes clear, Judge Shadur disallowed pleaders to dodge Rule 8 by (1) claiming that an allegation called for a legal conclusion, (2) claiming that documents speak for themselves, and (3) demanding strict proof. Judge Shadur also expected that affirmative defenses would be true affirmative defenses, and that defense attorneys would support affirmative defenses with foundational or predicate facts.*

*After presenting a minibiography of Judge Shadur, the backstory of State Farm v. Riley, and a gloss on the Appendix, this Article tracks the use of the Appendix by judges—mostly federal judges but some state judges—throughout the United States. The Article covers the citation of the Appendix by Judge Shadur himself, next by Northern District of Illinois colleagues, then within the broader Seventh Circuit, and next among the other federal circuits. There are a few citations in state courts. The Article concludes with the epitome of Shadur's Appendix, which was a rule change by the Arizona Supreme Court in 2018, the year of Shadur's death. Arizona's Rule 8 now aligns with Shadur's Appendix.*

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*Specifically, the Article focuses on speaking documents, legal conclusions, and affirmative defenses. The organization by federal circuit should be interesting to academics and useful to attorneys preparing FRCP 12 motions to deem allegations admitted, motions for a more definite statement, or motions to strike affirmative defenses.*

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I. JUDGE MILTON SHADUR: DISRUPTER OF FRIVOLOUS DEFENSES

Judge Milton Shadur was a disrupter of frivolous defenses. Judge Shadur, who died at the age of ninety-three in 2018,<sup>1</sup> schooled lawyers who answered civil cases during his thirty-seven years as a judge of the United States District Court for the Northern District of Illinois.<sup>2</sup> Sua

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1. Tony Briscoe, *Judge Oversaw Cases Involving CPS and Jail*, CHI. TRIB., Jan. 17, 2018, at 5; *Shadur, Milton Irving*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/shadur-milton-irving> [<https://perma.cc/SYS8-UHGK>] (last visited Apr. 5, 2021).

2. Julianne M. Hartzell & David N. Patariu, *More Than a Judge, Shadur Became a Teacher on*

sponte, Judge Shadur reviewed civil complaints and answers.<sup>3</sup> Indeed, one former clerk told me the judge's nickname was Sua Sponte Shadur; if this lore be untrue, then I bestow the nickname posthumously.<sup>4</sup>

From his first years on the bench in the early 1980s until he retired near the end of his life,<sup>5</sup> Sua Sponte Shadur disrupted the pleading of frivolous defenses. Judge Shadur rejected answers that departed from or ignored Federal Rules of Civil Procedure Rule 8, which governs the pleading of allegations in complaints, permissible responses to allegations, and the pleading of affirmative defenses.<sup>6</sup> In Shadur's court, when defense lawyers' responses had no basis in law, Judge Shadur rejected them. When answering attorneys listed affirmative defenses without legal or factual support, he rejected the frivolous defenses without waiting for the plaintiffs' lawyers to file motions. I endorse Judge Shadur's approach and urge federal judges, state court judges, and defense attorneys—especially insurance defense attorneys—to emulate Judge Shadur. For plaintiffs' lawyers who may need to convince a judge or opposing counsel of the wisdom of this Illinois federal judge's approach, I have organized this article by jurisdiction with an eye toward providing authority to support motions to overcome frivolous defenses.

This article meshes with empirical analysis I present in my article *Frivolous Defenses*.<sup>7</sup> In that piece, I examine car crash answers and complaints in the state courts of Colorado, where I live, teach, and have practiced law. For 298 lawsuits, I retrieved and read the complaints and corresponding 356 answers, which number more than 298 because a number of suits had multiple defendants.<sup>8</sup> Consistent with Judge Shadur's understanding of the Federal Rules of Civil Procedure, which Colorado's Rules of Civil Procedure largely adopt, I coded the pleading of insurance

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*Civil Procedure*, CHI. DAILY L. BULL., Mar. 21, 2018; Julianne M. Hartzell & David N. Patariu, *Shadur's Crusade Against Misdirected Affirmative Defenses Still Has Merit*, CHI. DAILY L. BULL., Apr. 26, 2018.

3. In *Murphy v. Schering Corp.*, 878 F. Supp. 124, 125 n.1 (N.D. Ill. 1995), Judge Shadur explained in a footnote that “[t]his Court always undertakes an immediate review of newly-filed complaints,” citing *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986) (quoting Judge Posner who explained that “[t]he first thing a federal judge should do when a complaint is filed is check to see that federal jurisdiction is properly alleged”). Judge Shadur included this footnote in nearly 500 cases. See, e.g., *Bryant v. Yellow Freight Sys.*, 989 F. Supp. 966, 967 n.2 (N.D. Ill. 1997); *Durr v. Intercounty Title Co. of Ill.*, 826 F. Supp. 259, 263 n.2 (N.D. Ill. 1993), *aff'd*, 14 F.3d 1183 (7th Cir. 1994); *Salzstein v. Bekins Van Lines, Inc.*, 747 F. Supp. 1281, 1282 n.2 (N.D. Ill. 1990).

4. Attorneys in the office of the Illinois Attorney General may have had a different nickname for Judge Shadur. See *infra* p. 920.

5. *Shadur, Milton Irving*, *supra* note 1; *State Farm Mut. Auto. Ins. Co. v. Riley (State Farm v. Riley)*, 199 F.R.D. 276, 278 (N.D. Ill. 2001).

6. FED. R. CIV. P. 8.

7. Thomas D. Russell, *Frivolous Defenses*, 69 CLEV. ST. L. REV. 785 (2021).

8. Russell, *supra* note 7, at Part III.

defense lawyers on behalf of insured defendants in car crash cases. As 60% of all tort filings, car crashes dominate personal injury litigation in Colorado.<sup>9</sup> At bottom, personal injury and the subject of torts are about car crashes.<sup>10</sup> Liability insurance—car insurance—fuels the system.<sup>11</sup> Adopting jargon that Stanford Law Professor Nora Freeman Engstrom used for plaintiffs' lawyers,<sup>12</sup> I refer to most lawyers who filed answers in car crash cases as insurance defense mill lawyers.<sup>13</sup> My empirical analysis reveals that insurance defense mill lawyers routinely depart from Colorado's Rule 8 by adopting evasive, formulaic methods to avoid answering allegations. I will touch upon some of these findings as I explain Judge Shadur's approach.

My empirical research also confirms what Judge Shadur abhorred regarding affirmative defenses. Insurance defense mill lawyers often improperly label claims as affirmative defenses, a technical point that concerned Judge Shadur but that may be a bit pedantic even for this law professor. More important, in my view, insurance defense mill lawyers cut and paste long laundry lists of fact-free defenses into their pleadings. Colorado's insurance defense mill lawyers, though they have access to claim files that include insurers' investigations that started the day of or soon after the crash, nonetheless plead no facts whatsoever in 90% of all answers and included an average of 0.14 facts to support each list of defenses.<sup>14</sup> The median number of facts supporting each list of defenses—again not each defense—is zero; the greatest number of facts any insurance defense lawyer includes in support of a list of affirmative defenses is four.<sup>15</sup>

Fact-free affirmative defenses are literally groundless and therefore frivolous. Judge Shadur used the adjective frivolous and, possessing a rich vocabulary, used other terms as well. In 1982, a defendant's counsel raised as an affirmative defense that the plaintiff's "purpose in bringing

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9. *Id.* at Section II.D.

10. *Id.* at Part I.

11. See Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1114–15 (1990) ("I believe liability insurance and tort litigation evolve together, with each institution acting upon, reacting to, and supporting the other.").

12. Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1538–39 (2009) [hereinafter Engstrom, *Run-of-the-Mill Justice*]; Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 841 (2011) [hereinafter Engstrom, *Sunlight*]; Nora Freeman Engstrom, *Legal Access and Attorney Advertising*, 19 AM. U. J. GENDER, SOC. POL'Y & L. 1083 (2011) [hereinafter Engstrom, *Legal Access*]; Nora Freeman Engstrom, *Shining a Light on Shady Personal Injury Claims*, 2 J. INS. FRAUD AM. 13 (2011) [hereinafter Engstrom, *Shining A Light*] (describing a settlement mill as acting in a cookie-cutter or routine manner to process its large caseload).

13. Russell, *supra* note 7, at Part I.

14. *Id.* at Part IV.

15. *Id.*

this action is to enable him to receive more favorable terms for the sale of his stock . . . .”<sup>16</sup> “As a ‘defense,’” thundered Judge Shadur, “that allegation is entirely frivolous. . . . Improving settlement prospects is a normal and legitimate concomitant of filing a lawsuit,” he commented before striking the affirmative defense.<sup>17</sup> By 2017, near the end of his career on the bench, he had become even more efficient. With just 151 words within an order, he struck three different affirmative defenses, describing them as “unnecessary,” not “an A[ffirmative] D[efense] within the purview of Rule 8(c),” “not only frivolous . . . but . . . also flawed as a conceptual matter,” a “partial laundry list selected from the grab bag of defenses listed in Rule 8(c),” “subject to the same criticism and, . . . totally uninformative as to the predicate for each of the listed grounds.”<sup>18</sup> For simplicity’s sake, I just use the phrase frivolous defenses. Argument and writing about frivolous litigation or frivolous lawsuits is familiar to Americans—really to the entire world. But the phrase frivolous defenses is rarely found on Google or heard anywhere. I am trying to right this imbalance.

## II. MINIBIOGRAPHY OF JUDGE SHADUR

Born in Minnesota in 1924, Milton Shadur grew up in Milwaukee. He graduated first in his high school class at age 15.<sup>19</sup> He left Wisconsin for the University of Chicago, where he had a full scholarship of \$300 per year and studied math and physics.<sup>20</sup> After the University of Chicago graduated him in 1943, Shadur joined the United States Navy.<sup>21</sup> After World War II ended, he attended the University of Chicago School of Law,<sup>22</sup> where, according to his law partner Ronald S. Miller, Esq., Shadur again finished first in his class.<sup>23</sup> He was editor in chief of the University of Chicago Law Review in 1948–49.<sup>24</sup>

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16. *Bobbitt v. Victorian House, Inc.*, 532 F. Supp. 734, 738 (N.D. Ill. 1982).

17. *Id.*

18. *Webb v. Medcredit, Inc.*, No. 16-C-11125, 2017 WL 74854, at \*2 (N.D. Ill. Jan. 9, 2017).

19. *Social and Personal*, WIS. JEWISH CHRON., May 10, 1940, at 2.

20. *Id.*

21. Gregory Pratt, *Shadur to Step Down After 37 Years on Federal Bench*, CHI. TRIB., Aug. 2, 2017, at 4.

22. *Id.*

23. Ronald S. Miller, *Magnificent Reasons for Keeping Involved*, ABA (Sept. 1, 2011), [https://www.americanbar.org/groups/senior\\_lawyers/publications/voice\\_of\\_experience/2011/fall/magnificent-reasons-for-keeping-involved/](https://www.americanbar.org/groups/senior_lawyers/publications/voice_of_experience/2011/fall/magnificent-reasons-for-keeping-involved/) [<https://perma.cc/UBN5-4L5H>]; see also *High Law Grades*, CHI. TRIB., Apr. 10, 1949, at 225 (“Milton Irving Shadur . . . established a record of having the highest grade average in the university’s law school in the last eight years.”).

24. 15 U. CHI. L. REV. 909 (1947–48).

In 1948, Shadur agreed to join the law firm Goldberg, Devoe & Brussell,<sup>25</sup> which Arthur Goldberg,<sup>26</sup> later Associate Justice of the Supreme Court of the United States, had founded in 1946.<sup>27</sup> Judge Shadur recounted that when he joined the firm “the three lawyers were then occupying unprepossessing offices as subtenants of another firm at 231 South LaSalle Street,” the Central Standard Building.<sup>28</sup> Shadur became a partner in 1952, by which time Goldberg was practicing law in Washington, DC.<sup>29</sup>

Later, Abner Mikva was one of Shadur’s partners. They grew up on the same block in Milwaukee though in different years. In a well-known story, Mr. Mikva sua sponte stopped at the 8th Ward Regular Democratic Organization in 1948 when he was a law student. The committeeman asked who sent him; Mr. Mikva answered, “nobody.” The ward heeler told the law student, “we don’t want nobody nobody sent.”<sup>30</sup> Too liberal and reform-oriented for the Daley Machine, Chicago’s Democrats left Mr. Mikva to pursue his political interests downstate in the state house and later in Congress.<sup>31</sup> And, as with Shadur, President Carter appointed him to the federal bench where he served as Judge of the United States Court of Appeals for the District of Columbia Circuit.<sup>32</sup> Later, Judge Mikva was counsel to President Clinton.<sup>33</sup> The firm that spawned Justice Goldberg, Judge Mikva, and Judge Shadur—also Judge Elaine Bucklo<sup>34</sup>—is now Miller Shakman Levine & Feldman, which rightly touts its impressive history.<sup>35</sup>

I am not presenting Judge Shadur’s biography, although someone

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25. Gerald Berendt et al., *Arthur J. Goldberg’s Legacies to American Labor Relations*, 32 J. MARSHALL L. REV. 667, 671–72 (1999).

26. *Goldberg, Arthur Joseph*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/goldberg-arthur-joseph> [<https://perma.cc/5A7J-4QU8>] (last visited Apr. 5, 2021).

27. Goldberg founded the firm as Goldberg & Devoe. Berendt et al., *supra* note 25, at 669. The firm was Goldberg, Devoe & Brussell by the time Shadur joined.

28. Berendt et al., *supra* note 25, at 672; *Central Standard Building*, BEACON CAP. PARTNERS, <https://231southlasalle.com> [<https://perma.cc/5UE3-E5PT>] (last visited May 7, 2021).

29. *See Neighborhood Section*, CHI. SUNDAY TRIB., Feb. 17, 1952 at Part 3, p. 1 (advertising Shadur’s new position as partner at Goldberg, Devoe, Brussell & Shadur).

30. MILTON L. RAKOVE, *WE DON’T WANT NOBODY NOBODY SENT: AN ORAL HISTORY OF THE DALEY YEARS* 318 (1979).

31. MILTON L. RAKOVE, *DON’T MAKE NO WAVES, DON’T BACK NO LOSERS: AN INSIDER’S ANALYSIS OF THE DALEY MACHINE* 104–05, 160, 197 (1975).

32. *Mikva, Abner Joseph*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/mikva-abner-joseph> [<https://perma.cc/2PU9-4CLN>] (last visited Apr. 5, 2021).

33. Ronald S. Miller, *Magnificent Reasons for Keeping Involved*, ABA (Sept. 1, 2011) [https://www.americanbar.org/groups/senior\\_lawyers/publications/voice\\_of\\_experience/2011/fall/magnificent-reasons-for-keeping-involved/](https://www.americanbar.org/groups/senior_lawyers/publications/voice_of_experience/2011/fall/magnificent-reasons-for-keeping-involved/) [<https://perma.cc/WJA4-Y33F>].

34. *Bucklo, Elaine E.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/bucklo-elaine-e> [<https://perma.cc/WLB7-SBZV>] (last visited Apr. 6, 2021).

35. *History*, MILLER SHAKMAN LEVINE & FELDMAN, <http://www.millershakman.com/history/> [<https://perma.cc/2795-T52R>] (last visited Apr. 6, 2021).

should write his story. I am also not attempting to identify influences that may have shaped him as a judge. He was a Democrat, of course. He and his partners became powerful Jewish lawyers at a time when the most powerful law firms in the United States did not hire Jews.<sup>36</sup> Whether Judge Shadur's Democratic politics, religion, family life, early years in Milwaukee, or maybe his time at the University of Chicago shaped his judicial practice or philosophy, I leave to a biographer.<sup>37</sup> His personal history is fascinating, but my focus is Judge Shadur's insistence regarding FRCP 8.

First, I describe the backstory of *State Farm v. Riley*, the case onto which Judge Shadur engrafted the Appendix. Then, I review Judge Shadur's Appendix in detail. Judge Shadur sent his order and Appendix to West Publishing for inclusion in the *Federal Rules Decisions* reporter, and I briefly explain the *FRD*, as it's known. Subsequent parts track citation of the Appendix, which has been quite extensive. Not surprisingly, Judge Shadur cited the Appendix frequently. In another part, I look at his Northern District colleagues' citation of the Appendix by the three most important topics: speaking documents, legal conclusions, and affirmative defenses. In subsequent sections, I follow the same

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36. See *Temple Beth El*, WIS. JEWISH CHRON., June 11, 1937, at 5 (“Rabbi Philip Kleinman will deliver a sermon in honor of the Bar Mitzvah of Milton Shadur.”). Gil Cornfield, Esq., an Illinois labor lawyer, commented on Shadur's first job with Goldberg, Devoe, and Brussell:

Can you imag[in]e today the Editor-in-Chief of the University of Chicago Law Review going to work for a three-person law firm in Chicago? But, Goldberg's and Shadur's starts in the profession were not uncharacteristic of a new Jewish attorney in the years preceding and after World War II, whether or not they were outstanding graduates from prestigious law schools. I remember some years ago, on behalf of the Illinois Humanities Counsel, I participated and assisted in a program on the relationship of the Jewish labor lawyer to the labor movement. I interviewed Les Asher, Joe Jacobs and others who were from an older generation and in many cases these people became involved in labor movement partially because they had become professionals and there weren't other positions available to them. They did not even consider the possibility of working for the large LaSalle Street law firms.

Berendt et al., *supra* note 25, at 696; see also Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 STAN. L. REV. 1803 (2008) (discussing the segregation in law firms along religious and cultural lines); Eli Wald, *The Rise of the Jewish Law Firm or Is the Jewish Law Firm Generic?*, 76 UMKC L. REV. 885 (2008); Eli Wald, *The Jewish Law Firm: Past and Present* (Univ. of Denver Sturm Coll. of L. Legal Rsch. Paper Series, Working Paper No. 15-32, 2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2631782#](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2631782#) [<https://perma.cc/7HM3-HXR>]; MALCOLM GLADWELL, OUTLIERS 116–58 (2008) (discussing Joseph “Joe” Flom, a successful attorney whose perceived disadvantages in life—growing up during the Depression, being a poor child of garment workers, and Jewish—contributed to his successful career).

37. Cf. Joanna Shepherd, *Jobs, Judges, and Justice: The Relationship Between Professional Diversity and Judicial Decisions*, DEMAND JUSTICE 1, 2–3, [http://demandjustice.org/wp-content/uploads/2021/02/Jobs-Judges-and-Justices\\_Demand-Justice\\_Joanna-Shepherd-Report\\_2021.pdf](http://demandjustice.org/wp-content/uploads/2021/02/Jobs-Judges-and-Justices_Demand-Justice_Joanna-Shepherd-Report_2021.pdf) [<https://perma.cc/TFZ6-LE47>] (addressing the relationship between judges' qualifications and backgrounds to their judicial decisions). See also RICHARD A. POSNER, HOW JUDGES THINK 19–29 (2008) (describing the “attitudinal theory” of judging).

organization except that I do not include the reference to strict proof, which does not seem to be prevalent outside the Northern District. I canvass citations of the case in the Seventh Circuit and then track it through the remaining circuits in numerical order.<sup>38</sup> Finally, after looking at *all* state courts, I found three cases citing the Appendix in Maryland, Connecticut, and Illinois. I conclude with Arizona, which through a rule change by its highest court, perfects the Shadur scheme with an amendment of Rule 8 that disallows the offenses that Judge Shadur perceived as the worst. Along the way, I do not shy from expressing my admiration for Judge Shadur's approach.

### III. BACKSTORY OF *STATE FARM V. RILEY*

In 2001, Judge Shadur made his expectations clear regarding Rule 8 and answers in an appendix that he attached to an order in *State Farm v. Riley*.<sup>39</sup> A fellow judge estimates that Judge Shadur issued more than 11,000 orders over the course of his thirty-seven-year career on the bench.<sup>40</sup> Westlaw includes 7,544 of these "Opinions and Orders," their most common title, and Judge Shadur's Opinion and Appendix in *State Farm v. Riley* is his twentieth-most-cited document on Westlaw, with 774 citations. Starting as early as 1997, Judge Shadur sat by designation on various panels of the United States Circuit Court of Appeals including the First, Second, Third, Seventh, Ninth, Tenth, and District of Columbia Circuits,<sup>41</sup> and seventeen of his twenty most cited opinions result from these temporary stints on the Circuit Courts of Appeal.<sup>42</sup> Shadur's

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38. I found no citations of Judge Shadur's Appendix in either the Federal or DC Circuits.

39. See 199 F.R.D. 276, 278 (N.D. Ill. 2001) (publishing the appendix due to "years of unsuccessful efforts to correct a gaggle of fundamental pleading errors that continue to crop up in responsive pleadings").

40. Briscoe, *supra* note 1, at 5.

41. The Chief Justice designates district court judges for service on circuit courts of appeal in circuits other than their home circuit. 28 U.S.C. § 292(d). Judge Shadur discussed his Circuit Court of Appeals stints in an interview with Above the Law. Howard J. Bashman, *How Appealing's 20 Questions, ABOVE THE LAW* (April 19, 2004, 12:00 AM) [https://howappealing.abovethelaw.com/20q/2004\\_04\\_01\\_20q-appellateblog\\_archive/](https://howappealing.abovethelaw.com/20q/2004_04_01_20q-appellateblog_archive/) [<https://perma.cc/3AEQ-CG5F>].

42. See *e.g.*, Harris v. City of New York, 186 F.3d 243 (2d Cir. 1999); Rutherford v. Barnhart, 399 F.3d 546 (3d Cir. 2005); Avetova-Elisseva v. INS, 213 F.3d 1192 (9th Cir. 2000), *as amended* (June 26, 2000); Abdulrahman v. Ashcroft, 330 F.3d 587 (3d Cir. 2003); Hasan v. Galaza, 254 F.3d 1150 (9th Cir. 2001); United States v. Weatherspoon, 410 F.3d 1142 (9th Cir. 2005); United States v. Sandoval, 29 F.3d 537 (10th Cir. 1994); Diaz v. United Agric. Emp. Welfare Benefit Plan & Tr., 50 F.3d 1478 (9th Cir. 1995); Thompson v. State Farm Fire & Cas. Co., 34 F.3d 932 (10th Cir. 1994); Hendricks v. Coughlin, 114 F.3d 390 (2d Cir. 1997); Espinoza-Matthews v. California, 432 F.3d 1021 (9th Cir. 2005); Morningside Grp. v. Morningside Cap. Grp., 182 F.3d 133 (2d Cir. 1999); Nunes v. Mueller, 350 F.3d 1045 (9th Cir. 2003); Bobbitt v. Victorian House, Inc., 532 F. Supp. 734 (N.D. Ill. 1982); Walker v. United Parcel Serv., Inc., 240 F.3d 1268 (10th Cir. 2001); Spaulding v. United Transp. Union, 279 F.3d 901 (10th Cir. 2002); Jordan v. City of Cleveland, 464 F.3d 584 (6th Cir. 2006).

opinions for various Circuit Courts of Appeal have precedential force, which accounts for their placement atop his citation ranking. His opinions as a trial court judge for the Northern District of Illinois lacked the precedential force of the circuit opinions, and one would expect little citation of the trial court orders of federal district judges. Even so, four of his trial court opinions—including *State Farm v. Riley*—climbed into his top twenty list of cited cases.<sup>43</sup> The mean number of citations of his orders is 18.9 with the median at 1. Just about half of his orders—3,594—have never been cited.<sup>44</sup>

There was nothing auspicious about the parties, issues, or lawyers in *State Farm v. Riley* that suggested the case would be among the most cited in Judge Shadur's long career. Judge Shadur's sua sponte memorandum order offers no detail whatsoever about the lawsuit, save for describing it as an "interpleader action brought by State Farm Mutual Automobile Insurance Company."<sup>45</sup> Attorneys for State Farm filed the complaint on January 17, 2001.<sup>46</sup> With the complaint, State Farm's attorneys sought to discharge the insurer's obligation by interpleading the policy limits—that is, paying the money into the court so that Judge Shadur could sort out how the five different defendants should divide the insurance proceeds.<sup>47</sup>

The underlying story of *State Farm v. Riley* was tragic. William G. Riley, the first named defendant, drove a 2000 Chevrolet Cavalier to Hemingway's Restaurant in Westmont, Illinois, on June 25, 2000.<sup>48</sup> In the restaurant's parking lot, State Farm alleged, Mr. Riley stopped the car, and his wife Leona Riley and a woman named Rose Linger got out of the Chevy's rear doors.<sup>49</sup> Mr. Riley, born in 1916, was then eighty-

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43. *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282 (N.D. Ill. 1988) (6th most cited); *Keene Corp. v. Int'l Fid. Ins. Co.*, 561 F. Supp. 656 (N.D. Ill. 1982), *aff'd*, 735 F.2d 1367 (7th Cir. 1984), and *aff'd*, 736 F.2d 388 (7th Cir. 1984) (7th most cited); *Bobbitt*, 532 F. Supp. at 734 (16th most cited); *State Farm Mut. Auto. Ins. Co. v. Riley (State Farm v. Riley)*, 199 F.R.D. 276 (N.D. Ill. 2001) (20th most cited).

44. See Westlaw Edge, <https://1.next.westlaw.com/Search/Home.html> (last visited Apr. 19, 2021) (search "JU(shadur)"; sort the 7,544 resulting cases by date; download results into .csv files (accommodating for the fact that Westlaw caps downloads to the first 1,000 results, repeating the downloading process the eight necessary times and ensuring no duplicate cases in the resulting spreadsheet); review the "citing references count" column to calculate the mean and median).

45. *State Farm v. Riley*, 199 F.R.D. at 277.

46. Complaint of Interpleader, *State Farm v. Riley*, 199 F.R.D. 276 (No. 01-C-0318) [hereinafter *State Farm v. Riley* Complaint].

47. *Id.*

48. *Id.* ¶ 5.

49. *Id.*

four years old.<sup>50</sup> Mrs. Riley, born in 1919, was eighty-one years old.<sup>51</sup> They had been married for fifty-nine years.<sup>52</sup> State Farm, which insured the Cavalier, then noted that “Mr. Riley, unaware that his passengers had gotten out of the car, put the car into reverse to back into a parking space.”<sup>53</sup> The rear doors were open, and the octogenarian Mr. Riley struck the two women and knocked them both to the pavement.<sup>54</sup> Mrs. Riley broke her hip, suffered other injuries, and, presumably via ambulance, went to Hinsdale Hospital, where she received treatment, developed complications, and died more than a month later on July 31, 2000.<sup>55</sup> Mrs. Riley’s hospital and other medical bills exceeded \$200,000.<sup>56</sup> Mr. and Mrs. Riley had one child, William G. Riley, Jr., whom the interpleader complaint describes as “a developmentally disabled adult due to mental retardation” and “a ward of the Illinois State Guardian.”<sup>57</sup>

Without the involvement of a personal injury attorney representing Mrs. Riley’s estate or her son, State Farm concluded that its insured, Mr. Riley, was at fault for his wife’s death.<sup>58</sup> The liability policy’s limits were \$150,000, but State Farm interpreted its policy—correctly, in my view—to exclude coverage for Mrs. Riley and her estate because she was a “member of the family of the insured, related by blood, marriage or adoption, residing in the same household.”<sup>59</sup>

Exclusion from liability coverage transformed Mr. Riley’s Chevy Cavalier into an uninsured motor vehicle. However, the policy provided \$50,000 in uninsured motor vehicle coverage, and “State Farm wishe[d]

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50. *U.S., Social Security Death Index, 1935–2014*, ANCESTRY.COM, <https://www.ancestry.com/search/collections/3693/> [<https://perma.cc/L4XM-HDPP>] (last visited May 15, 2021) (enter “William Giles” for “First & Middle Name(s)” and “Riley” for “Last Name” and select “Match all terms exactly” to generate one record result) (original data from the United States Social Security Administration).

51. *U.S., Social Security Applications and Claims Index, 1936–2007*, ANCESTRY.COM, <https://www.ancestry.com/search/collections/60901/> [<https://perma.cc/X4M4-WAAU>] (last visited May 15, 2021) (enter “Leona” for “First & Middle Name(s)” and “Pruger” (Ms. Riley’s maiden name) for “Last Name” and select “Match all terms exactly” to generate one record result) (original data from the United States Social Security Applications and Claims, 1936–2007).

52. *Cook County, Illinois Marriage Index, 1930–1960*, ANCESTRY.COM, <https://www.ancestry.com/search/collections/1500/> (last visited May 15, 2021) (enter “Leona” for “First & Middle Name(s),” “Pruger” for “Last Name,” “1941” for “Year,” “William” for “Spouse First & Middle Name(s),” “Riley” for “Spouse Last Name,” and select “Match all terms exactly” to generate one record result) (original data from Cook County Clerk Genealogy Records).

53. *State Farm v. Riley* Complaint, *supra* note 46, ¶ 5.

54. *Id.*

55. *Id.* ¶¶ 6–7.

56. *Id.* ¶ 8.

57. *Id.* ¶¶ 17, 21.

58. *Id.* ¶ 12.

59. *Id.* ¶ 13.

to pay the \$50,000.00 limits and be discharged from further liability under the policy.”<sup>60</sup> Sad though the details of Mrs. Riley’s injury and death are, State Farm was simply tendering its uninsured motorist policy limits.

Four different persons or entities had claims upon the \$50,000 that State Farm tendered. The Rileys’ policy included \$100,000 in medical payment coverage, which State Farm had already paid to Hinsdale Hospital.<sup>61</sup> State Farm noted in the complaint that the hospital might also have a claim to the \$50,000 under Illinois’s Hospital Lien Act.<sup>62</sup> Given Mrs. Riley’s age, Medicare paid for all or most of her treatment (one hopes), and for that reason, State Farm listed Donna Shalala, then secretary of health and human services, as a defendant and cited the relevant federal statute concerning Medicare’s claim for reimbursement.<sup>63</sup> State Farm’s attorney, John Adams, Esq., told me that he filed the lawsuit simply because getting Medicare to provide a reimbursement lien figure was so bureaucratically difficult that filing a federal lawsuit was the best way to get Medicare to respond. Against Mr. Riley, State Farm noted there might be a wrongful death claim and a negligence claim under Illinois’s Survival Act.<sup>64</sup> Mrs. Riley had died without a will,<sup>65</sup> and her heirs at law and next of kin for purposes of the Wrongful Death Act were her husband and disabled son.<sup>66</sup> Mr. Riley thus may have been entitled to claim some of the insurance payment for her wrongful death or perhaps under the Survival Act—a complicated issue.<sup>67</sup> Last, Mrs. Riley’s adult son, as her heir and next of kin, had a claim to the insurance proceeds. State Farm named the son as a defendant, but because he was a ward of the state, State Farm also named the Illinois State Guardian, which was a division of the Illinois Guardianship and

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60. *Id.* ¶¶ 14–15.

61. *Id.* ¶ 10. Whether State Farm should first have paid Medicare is a question.

62. *Id.* ¶ 20 (citing 770 ILL. COMP. STAT. 35/0.01 et seq. which, having been repealed, is now 770 ILL. COMP. STAT. 23/35 (2021)).

63. *Id.* ¶ 2 (citing 42 U.S.C. § 1395y). Medicare, as a secondary payer, is entitled to be reimbursed after “payment has been made . . . under an automobile or liability insurance policy or plan (including a self-insured plan) or under no fault insurance.” 42 U.S.C. § 1395y(b)(2)(B)(iii), (A)(ii). The interplay between hospital liens and Medicare and Medicaid remains complicated twenty years after Mrs. Riley’s death. See Sarah Kliff & Jessica Silver-Greenberg, *How Rich Hospitals Profit from Patients in Car Crashes*, N.Y. TIMES (Feb. 1, 2021), <https://www.nytimes.com/2021/02/01/upshot/rich-hospitals-profit-poor.html> [<https://perma.cc/WT9Z-CC8G>] (highlighting that filing hospital liens against liability insurance proceeds “has become routine” in hospitals and results in high reimbursement rate especially when used against low-income patients with Medicaid).

64. *State Farm v. Riley* Complaint, *supra* note 46, ¶ 11 (citing 740 ILL. COMP. STAT. 180/1 et seq. (2021) (Wrongful Death Act) and 755 ILL. COMP. STAT. 5/27-6 (2021) (Survival Act)).

65. *Id.* ¶ 16.

66. *Id.* ¶ 18.

67. 755 ILL. COMP. STAT. 5/27-6 (2021).

Advocacy Commission.<sup>68</sup> All this sounds complicated, but ultimately the lawsuit was about dividing \$50,000 among Medicare, the hospital, the negligent husband, and the disabled son by way of his guardian. I am not bothered by how State Farm's lawyers handled this matter.

Patrick DeMoon, Esq., from the Office of the Illinois Attorney General answered on behalf of the state guardian. Assistant Attorney General DeMoon represented Ms. Nancy Demarco from the Office of State Guardian. Mr. DeMoon did not typically litigate in federal court; he mostly handled state court matters.<sup>69</sup> Judge Shadur had a feud with the Illinois Attorney General's Office or perhaps only with the parts of the office that dealt with the Department of Corrections. In the second sentence of his order, Judge Shadur noted that "the Answer is stricken in its entirety—but with leave granted to DeMarco's counsel (an Assistant Attorney General) to replead promptly." Mr. DeMoon believes the parenthetical reference to him as "(an Assistant Attorney General)" points to Judge Shadur's unhappiness with the Attorney General's Office.<sup>70</sup> Mr. DeMoon suggests that Judge Shadur may well have prepared and held the six-page Appendix, lying in wait for a lawyer from the Attorney General's Office to receive his wrath.<sup>71</sup> Mr. DeMoon walked into a judicial ambush.

Bad blood already existed between Judge Shadur and the state Attorney General's Office. In 1994, Judge Shadur had launched an order with "[a]ll too often the representatives of the Illinois Attorney General's Office appear in the federal court system wearing false—or at least misleading—colors."<sup>72</sup> Judge Shadur then recounted the notorious history of the state's attorney general. "Half a century ago," he wrote, "Illinois was a national byword for its relentless promotion of injustice to prisoners—its then Attorney General encouraged its courts . . . in erecting a labyrinthine maze of procedural dead ends for prisoners who claimed violations of their constitutional rights."<sup>73</sup> He explained that "[h]abeas corpus, common law writ of error, writ of error coram nobis—

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68. *State Farm v. Riley* Complaint, *supra* note 46, ¶ 21.

69. *See, e.g.,* *People ex rel. Dep't of Pro. Regul. v. Manos*, No. CH-1859, 2000 WL 35747903 (Ill. Cir. Ct., July 31, 2000) *rev'd in part* 761 N.E.2d 208 (Ill. App. 2001); Plaintiff's Motion for Summary Judgment, *Manos*, No. CH-1859, 2000 WL 35747934; Defendant's Motion to Dismiss Plaintiff's Complaint, *Arvia v. Ryan*, No. CH-16992, 2000 WL 35727006; Transcript on Hearing for Plaintiff's Motion for Summary Judgment, *Chi. Journeymen Plumbers Local Union 130, U.A. v. Ill. Dep't of Pub. Health*, No. CH-4700, 2000 WL 35715320 (Ill. Cir. Ct., Sept. 18, 2000).

70. Conversation with Patrick DeMoon, Former Assistant Att'y Gen., Off. of the Ill. Att'y Gen. (January 29, 2021) (notes on file with author).

71. *Id.*

72. *United States ex rel. Green v. Peters*, No. 93-C-5671, 1994 WL 8258, at \*1 (N.D. Ill. Jan. 8, 1994).

73. *Green*, 1994 WL 8258, at \*1.

whichever remedy a prisoner would invoke was urged by the Attorney General and was then held by the Illinois courts to be the wrong path,” with the consequence of the attorney general’s misdirection being that “it would typically take years before a hearing on the merits could be obtained by the prisoner (if at all).”<sup>74</sup>

Judge Shadur then cited what he called a “scathing denunciation of that procedural merry-go-round” by Justice Wiley Rutledge<sup>75</sup> in a 1947 concurrence for the Supreme Court of the United States that Justices William O. Douglas<sup>76</sup> and William Francis Murphy<sup>77</sup> joined.<sup>78</sup> Unfavorably comparing the Attorney General’s Office in the 1990s to the 1940s, Judge Shadur noted, “[b]ut at least the Attorney General of that era occasionally acknowledged wrongdoing. . . . By contrast, these current cases display the Attorney General—presumably carrying out office policy—engaged in the active pursuit of the same time-dishonored goal of throwing up roadblocks to criminal defendants’ access to the justice system.”<sup>79</sup>

In the remainder of the 1994 order, Judge Shadur refers to a “bogus argument” that the attorney general had made earlier;<sup>80</sup> cracks that “[t]o its continuing discredit, the Attorney General’s Office stonewalled”;<sup>81</sup> and quips that “[i]n his latest submission the Attorney General continues to be faithless to his role as attorney for the ‘People of the State of Illinois.’”<sup>82</sup> Along his scorching path, Judge Shadur refers to a “Catch-22 argument” that the attorney general had made, and in a footnote suggests “[p]erhaps ‘Kafkaesque’ might be a more elegant and appropriate characterization than ‘Catch-22,’ given Kafka’s *The Trial*

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74. *Id.* at \*1.

75. *Rutledge, Wiley Blount*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/rutledge-wiley-blount> [<https://perma.cc/HDG2-Z2V3>] (last visited Apr. 5, 2021).

76. *Douglas, William Orville*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/douglas-william-orville> [<https://perma.cc/MB8C-EYGD>] (last visited Apr. 5, 2021).

77. *Murphy, Frank*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/murphy-frank> [<https://perma.cc/6WQ6-NSPP>] (last visited Apr. 5, 2021).

78. *Green*, 1994 WL 8258, at \*1 (citing *Marino v. Ragen*, 332 U.S. 561, 563 (1947)). Judge Shadur added a footnote to his citation of Justice Rutledge’s concurrence in which Judge Shadur showed off that “[t]his Court played a chance role in the public identification of Illinois’ shameful record in that respect. As a second year law school student and member of the law review staff, he received a last minute assignment, in connection with a study of the Illinois Supreme Court, to write the criminal law segment of that study (the originally assigned writer having disappointed the editor). And that quickly-produced section of the study (15 U.Chi.L.Rev. 118–31 (1947)) was published just before the *Marino* decision came down—and when it did, a startled law student thus found that his work had just been cited and quoted in the Supreme Court reports (332 U.S. at 562, 568 n.7, 569 n.11).” *Id.* at \*6 n.4.

79. *Green*, 1994 WL 8258, at \*2.

80. *Id.* at \*3.

81. *Id.*

82. *Id.* at \*4.

and the judicial-system context in which the Attorney General has asserted his outrageous positions.”<sup>83</sup>

In yet another footnote that stoked ill will between the judge and the state’s top lawyers, Judge Shadur quoted Shakespeare. He claimed that the state’s lawyers had misrepresented a Seventh Circuit Court of Appeals decision as supporting the attorney general’s position.<sup>84</sup> Judge Shadur quoted that “[t]he devil can cite Scripture for his purpose” after listing the act, scene, and line where the attorneys general might find this aphorism in *The Merchant of Venice*.<sup>85</sup> Unable or unwilling to control his poison pen, Judge Shadur then specified that “[t]hat obviously applies only metaphorically and not literally to the current situation—its figure of speech does not of course suggest that the Attorney General has literally joined the forces of darkness.”<sup>86</sup> Simply put, Judge Shadur and the Attorney General’s Office hated each other; Judge Shadur clapped back at the Attorney General’s Office with references to literature, while in their own offices, the state’s lawyers engaged popular culture and referred to him, cleverly, as Lord Shadur.

State Farm’s complaint consisted of twenty-one short paragraphs that laid out the story of how Mr. Riley negligently hit his wife while backing up their Chevy and sent her to the hospital where she developed complications and died. In the interpleader action, State Farm was tendering the uninsured motorist policy limits of \$50,000 so that the insurer could walk away, and the four claimants—Medicare, the hospital, the disabled son’s guardian, and the widower husband—could divide the money. Mr. DeMoon denied all but one of the complaint’s paragraphs. The only paragraph that the assistant attorney general admitted was the final one before the prayer for relief.<sup>87</sup> State Farm alleged that “William G. Riley, Jr. is a developmentally disabled adult due to mental retardation, and is a ward of the Illinois State Guardian. The State Guardian is a division of the Guardianaship [*sic*] and Advocacy Commission.”<sup>88</sup> Mr. DeMoon admitted only this allegation, the one that dealt most closely with his client.<sup>89</sup>

For the state and its ward, Mr. DeMoon might have answered differently. State Farm took responsibility and was tendering its policy

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83. *Id.* at \*3 n.8.

84. *Id.* at \*5.

85. *Id.* at \*5 n.11 (citing WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, act I, sc. 3, l. 99).

86. *Id.* at \*5 n.11.

87. *State Farm Mut. Auto. Ins. Co. v. Riley (State Farm v. Riley)*, 199 F.R.D. 276, 278 (N.D. Ill. 2001) (“[O]nly the final Answer ¶ 21 is in proper form, each of the Answer’s other 20 paragraphs having involved one or both of the repeated infractions.”).

88. *State Farm v. Riley* Complaint, *supra* note 46, ¶ 21.

89. *State Farm v. Riley*, 199 F.R.D. at 278.

limits. The insurer was turning to the court for assistance dividing the payout. The assistant attorney general might have admitted every allegation in the interpleader complaint without, in my view, hindering his client's position in the slightest. Instead, the stubbornness of not answering took over the pleading of the answer. With a look at the policy and just a bit of legal research, the assistant attorney general could have confirmed that there was only \$50,000 and not \$150,000 available. State Farm's interpretation of its own policy seems to me correct, which means the assistant attorney general should have admitted those paragraphs. Likewise, Mr. DeMoon might have analyzed the legitimacy of Medicare's subrogation claim, the hospital's claim for its bills, and the claim, if any, that Mr. Riley, the widower, might have after causing his wife's death. These claims all appear to have been legitimate ones, even if the amount was unliquidated.

Mr. DeMoon might have served his client effectively by admitting each of the complaint's twenty-one paragraphs, but such was the strength of the culture of denial by defendants that the assistant attorney general did the opposite and denied all but one paragraph. Mr. DeMoon's answer, like the answers of insurance defense attorneys that I examined in Colorado car crash cases, reflexively refused to admit allegations even when admissions would help his client.<sup>90</sup>

With *State Farm v. Riley*, the final winners were, predictably, the hospital and insurers. The hospital took \$45,000 of State Farm's \$50,000. Along the way, Humana Health Care Plans, Inc. entered the matter and collected \$4,000 presumably by way of a subrogation claim. Medicare got only \$535.25. Mr. Riley, the widower, took nothing and seems not to have participated in the matter. Mr. and Mrs. Riley's disabled son received \$464.75.<sup>91</sup> Mr. DeMoon told me that he suggested to the judge that the son receive enough money that when his own time came, there might be money for a suit and burial.<sup>92</sup>

Fully unaware of what was headed his way, Mr. DeMoon caught Judge Shadur's wrath. Mr. DeMoon recalls filing his answer in the case around eleven in the morning and receiving a call from the judge's secretary before one in the afternoon saying that "his order was ready."<sup>93</sup> The docket sheet shows that Mr. DeMoon entered an appearance and filed an answer on February 21, 2001, and Judge Shadur dated his order February 22, 2001. What seems like two hours now may have been one day. Either way, Mr. DeMoon was certainly surprised and reasonably felt ambushed

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90. Russell, *supra* note 7, at Part V (offering a general summary of refusal to admit practice); Jonathan R. Cohen, *The Culture of Legal Denial*, 84 NEB. L. REV. 247, 248 (2005).

91. Agreed Order, *State Farm v. Riley*, No. 01-C-0318 (July 31, 2001).

92. Conversation with Patrick DeMoon, *supra* note 70.

93. *Id.*

that, *sua sponte*, a federal judge had so quickly issued a four-paragraph, two-page order with a six-page, separately paginated appendix in response to his answer on behalf of the state guardian.

#### IV. SHADUR'S APPENDIX TO *STATE FARM V. RILEY*

Assistant Attorney General DeMoon's misfortune was filing the wrong answer in the wrong courtroom at the wrong time. Judge Shadur's order struck Mr. DeMoon's answer completely—threw it out—and ordered the assistant attorney general to replead his answer in compliance with the Appendix.<sup>94</sup>

"For too many years," Judge Shadur wrote, "this Court has been required to treat with a battery of basic pleading errors committed by defendants' lawyers who have failed to conform to the clear directives—or to the basic thrust—of the Federal Rules of Civil Procedure."<sup>95</sup> Judge Shadur explained that "[b]oth to simplify the process of correcting such deficiencies in the future and to save unwarranted wear and tear on its secretary," he had "decided to issue the attached Appendix as a compendium of most of those frequently-encountered errors."<sup>96</sup> Hoping to save time for litigants, his staff, and himself, he wrote that "future flaws of the same types in later cases can be addressed by a simple reference to the Appendix rather than by a set of repeated substantive discussions from case to case."<sup>97</sup>

The paragraphs below review Judge Shadur's 1,344-word Appendix to his order in *State Farm v. Riley*. The Appendix consists of several sections. The first four sections explained Rule 8(b) of the Federal Rules of Civil Procedure and singled out common deviations from the rule that particularly irked the judge.<sup>98</sup> In the fifth section, Judge Shadur tackled affirmative defenses and FRCP 8(c).<sup>99</sup> The following two sections dealt with the relationship of a local rule of the Northern District of Illinois to answers.<sup>100</sup> And with the final section, Judge Shadur protected defendants by penalizing defense lawyers who filed faulty, frivolous answers.<sup>101</sup>

Judge Shadur first offered his gloss on Rule 8(b), concerning responses to the allegations of complaints. In 2001, Rule 8(b) was a five-sentence,

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94. *State Farm v. Riley*, 199 F.R.D. at 278.

95. *Id.* at 277.

96. *Id.*

97. *Id.* at 278.

98. FED. R. CIV. P. 8(b); *State Farm v. Riley*, 199 F.R.D. at 278–79.

99. FED. R. CIV. P. 8(c); *State Farm v. Riley*, 199 F.R.D. at 279.

100. N.D. ILL. R. 10.1; *State Farm v. Riley*, 199 F.R.D. at 279–80.

101. *State Farm v. Riley*, 199 F.R.D. at 280.

200-word block of text.<sup>102</sup> Judge Shadur focused on Rule 8(b)'s second sentence: "If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial."<sup>103</sup> "Even though the second sentence of Rule 8(b) marks out an unambiguous path for any party that seeks the benefit of a deemed denial when he, she or it can neither admit outright nor deny outright a plaintiff's allegation (or plaintiff's 'averment,' the word used in Rule 8(b)),<sup>104</sup> Judge Shadur lectured, "too many lawyers feel a totally unwarranted need to attempt to be creative by straying from that clear path."<sup>105</sup> Answering lawyers, he complained, failed most often to mention belief, less often information, notwithstanding that the rule's "drafters deliberately chose those terms as elements of the Rule's necessary disclaimer in order to set a higher hurdle for the earning of a deemed denial."<sup>106</sup>

Judge Shadur next addressed the answering pleaders' demands for "strict proof." "[A]lthough the concept of 'strict proof,' whatever that may mean, is nowhere to be found in the Rules (or to this Court's knowledge in any other set of rules or in any treatise on the subject of pleading)," Judge Shadur complained that "some members of the same coterie of careless defense counsel will also often include an impermissible demand for such proof."<sup>107</sup> He then cited two of his own previous orders.<sup>108</sup>

In 1989, Judge Shadur had launched an early salvo in his fight against frivolous answers. In a footnote in his order in *Gilbert v. Johnston*, he

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102. DEFENSES; FORM OF DENIALS. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

FED. R. CIV. P. 8(b) (2001) (amended 2007).

103. *Id.*

104. In 2007, the text of Rule 8 changed to no longer include the word averment. *See* Amendments to Federal Rules of Civil Procedure, 550 U.S. 1003, 1023–24 (2007).

105. *State Farm v. Riley*, 199 F.R.D. at 278.

106. *Id.*

107. *Id.*

108. *Id.* Judge Shadur cited *Gilbert v. Johnston*, 127 F.R.D. 145, 146 (N.D. Ill. 1989), and *King Vision Pay Per View, Ltd. v. J.C. Dimitri's Restaurant, Inc.*, 180 F.R.D. 332 (N.D. Ill. 1998). Demands for "strict proof" are infrequent in Colorado cases. *See* Russell, *supra* note 7, at Part III.

wondered just how defense lawyers learned to answer frivolously. “So many pleadings reflecting the flaws discussed in this opinion have been coming across this Court’s desk that,” he sarcastically speculated, “[t]here is room for a growing suspicion that someone somewhere has produced a pleadings form book (no doubt entitled *Federal Rules of Civil Procedure: How Not To Plead*) prescribing the kind of response referred to in this opinion.”<sup>109</sup> He noted, too, that his own responses to frivolous pleading and departures from Rule 8 were becoming standardized so that “[m]uch of the substantive content of this order has become a standardized form (subject to any necessary minor adaptations for particular situations) available on the word processor used by this Court’s secretary.”<sup>110</sup> He finished the footnote by commenting on the difficulty of educating lawyers about pleading. “This opinion is being published in the forlorn hope that it may stanch the flow of such pleadings,” he wrote, “(though it would be overly sanguine to expect any appreciable diminution—nonreaders of Rule 8(b) are also likely to be nonreaders of F. Supp. and F.R.D.).”<sup>111</sup>

Judge Shadur’s *Gilbert v. Johnston* order had identified the specific language he targeted with the first section of his 2001 Appendix to *State Farm v. Riley*.<sup>112</sup> Defense counsel for New South Publications, Inc. included the following sentence in an answer: “Defendant lacks the knowledge sufficient to form a belief as to the truth of the allegations of paragraph—and, therefore, neither admits nor denies such allegations, but demands strict proof thereof.”<sup>113</sup> Judge Shadur counted twelve different uses of this sentence by New South’s attorney, Donald J. Nolan, Esq.<sup>114</sup> Judge Shadur first dug into the relationship between the pleader’s belief, knowledge, and information. He then coupled this analysis to the answer’s references to “strict proof,” which found “no warrant either in the Rules or, for that matter, in the Illinois Code of Civil Procedure—both of which can be searched in vain for any such concept.”<sup>115</sup> Regarding the concept of “strict proof,” Judge Shadur noted that he would not “ask counsel for an explanation of (1) exactly what ‘strict proof’ means, (2) what its origins are as a pleading standard or (3) where counsel got the idea that concept plays any part at all in litigation today.”<sup>116</sup> He then struck the offending parts of the answer and gave the lawyer ten days

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109. *Gilbert*, 127 F.R.D. at 146 n.1.

110. *Id.*

111. *Id.*

112. *Id.*; *State Farm v. Riley*, 199 F.R.D. at 278.

113. *Gilbert*, 127 F.R.D. at 146.

114. *Id.*

115. *Id.*

116. *Id.*

to replead, or he would deem the allegations admitted.<sup>117</sup>

The second of his own orders to which Judge Shadur referred in the first part of the *State Farm v. Riley* appendix was his 1998 order in *King Vision v. Dimitri's Restaurant*.<sup>118</sup> Judge Shadur opened the second paragraph:

This is it. For too many years and in too many hundreds of cases this Court has been reading, and has been compelled to order the correction of, allegedly responsive pleadings that are written by lawyers who are either unaware of or who choose to depart from Rule 8(b)'s plain roadmap.<sup>119</sup>

In a footnote, Judge Shadur wrote that *Gilbert v. Johnson* “was probably the first case in which this Court reduced to published form its identification of the repeatedly manifested problem that is again dealt with here.”<sup>120</sup> But, he emphasized, the problem was longstanding and pervasive. *Gilbert*, he explained, “had been preceded by years of like encounters with pleadings too numerous to waste time in tracing, and the near decade that has elapsed since *Gilbert* has exhibited no abatement in lawyers’ carelessness of the same kind or its equivalent.”<sup>121</sup>

After denouncing pleaders’ practice of claiming no information, refusing to admit or deny, and then demanding strict proof, Judge Shadur turned, in the second part of the *State Farm v. Riley* Appendix, to “Legal Conclusions.” “Another regular offender,” the judge lectured, “is the lawyer who takes it on himself or herself to decline to respond to an allegation because it ‘states a legal conclusion.’”<sup>122</sup> Judge Shadur noted that this answer violated “the express Rule 8(b) requirement that *all* allegations must be responded to.” And, “perhaps even more importantly,” he wrote that refusing to answer because an allegation states a legal conclusion “disregards established law from the highest authority on down that legal conclusions are an integral part of the federal notice pleading regime.”<sup>123</sup> He concluded with an example: “[C]ould anything be more of a legal conclusion than a plaintiff’s allegation of

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117. *Id.*

118. *King Vision Pay Per View, Ltd. v. J.C. Dimitri's Rest., Inc.*, 180 F.R.D. 332, 333 (N.D. Ill. 1998).

119. *Id.* at 333.

120. *Id.* at 333 n.2.

121. *Id.*

122. *State Farm Mut. Auto. Ins. Co. v. Riley (State Farm v. Riley)*, 199 F.R.D. 276, 278 (N.D. Ill. 2001).

123. *State Farm v. Riley*, 199 F.R.D. at 278 (citing *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Denton v. Hernandez*, 504 U.S. 25, 31 (1992); and *Jackson v. Marion County*, 66 F.3d 151, 153–54 (7th Cir. 1995)).

subject matter jurisdiction, which must of course be answered?”<sup>124</sup>

Assistant Attorney General DeMoon had run afoul of the first two items in Shadur’s Appendix. The judge’s order reveals how Mr. DeMoon had answered. Judge Shadur’s order specifies that “Answer ¶¶ 1, 4–10 and 12–20 run afoul of App. ¶ 1,”<sup>125</sup> which means that for seventeen paragraphs, Mr. DeMoon answered with a variant of “Defendant lacks the knowledge sufficient to form a belief as to the truth of the allegations of paragraph—and, therefore, neither admits nor denies such allegations, but demands strict proof thereof.”<sup>126</sup> Judge Shadur also specified in his order that Mr. DeMoon’s “Answer ¶¶ 2, 3, 4, 11, 14 and 18 are at odds with App. ¶ 2,”<sup>127</sup> which means that Mr. DeMoon avoided answering six paragraphs by claiming that State Farm’s allegation called for a legal conclusion. With twenty-one paragraphs in the complaint, Mr. DeMoon used forbidden pleading responses twenty-three times, doubling up on three paragraphs, and denying or refusing to answer all but one paragraph. The stubborn refusal to admit the allegations may explain Judge Shadur’s apparent fury.<sup>128</sup>

Judge Shadur did not point out that the lone allegation that Mr. DeMoon did admit, that “William G. Riley, Jr. is a developmentally disabled adult due to mental retardation, and is a ward of the Illinois State Guardian. The State Guardian is a division of the Guardianaship [*sic*] and Advocacy Commission,” contains at least two legal conclusions—that the son was a ward of the state, and that the Office of State Guardian was a division of the Illinois Guardianship and Advocacy Commission.

Continuing, Judge Shadur moved on to misdeeds that Mr. DeMoon had *not* committed. He titled the third section of his Appendix “Speaks for Itself.”<sup>129</sup> “Another unacceptable device,” he opened, “used by lawyers who would prefer not to admit something that is alleged about a document in a complaint (or who may perhaps be too lazy to craft an appropriate response to such an allegation), is to say instead that the

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124. *State Farm v. Riley*, 199 F.R.D. at 278. Judge Shadur was also impatient with defense lawyers who wrongly claimed lack of subject matter as an affirmative defense. See *McCain v. Merrill Pub. Co.*, No. 90-C-707, 1990 WL 37671, at \*1 (N.D. Ill. Mar. 13, 1990) (“A[ffirmative] D[efense] ¶ 2—an asserted lack of jurisdiction over the subject matter—is stricken as clearly frivolous.”).

125. *State Farm v. Riley*, 199 F.R.D. at 278.

126. *Gilbert v. Johnston*, 127 F.R.D. 145, 146 (N.D. Ill. 1989); *State Farm v. Riley*, 199 F.R.D. at 278.

127. *State Farm v. Riley*, 199 F.R.D. at 278.

128. Though Mr. DeMoon felt ambushed by Judge Shadur’s order and Appendix, the judge had made his concerns about “strict proof” clear in *Gilbert v. Johnston*, 127 F.R.D. 145, 146 (N.D. Ill. 1989), just as he had addressed “legal conclusions” in *King Vision Pay Per View, Ltd. v. J.C. Dimitri’s Rest., Inc.*, 180 F.R.D. 332, 333 (N.D. Ill. 1998).

129. *State Farm v. Riley*, 199 F.R.D. at 279.

document ‘speaks for itself.’”<sup>130</sup> Humorously—but imperiously—Judge Shadur noted that “[t]his Court has been attempting to listen to such written materials for years (in the forlorn hope that one will indeed give voice)—but until some such writing does break its silence,” he continued, “this Court will continue to require pleaders to employ one of the three alternatives that *are* permitted by Rule 8(b) in response to all allegations about the contents of documents (or statutes or regulations).”<sup>131</sup> Those alternatives, of course, were to admit, deny, or state the pleader lacked “knowledge or information sufficient to form a belief” in order to gain a deemed denial.<sup>132</sup>

Judge Shadur then included in the Appendix a catchall category titled “Other Failure to Answer.” He emphasized, “this Court regularly requires that every allegation in a complaint be responded to in conformity with Rule 8(b).”<sup>133</sup>

After Rule 8(b), Judge Shadur turned to Rule 8(c) and affirmative defenses.<sup>134</sup> Regarding affirmative defenses, Judge Shadur became a bit more technical, which is not out of place for a judge, especially not a federal judge, just as pedantry is part of the law professor’s portfolio. “Some defense counsel,” Judge Shadur noted, “are inordinately fond of following the direct responses to a complaint’s allegations with a set of purported affirmative defenses (‘ADs’) that don’t really fit that concept.”<sup>135</sup> Judge Shadur lectured that an affirmative defense “essentially takes the . . . approach of *admitting* all of the allegations of a complaint, but of then going on to explain other reasons that defendant is not liable to plaintiff anyway . . . .”<sup>136</sup> Put simply, an affirmative defense says, “If so, so what?”<sup>137</sup> Judge Shadur then included two conditions that would cause him to strike affirmative defenses. The first condition was where the defense attorney pleaded an affirmative defense “inconsistent with a complaint’s allegation . . . .”<sup>138</sup> Such a defense fails the “if so” prong of the “if so, so what?” test of affirmative defenses. However, as Judge Shadur noted, “nothing is lost by defendant in that situation, because the denial of that allegation in the answer has already put the

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130. *Id.*

131. *Id.*

132. FED. R. CIV. P. 8(b).

133. *State Farm v. Riley*, 199 F.R.D. at 279.

134. *Id.*

135. *Id.*

136. *Id.* He noted, too that an affirmative defense might admit the allegations but plead that the damages should be less because of the plaintiff’s comparative fault failure to mitigate. *Id.*

137. Russell, *supra* note 7, at Part IV.

138. *State Farm v. Riley*, 199 F.R.D. at 279.

matter at issue.”<sup>139</sup>

Second, Judge Shadur demanded that the pleader include a predicate—an underlying or foundational fact—to support any affirmative defenses. “It is unacceptable for a party’s attorney,” he wrote in the Appendix, “simply to mouth ADs in formula-like fashion (‘laches,’ ‘estoppel,’ ‘statute of limitations’ or what have you), for that does not do the job of apprising opposing counsel and this Court of the predicate for the claimed defense—which is after all the goal of notice pleading.”<sup>140</sup>

Judge Shadur was not just tidying up affirmative defenses that did not spark joy.<sup>141</sup> As he wrote in 2015, he recognized that “[c]onventional wisdom teaches that motions to strike under Rule 12(f) are disfavored . . . .”<sup>142</sup> “But where a defendant’s asserted A[ffirmative] D[efense]s are both legion and mostly frivolous,” he countered, “a motion to strike can aid the parties in resolving the case by removing irrelevant issues from consideration.”<sup>143</sup> Removing frivolous defenses aided the parties and the court. Judge Shadur referred to Judge Daniel Manion’s<sup>144</sup> 1989 opinion for the Seventh Circuit Court of Appeals in *Heller Financial v. Midwhey Powder*,<sup>145</sup> which, Judge Shadur noted, “is worth quoting at length . . . .”<sup>146</sup>

Long before United States Supreme Court opinions in *Iqbal* and *Twombly*,<sup>147</sup> Judge Manion struck affirmative defenses that were “nothing but bare bones conclusory allegations.” The defendant Midwhey, he explained, “omitted any short and plain statement of facts and failed totally to allege the necessary elements of the alleged claims.”<sup>148</sup> Judges Shadur and Manion had the same goals. Judge Manion had written that “Midwhey places great reliance on the general rule that motions to strike are disfavored. This is because,” the Seventh Circuit

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139. *Id.* Judge Shadur may have been slyly encouraging defendants to be sure to deny allegations, because evading answering—through the document speaks, legal conclusion, or strict proof gambits—could lead a court to deem an allegation admitted because not denied.

140. *Id.*

141. MARIE KONDO, *THE LIFE-CHANGING MAGIC OF TIDYING UP: THE JAPANESE ART OF DECLUTTERING AND ORGANIZING* (2014).

142. *NewNet Commc’n Techs., LLC v. VI E-Cell Tropical Telecom, Ltd.*, 85 F. Supp. 3d 988, 993 (N.D. Ill. 2015) (citing 5C CHARLES WRIGHT & ARTHUR MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1380 (3d ed.2004)).

143. *Id.*

144. *Manion, Daniel Anthony*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/manion-daniel-anthony> [<https://perma.cc/3AF3-QESM>] (last visited Apr. 5, 2021).

145. *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989); *NewNet Commc’n Techs., LLC*, 85 F. Supp. 3d at 993.

146. *NewNet Commc’n Techs., LLC*, 85 F. Supp. 3d at 993.

147. *See generally* *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

148. *Heller Fin., Inc.*, 883 F.2d at 1295.

judge explained, “motions to strike potentially serve only to delay.”<sup>149</sup> Striking a chord that resonated with Judge Shadur, Judge Manion wrote, “[b]ut where, as here, motions to strike remove unnecessary clutter from the case, they serve to expedite, not delay.”<sup>150</sup> Pleadings that define rather than hide the contested issues, Judges Manion and Shadur understood, speed the process. Many judges either disagree or do not care.

Judge Shadur’s Appendix next deals, in items 6 and 7, with housekeeping matters related to answering. Though prosaic, these important sections keep front and center that the purpose of the Appendix and Judge Shadur’s insistence on proper pleading was to generate pleadings that identified the issues in controversy, were useful to the parties and the court, and, as Judge Manion wrote in *Heller*, “serve[d] to expedite, not delay.”<sup>151</sup> The Northern District had, and still has, local rule 10.1, which specifies that “[r]esponsive pleadings shall be made in numbered paragraphs each corresponding to and stating a concise summary of the paragraph to which it is directed.”<sup>152</sup> Judge Shadur explained the rule simply and concretely: “As a matter of practice,” local rule 10.1 “is most often complied with by a defendant’s verbatim copying of the complaint’s allegations in each paragraph, followed immediately by defendant’s response to that paragraph.”<sup>153</sup> Judge Shadur noted the convenience of local rule 10.1, which “avoids a kind of patchwork pleading, in which more than one document must be examined to see the totality of the responding party’s pleading.”<sup>154</sup> The judge focused on the utility of a “self-contained pleading, so that the judicial or adversary reader can avoid the inconvenience of having to flip back and forth between two pleadings to see just what is or is not being placed at issue.”<sup>155</sup> Ultimately, his rules—fussy and angry as lawyers may have experienced them—focused on the utility of efficiently laying bare the controverted issues for the parties and the judge in order to expedite the case.

Last, Judge Shadur created an innovative cost mechanism to promote adherence to the pleading rules of his Appendix. He began the eighth and final of the Appendix’s items by noting that “[b]ecause all of the matters that have been addressed here are the product of some lawyer’s deficient

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149. *NewNet Commc’n Techs., LLC*, 85 F. Supp. 3d at 993 (quoting *Heller Fin., Inc.*, 883 F.2d at 1294).

150. *Heller Fin., Inc.*, 883 F.2d at 1294.

151. *NewNet Commc’n Techs., LLC*, 85 F. Supp. 3d at 993 (quoting *Heller Fin., Inc.*, 883 F.2d at 1294).

152. *State Farm Mut. Auto. Ins. Co. v. Riley (State Farm v. Riley)*, 199 F.R.D. 276, 279 (N.D. Ill. 2001) (quoting N.D. ILL. R. 10.1).

153. *Id.*

154. *Id.* at 280.

155. *Id.* at 279.

performance, there is no reason that the client should bear the cost of correction via a revised pleading . . . .”<sup>156</sup> He therefore directed that “no charge is to be made to the client by its counsel for the added work and expense incurred in correcting counsel’s own errors.”<sup>157</sup> Further, he ordered the repleading attorneys to send a letter to their clients letting them know the lawyers would not bill them for their time correcting the pleading.<sup>158</sup> And, what’s more, counsel was to deliver a copy of the no-billing letter to the “Court’s chambers as an informational matter (not for filing).”<sup>159</sup> I wonder whether a file folder of those letters is extant? They would surely be interesting.

#### V. FEDERAL RULES DECISIONS (FRD) AND SHADUR’S APPENDIX

The Appendix to *State Farm v. Riley*, now twenty years old, is living a rich life. The number of citations to the case is approaching 800.<sup>160</sup> Judges have cited Judge Shadur’s order and appendix 232 times.<sup>161</sup> Litigants have cited the case 454 times in trial court motions and filings as well as 14 times in appellate matters.<sup>162</sup> Westlaw reports 52 citations in secondary sources and another 13 in a directory West calls “Practical Law.”<sup>163</sup>

Judge Shadur deliberately sought publication of the order and appendix in a specific West reporter. In the second paragraph of the order directing Mr. DeMoon to replead, Judge Shadur explained that by issuing the “Appendix as a compendium of most of those frequently-encountered errors, . . . future flaws of the same types in later cases can be addressed by a simple reference to the Appendix rather than by a set of repeated substantive discussions from case to case.”<sup>164</sup> The judge then added a footnote: “To facilitate such future references, this opinion is being sent in to West Publishing Company for publication.”<sup>165</sup>

West Publishing included Judge Shadur’s order and appendix in the *Federal Rules Decisions* or *FRD*. Roughly as a matter of course, appellate opinions appear in reporters and the online databases of Westlaw, Lexis,

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156. *Id.* at 280.

157. *Id.*

158. *Id.*

159. *Id.*

160. *State Farm Mut. Auto. Ins. Co. v. Riley: Citing References*, WESTLAW EDGE, <https://1.next.westlaw.com/RelatedInformation/18ded740353dc11d997e0acd5cbb90d3f/kcCitingReferences.html> (last visited Mar. 25, 2021) [hereinafter *Riley Citing References*] (reporting 776 total citations).

161. *Id.*

162. *Id.*

163. *Id.*

164. *State Farm v. Riley*, 199 F.R.D. at 277–78.

165. *Id.* at 278 n.1.

Bloomberg, and other companies. The work product of trial court judges—as opposed to appellate judges and justices—does not automatically find publication; most of the output is not sufficiently interesting or important to merit a wider audience.<sup>166</sup> The Federal Rules of Civil Procedure went into effect in 1938. West published the first volume of the Federal Rules Decisions in 1940 with numbers 1–12 that year and 13–20 the following year.<sup>167</sup> The title page of the first volume describes the reporter as including “opinions, decisions and rulings involving the Federal Rules of Civil Procedure.”<sup>168</sup> Myron Jacobstein, my law librarian while I was a law student; Roy Mersky, my law librarian during the first decade of my career as a law professor; and Dean Donald J. Dunn explain that the *FRD* “contains cases of the federal district courts since 1939 that construe the Federal Rules of Civil Procedure and cases since 1946 decided under the Rules of Criminal Procedure.”<sup>169</sup> Jacobstein et al. note that “[i]n addition to court cases, [the *FRD*] also included articles on various aspects of federal courts and federal procedure”<sup>170</sup> and that “these cases are not published in the *Federal Supplement*.”<sup>171</sup> Brian Lizotte has examined West Publishing Company’s *Publication Guide for Judges of the United States District Courts* and reports that “[i]n selecting cases for publication in the Federal Supplement, the Federal Rules Decisions, and the Bankruptcy Reporter, West’s publication guide similarly favors cases dealing with issues of first impression, modifying or explaining a rule of law, or reviewing or criticizing a body of law.”<sup>172</sup>

Just as law professors battle it out for citation of their work, judges do the same. In 1966, Professor Allan D. Vestal published his article titled “Reported Federal District Court Opinions: Fiscal 1962.”<sup>173</sup> Professor Vestal examined patterns of selection by various publishers of judicial opinions. Professor Vestal noted critically that “[t]here are numerous reasons why a judge or a publisher might want to publish an opinion

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166. Allan D. Vestal, *Reported Federal District Court Opinions: Fiscal 1962*, 4 Hous. L. Rev. 185, 188–89, 190 (1966).

167. 1 FEDERAL RULES DECISIONS at iv (1941).

168. *Id.* at iii.

169. J. MYRON JACOBSTEIN, ROY MERSKY & DONALD J. DUNN, *FUNDAMENTALS OF LEGAL RESEARCH* 254 (7th ed. 1998).

170. *Id.* at 51.

171. *Id.*

172. Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts*, 2007 Wis. L. Rev. 107, 127 n.121, 139 (2007) (citing WEST PUBLISHING CO., *PUBLICATION GUIDE FOR JUDGES OF THE UNITED STATES DISTRICT COURTS* (1994)). Thomson Reuters has similar guidelines for judges. See *Submission Guidelines for Court Opinions*, THOMSON REUTERS, <https://legal.thomsonreuters.com/en/solutions/government/court-opinion-submission-guidelines> [<https://perma.cc/9BKD-2LZT>] (last visited Mar. 25, 2021).

173. See generally Vestal, *supra* note 166.

which is valueless as far as contributing to the corpus juris.<sup>174</sup> For instance,” he explained, “a judge might feel that one way of gaining recognition is publication of a large number of opinions, and, as a result, he wants everything he writes published regardless of its value.”<sup>175</sup> Compounding this judicial egocentricity, Professor Alexander Reinert remarks that “[t]here is thus a perception among judges and lawyers that cases published in the bound case reporters are more ‘important’ to the development of the law.”<sup>176</sup>

Judge Shadur, as should be clear, thought of himself and his ideas as important, and he may have thought that his interpretation of the Federal Rules—both of Civil Procedure and of Criminal Procedure—was particularly important. West Publishing and Thomson Reuters, which now publishes the *FRD*, apparently agree, as 154 of Judge Shadur’s orders and opinions have appeared in the *Federal Rules Decisions* reporters.<sup>177</sup> The first of his opinions in the *FRD* was from August 26, 1980, just three months after he took the bench.<sup>178</sup> Thirty-five years later, in 2015, the *FRD* for the last time included one of his orders.<sup>179</sup> That year, Judge Shadur stopped carrying a full load of cases, but he did not completely leave the courtroom until 2017 and only handed off his final case shortly before his death in 2018.<sup>180</sup> Judge Shadur’s *State Farm v. Riley* order and appendix is his second-most-cited case within the *FRD*

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174. Vestal, *supra* note 166 at 188 n.28 (explaining why judges may want opinions published even if they do not add anything to the law). Though Professor Vestal never defines the term, “corpus juris” of course means “body of law.” The Romans, who did not use the letter J, referred to the Corpus Iuris Civilis, which, roughly speaking, was supposed to be all of the civil law. See, e.g., Quirinus Breen, *Justinian’s Corpus Juris Civilis*, 23 OR. L. REV. 219, 219 (1944); Cary R. Alburn, *Corpus Juris Civilis: A Historical Romance*, 45 A.B.A. J. 562, 562 (1959). As always happens with encyclopedic projects that try to organize (or restate) everything, a second effort became necessary. Hence, Corpus Juris Secundum. See generally C.J.S. (2021) (providing alphabetic encyclopedic information on legal topics from *Abandonment* to *Zoning and Land Planning*). I understand “corpus juris” to be a synonym for “The Law,” a phrase that reifies the output of the legal system as a discrete body to which one may add or not.

175. Vestal, *supra* note 166 at 188 n.28.

176. Alexander A. Reinert, *Measuring Selection Bias in Publicly Available Judicial Opinions*, 38 REV. LITIG. 255, 261 n.17 (2019) (citing Ross E. Davies, *Supreme Court Sluggers: Samuel A. Alito of the Philadelphia Phillies and Marvin Miller of the MLBPA*, 3 J.L.: PERIODICAL LABORATORY LEG. SCHOLARSHIP 77, 82–83 (2013)).

177. *Federal Rules Decisions Cases*, WESTLAW EDGE, <https://1.next.westlaw.com/Browse/Home/Cases/FederalDistrictCourtCases/FederalRulesDecisionsCases> [<https://perma.cc/H4KJ-78PM>] (last visited Mar. 25, 2021) (select “Advanced Search” and enter “Shadur” in the “Judge” box to yield 154 cases).

178. See generally *Edmondson v. Simon*, 87 F.R.D. 487 (N.D. Ill. 1980); *Shadur, Milton Irving*, *supra* note 1 (showing that Judge Shadur received his commission on May 23, 1980); *Briscoe*, *supra* note 1; *Pratt*, *supra* note 21, at 4.

179. See generally *Chicago Teachers Union, Local 1 v. Bd. of Educ.*, 307 F.R.D. 475 (N.D. Ill. 2015).

180. See *Briscoe*, *supra* note 1.

with 776 citations.<sup>181</sup> The only Shadur opinion from the *FRD* with more citations than *State Farm v. Riley* is his 1988 order in *Quaker Alloy Casting Company v. Gulfco Industries, Inc.*<sup>182</sup> *Quaker Alloy* has attracted about 1,300 citations,<sup>183</sup> with most of those centering on Judge Shadur's tart comments about Gulfco's attorneys' motion for reconsideration of an order Judge Shadur issued. "Despite what Gulfco appears to think," Judge Shadur scolded, "this Court's opinions are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure."<sup>184</sup>

Of Judge Shadur's 154 cases within the *FRD*, West's filtering identifies 144 as concerning federal civil procedure with 24 narrowly concerned with pleadings.<sup>185</sup> Among these *FRD* cases, a half-dozen or so cluster around the issues concerning answers that Judge Shadur raised in *State Farm v. Riley*. In 1997, Judge Shadur presented an early draft of his pithy remarks about listening to documents—language that he later incorporated in the *State Farm v. Riley* Appendix.<sup>186</sup> As noted above, in 1989 Judge Shadur had addressed deemed denials and the foolishness of

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181. *Riley Citing References*, *supra* note 160.

182. *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282 (N.D. Ill. 1988).

183. *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.: Citing References*, WESTLAW EDGE, <https://1.next.westlaw.com/RelatedInformation/Id739b70455ac11d997e0acd5cbb90d3f/kcCitingReferences.html> [<https://perma.cc/97BK-V43M>] (last visited Mar. 25, 2021) (reporting 1,301 total citations).

184. *Quaker Alloy Casting Co.*, 123 F.R.D. at 288.

185. The twenty-four cases concerning pleadings are *Darling & Co. v. Klouman*, 87 F.R.D. 756 (N.D. Ill. 1980); *Badillo v. Central Steel & Wire Co.*, 89 F.R.D. 140 (N.D. Ill. 1981); *Fields v. Village of Skokie*, 89 F.R.D. 576 (N.D. Ill. 1981); *Board of Education of Evanston Township High School District No. 202 v. Admiral Heating & Ventilation, Inc.*, 94 F.R.D. 300 (N.D. Ill. 1982); *Amelio v. Yazoo Manufacturing Co.*, 98 F.R.D. 691 (N.D. Ill. 1983); *SFM Corp. v. Sundstrand Corp.*, 99 F.R.D. 101 (N.D. Ill. 1983); *Skokie Gold Standard Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 99 F.R.D. 108 (N.D. Ill. 1983); *Pete Thoesen Tractor & Equipment Repair Co. v. City of Chicago*, 101 F.R.D. 734 (N.D. Ill. 1984); *Ovitz v. Jefferies & Co., Inc.*, 102 F.R.D. 242 (N.D. Ill. 1984); *In re Ronco, Inc.*, 105 F.R.D. 493 (N.D. Ill. 1985); *National Union Fire Insurance Co. v. Continental Illinois Corp.*, 113 F.R.D. 527 (N.D. Ill. 1986); *Checker Taxi Co. v. National Production Workers Union*, 113 F.R.D. 561 (N.D. Ill. 1986); *McCarthy v. PaineWebber, Inc.*, 127 F.R.D. 130 (N.D. Ill. 1989); *Gilbert v. Johnston*, 127 F.R.D. 145 (N.D. Ill. 1989); *McDowell v. Sullivan*, 132 F.R.D. 501 (N.D. Ill. 1990); *Gwin v. Curry*, 161 F.R.D. 70 (N.D. Ill. 1995); *Aetna Casualty & Surety Co. v. William M. Mercer, Inc.*, 173 F.R.D. 235 (N.D. Ill. 1997); *Umar v. Johnson*, 173 F.R.D. 494 (N.D. Ill. 1997); *Controlled Environment Systems v. Sun Process Co.*, 173 F.R.D. 509 (N.D. Ill. 1997); *King Vision Pay Per View, Ltd. v. J.C. Dimitri's Restaurant, Inc.*, 180 F.R.D. 332 (N.D. Ill. 1998); *State Farm Mutual Automobile Insurance Co. v. Riley*, 199 F.R.D. 276 (N.D. Ill. 2001); *Azza International Corp. v. Gas Research Institute*, 204 F.R.D. 109 (N.D. Ill. 2001); *Smith v. Nike Retail Services, Inc.*, 234 F.R.D. 648 (N.D. Ill. 2006); and *Santana v. Cook County Board of Review*, 270 F.R.D. 388 (N.D. Ill. 2010).

186. *Controlled Env't Sys.*, 173 F.R.D. at 510 ("This Court has been attempting to listen to such written materials for years (in the forlorn hope that one will indeed give voice)—but until some such writing does break its silence, this Court will continue to require pleaders to employ one of the three alternatives that are permitted by Rule 8(b) in response to all allegations about the contents of documents.").

defense demands for “strict proof” in *Gilbert v. Johnston*.<sup>187</sup> In 1998, Judge Shadur also developed his arguments against the “strict proof” claim in *King Vision Pay Per View v. Dimitri’s Restaurant*.<sup>188</sup> In a couple of *FRD* cases from the 1980s and 1990s, he presented his technical arguments about labeling claims “affirmative defenses.”<sup>189</sup> The existence of these orders undermines Mr. DeMoon’s claim of ambush; someone in his office knowledgeable about Judge Shadur’s view of pleading might have tipped off the assistant attorney general.

#### VI. JUDGE SHADUR’S CITATION OF THE APPENDIX

After publication in the *Federal Rules Decisions* reporter in 2001, Judge Shadur’s Opinion and Appendix has received considerable attention. This part covers the citation of the Appendix first by Judge Shadur himself. Part VII reviews citations of the Appendix by Judge Shadur’s Northern District of Illinois colleagues. Part VIII then reviews citations within the Seventh Circuit but outside Judge Shadur’s home district, and Part IX moves to the other circuits. Last, Part X considers the few citations in state courts finishing, though, with the epitome of Shadur’s Appendix, in a rule change by the Arizona Supreme Court in 2018, the year of Shadur’s death.

There are 776 citations of *State Farm v. Riley* in the twenty years since Judge Shadur wrote his order, attached the appendix, and sent it to West Publishing.<sup>190</sup> More than 450 of these citations are in motions and other filings that lawyers have filed in trial courts, and there are just over 50 citations in secondary sources of varying sources.<sup>191</sup> My focus is citation by judges, although I do want this catalog of citation to the Shadur Appendix to be useful to attorneys filing motions to strike frivolous defenses.

Not shy about promoting his own work, Judge Shadur cited his Appendix 167 times—more than ten times per year from 2001 to early 2017.<sup>192</sup>

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187. *Gilbert*, 127 F.R.D. at 145. See also *supra* notes 112–117 and accompanying text.

188. *King Vision Pay Per View, Ltd.*, 180 F.R.D. at 333. See also *supra* notes 118–121 and accompanying text.

189. *Amelio*, 98 F.R.D. at 693; *Gwin*, 161 F.R.D. at 71.

190. *Riley Citing References*, *supra* note 160.

191. *Id.*

192. *Azza Int’l Corp. v. Gas Rsch. Inst.*, 204 F.R.D. 109, 110 (N.D. Ill. 2001); *Howard Comme’ns Ltd. v. Golf Gifts & Gallery, Inc.*, No. 01-C-1419, 2001 WL 428168, at \*1 (N.D. Ill. Apr. 25, 2001); *Fisher-Townsell v. Syregelas*, No. 01-C-2930, 2001 WL 699108, at \*1 (N.D. Ill. June 20, 2001); *Kaczkowski v. Daimlerchrysler Corp.*, No. 01-C-3739, 2001 WL 766872, at \*1 (N.D. Ill. July 5, 2001); *Broadmark Cap. Corp. v. GlobalNet, Inc.*, No. 01-C-3855, 2001 WL 800096, at \*1 (N.D. Ill. July 12, 2001); *Lee’s Scrap Metal Co. v. Elec. Recovery Specialists, Inc.*,

No. 01-C-2672, 2001 WL 803659, at \*1 (N.D. Ill. July 17, 2001); Jet Support Servs., Inc. v. WW191, Inc., No. 01-C-4264, 2001 WL 811152, at \*1 (N.D. Ill. July 17, 2001); Adams v. Schlyer, No. 01-C-1408, 2001 WL 883657, at \*1 (N.D. Ill. Aug. 7, 2001); Kim v. Lim, No. 01-C-3741, 2001 WL 987465, at \*1 n.1 (N.D. Ill. Aug. 22, 2001); Native Am. Arts, Inc. v. Bundy-Howard, Inc., No. 01-C-1618, 2001 WL 987584, at \*1 (N.D. Ill. Aug. 28, 2001); Kim v. Lim, No. 01-C-3741, 2001 WL 1035714, at \*1 (N.D. Ill. Sept. 4, 2001); Flohr v. Comdisco, Inc., No. 01-C-3187, 2001 WL 1117328, at \*1 (N.D. Ill. Sept. 21, 2001); Bus. Elec. Soldering Techs., Inc. v. Smith, No. 01-C-5693, 2001 WL 1135944, at \*1 (N.D. Ill. Sept. 21, 2001); Cement Masons Pension Fund, Loc. 502 v. King & Larsen, Inc., No. 01-C-2919, 2001 WL 1155082, at \*1 (N.D. Ill. Sept. 27, 2001); Laborers' Pension Fund v. King & Larsen Const., Inc., No. 01-C-6855, 2001 WL 1196177, at \*1 (N.D. Ill. Oct. 5, 2001); Comerica Bank v. Patil, No. 01-C-7156, 2001 WL 1223558, at \*1 (N.D. Ill. Oct. 12, 2001); Scott v. Arrow Chevrolet, Inc., No. 01-C-7489, 2001 WL 1263498, at \*1 (N.D. Ill. Oct. 22, 2001); C.H. Robinson Co. v. Sw. Motor Transp., Inc., No. 01-C-8107, 2001 WL 1512533, at \*1 (N.D. Ill. Nov. 28, 2001); C.H. Robinson Co. v. Sw. Motor Transp., Inc., No. 01-C-8107, 2001 WL 1593147, at \*1 (N.D. Ill. Dec. 12, 2001); Auto. Fin. Corp. v. Ridge Chrysler Plymouth L.L.C., No. 01-C-8146, 2001 WL 1631870, at \*1 (N.D. Ill. Dec. 14, 2001); Washington Mut. Bank v. Morrison, No. 01-C-8988, 2002 WL 5583, at \*1 (N.D. Ill. Jan. 2, 2002); Tevlin v. Metro. Water Reclamation Dist., No. 01-C-9098, 2002 WL 69489, at \*1 (N.D. Ill. Jan. 18, 2002); Dixon v. Parker, No. 01-C-7419, 2002 WL 99747, at \*1 (N.D. Ill. Jan. 25, 2002); Mountain Funding-Z, Inc. v. Goldenberg, No. 02-C-121, 2002 WL 221520, at \*1 (N.D. Ill. Feb. 13, 2002); Flohr v. Comdisco, Inc., No. 01-C-3187, 2002 WL 598522, at \*2 (N.D. Ill. Apr. 18, 2002); Baumann v. Bayer, No. 02-C-2351, 2002 WL 1263987, at \*1 (N.D. Ill. June 5, 2002); Judt v. Doyle, No. 02-C-3155, 2002 WL 31386976, at \*1 (N.D. Ill. Oct. 21, 2002); Sherrod-Bey v. Griffin, No. 02-C-0600, 2002 WL 31399130, at \*1 (N.D. Ill. Oct. 23, 2002); United States v. Tarcom Corp., No. 02-C-6822, 2002 WL 31509777, at \*1 (N.D. Ill. Nov. 12, 2002); Banske v. Tarka, No. 02-C-7359, 2003 WL 23149, at \*1 (N.D. Ill. Jan. 2, 2003); Smith v. Westfield Ford, Inc., No. 02-C-9288, 2003 WL 288956, at \*1 (N.D. Ill. Feb. 6, 2003); Hubbard v. Certified Grocers Midwest, Inc., No. 02-C-9178, 2003 WL 744733, at \*1 (N.D. Ill. Feb. 28, 2003); Beckman v. Pajian, No. 03-C-1511, 2003 WL 1563699, at \*1 (N.D. Ill. Mar. 24, 2003); Dean v. Liberty Funding Servs., Inc., No. 03-C-0947, 2003 WL 1748637, at \*1 (N.D. Ill. Apr. 1, 2003); Joseph T. Ryerson & Son, Inc. v. Plastech Engineered Prods., Inc., No. 01-C-5878, 2003 WL 21145630, at \*2 (N.D. Ill. May 13, 2003); Marshall v. Chicago Sun-Times, Inc., No. 02-C-9365, 2003 WL 21254360, at \*2 (N.D. Ill. May 30, 2003); Feld v. Altschuler, No. 03-C-940, 2003 WL 21360879, at \*1 (N.D. Ill. June 11, 2003); Gelso v. Sheahan, No. 03-C-2468, 2003 WL 21641926, at \*1 (N.D. Ill. July 10, 2003); Alexian Bros. Health Providers Ass'n v. Humana Health Plan, Inc., 277 F. Supp. 2d 880, 885 (N.D. Ill. 2003); Gulf Ins. Co. v. United Nat'l Ins. Co., No. 03-C-5156, 2003 WL 22717769, at \*1 (N.D. Ill. Nov. 17, 2003); Dugan v. Carpentersville Quarry, Inc., No. 03-C-6895, 2003 WL 22717770, at \*1 (N.D. Ill. Nov. 17, 2003); U.S. EEOC v. PepsiAmericas, Inc., No. 03-C-6576, 2003 WL 22764869, at \*1 (N.D. Ill. Nov. 20, 2003); Safety Nat'l Cas. Corp. v. Dominick's Finer Foods, Inc., No. 03-C-7477, 2003 WL 22872114, at \*1 (N.D. Ill. Dec. 2, 2003); Moriarty v. B. Michael Muzyka, Ltd., No. 03-C-7946, 2003 WL 22964370, at \*1 (N.D. Ill. Dec. 15, 2003); IFC Credit Corp. v. B. Braun Med., Inc., No. 03-C-8815, 2004 WL 2700491, at \*1 (N.D. Ill. Feb. 4, 2004); Liners Direct, Inc. v. Luxury Bath Liners, Inc., No. 04-C-0108, 2004 WL 442605, at \*1 (N.D. Ill. Feb. 25, 2004); A-Tech Int'l, Ltd. (USA) v. Schiller, No. 04-C-2038, 2004 WL 792815, at \*1 (N.D. Ill. Apr. 9, 2004); Lathom v. City of Des Plaines, No. 04-C-1249, 2004 WL 870829, at \*1 (N.D. Ill. Apr. 22, 2004); Burke v. J.B. Hunt Transp. Servs., Inc., No. 04-C-2678, 2004 WL 1166637, at \*1 (N.D. Ill. May 19, 2004); Benson v. Equifax Info. Servs., LLC, No. 04-C-3860, 2004 WL 2034774, at \*1 (N.D. Ill. Aug. 30, 2004); Kudish v. Freedland, No. 04-C-1164, 2004 WL 2033400, at \*1 (N.D. Ill. Sept. 9, 2004); United States v. Jimenez Landscaping Corp., No. 04-C-2806, 2004 WL 2203396, at \*1 (N.D. Ill. Sept. 29, 2004); Hsieh v. RR Donnelley & Sons Co., No. 04-C-5956, 2004 WL 2260629, at \*1 (N.D. Ill. Oct. 4, 2004); Ross v. Garcia, No. 04-C-5332, 2004 WL 2358297, at \*1 (N.D. Ill. Oct. 18, 2004); Comcast of Illinois X, LLC v. Thull, No. 04-C-4724, 2004 WL 2403781, at \*1 (N.D. Ill. Oct. 21, 2004); DirecTV, Inc. v. Woodlock, No. 04-C-5922, 2004 WL 2973744, at

\*1 (N.D. Ill. Dec. 2, 2004); Vergara v. City of Waukegan, No. 04-C-6586, 2004 WL 2958686, at \*1 (N.D. Ill. Dec. 20, 2004); Morris v. Household Mortg. Servs., Inc., 350 F. Supp. 2d 786, 788 n.1 (N.D. Ill. 2004); Canadian Nat'l Ry. Co. v. GE Cap. Rail Servs., No. 04-C-7901, 2005 WL 43303, at \*2 (N.D. Ill. Jan. 6, 2005); Smith v. Condell Med. Ctr., No. 05-C-339, 2005 WL 221239, at \*1 (N.D. Ill. Jan. 21, 2005); Lamar v. Experian Info. Sys., No. 05-C-817, 2005 WL 1026573, at \*1 (N.D. Ill. Mar. 3, 2005); Bal Glob. Fin., LLC v. Neoplan USA Corp., No. 05-C-1799, 2005 WL 8177383, at \*1 (N.D. Ill. May 10, 2005); Clardy v. FCStone, LLC, No. 05-C-2920, 2005 WL 8179233, at \*1 (N.D. Ill. June 9, 2005); Meyers v. Smith-Nephew Richards, No. 05-C-4447, 2005 WL 2848382, at \*1 (N.D. Ill. Oct. 27, 2005); Wattyl (No. 2) Inc. v. Goldmeier, No. 05-C-4979, 2005 WL 8179286, at \*1 (N.D. Ill. Oct. 31, 2005); Ciampi v. CCC Info. Servs. Inc., No. 05-C-7056, 2006 WL 681049, at \*1 (N.D. Ill. Mar. 10, 2006); Stark v. Abex Corp., No. 05-C-6987, 2006 WL 695464, at \*1 (N.D. Ill. Mar. 10, 2006); Ciampi v. CCC Info. Servs. Inc., No. 05 C 7056, 2006 WL 8459888, at \*2 (N.D. Ill. Mar. 21, 2006); Mote v. Aetna Life Ins. Co., No. 05-C-6212, 2006 WL 763652, at \*1 (N.D. Ill. Mar. 23, 2006); Stark v. Abex Corp., No. 05-C-6987, 2006 WL 1472555, at \*1 (N.D. Ill. Apr. 3, 2006); Weigert v. Newly Weds Foods, Inc., No. 06-C-2082, 2006 WL 1308625, at \*1 (N.D. Ill. May 5, 2006); Aster Telesolutions, Inc. v. Premier Tech. Sols. Inc., No. 06-C-2144, 2006 WL 1547980, at \*1 (N.D. Ill. May 26, 2006); Trustees of N.E.C.A.-IBEW v. L&S Elec. Co., No. 05-C-6188, 2006 WL 1547982, at \*1 (N.D. Ill. May 26, 2006); Bd. of Educ. of City of Chicago v. Illinois State Bd. of Educ., No. 06-C-3078, 2006 WL 1735287, at \*1 (N.D. Ill. June 16, 2006); Cordero v. Cent. DuPage Hosp., No. 06-C-2938, 2006 WL 1765429, at \*1 (N.D. Ill. June 22, 2006); Grillaert v. Capgemini U.S. LLC, No. 06-C-4814, 2006 WL 3210042, at \*1 (N.D. Ill. Nov. 6, 2006); McCutcheon v. Zimmer Holdings, Inc., No. 06-C-6256, 2006 WL 3431937, at \*1 (N.D. Ill. Nov. 29, 2006); Breakwater Trading, LLC v. Maslin, No. 06-C-4242, 2007 WL 163163, at \*1 (N.D. Ill. Jan. 18, 2007); Breeze Med. Equip., Inc. v. Companion Health Servs., Inc., No. 07-C-673, 2007 WL 917577, at \*1 (N.D. Ill. Mar. 26, 2007); Garcia v. City of Chicago, No. 06-C-4340, 2007 WL 9814431, at \*1 (N.D. Ill. Apr. 9, 2007); Smilie v. Comcast Corp., No. 07-C-3231, 2007 WL 2688450, at \*1 (N.D. Ill. Sept. 10, 2007); Pacer v. Rockenbach Chevrolet Sales, Inc., No. 07-C-5173, 2007 WL 4109291, at \*1 (N.D. Ill. Nov. 19, 2007); Goosinow v. Monterey Fin. Servs., Inc., No. 07-C-5353, 2007 WL 4215835, at \*1 (N.D. Ill. Nov. 29, 2007); Ochoa v. City of Aurora, No. 07-C-4421, 2007 WL 4294683, at \*1 (N.D. Ill. Dec. 3, 2007); Zapalik v. Bausch & Lomb Inc., No. 08-C-295, 2008 WL 268708, at \*1 (N.D. Ill. Jan. 30, 2008); Martinez v. Freedom Mortg. Team, Inc., No. 07-C-3442, 2008 WL 4372036, at \*1 (N.D. Ill. Feb. 1, 2008); Fusion Cap. Fund II, LLC v. Millenium Holding Grp., Inc., No. 07-C-4543, 2008 WL 719247, at \*1 (N.D. Ill. Mar. 14, 2008); Matz v. Zebra Techs. Corp., No. 08-C-1046, 2008 WL 824251, at \*1 (N.D. Ill. Mar. 25, 2008); J & J Sports Prods., Inc. v. Stephanie Medina, No. 07-C-5623, 2008 WL 907436, at \*1 (N.D. Ill. Mar. 31, 2008); Chicago Reg'l Council of Carpenters v. Boldt Co., No. 08-C-1000, 2008 WL 927955, at \*1 (N.D. Ill. Apr. 4, 2008); *In re* Egan Marine Corp., No. 05-C-4074, 2008 WL 978832, at \*3 (N.D. Ill. Apr. 8, 2008); Minter v. G & D Integrated Distrib., Inc., No. 08-C-2050, 2008 WL 2022442, at \*1 (N.D. Ill. May 9, 2008); White v. Cnty. of Cook, No. 08-C-1349, 2008 WL 2485686, at \*1 (N.D. Ill. June 16, 2008); Brown v. Cnty. of Cook, No. 06-C-617, 2008 WL 2510185, at \*1 (N.D. Ill. June 19, 2008); Cubrovic v. Luxury Motors, Inc., No. 08-C-3069, 2008 WL 4865583, at \*1 (N.D. Ill. June 20, 2008); Mauch v. Advoc. Health & Hosps. Corp., No. 08-C-1920, 2008 WL 4866325, at \*1 (N.D. Ill. June 23, 2008); Brown v. Cnty. of Cook, No. 06-C-617, 2008 WL 2741373, at \*1 (N.D. Ill. July 7, 2008); Poulos, Inc. v. Hartford Fire Ins. Co., No. 08-C-3396, 2008 WL 2961315, at \*1 (N.D. Ill. July 31, 2008); Johnson v. Garza, No. 07-C-6862, 2008 WL 3849906, at \*1 (N.D. Ill. Aug. 15, 2008); Trustees of Chicago Reg'l Council of Carpenters Pension Fund v. S. & E. Carpentry Servs., Inc., No. 08-C-3580, 2008 WL 3891312, at \*1 (N.D. Ill. Aug. 21, 2008); Gonzalez v. Abbott Lab'ys, No. 08-C-3718, 2008 WL 4164569, at \*1 (N.D. Ill. Sept. 10, 2008); Ochoa v. City of Aurora, No. 07-C-4421, 2008 WL 4812675, at \*1 (N.D. Ill. Oct. 31, 2008); Tempco Elec. Heater Corp. v. J.L. Becker Co., No. 08-C-2870, 2008 WL 4834135, at \*1 (N.D. Ill. Nov. 6, 2008); Gittings v. Tredegar Film Prod.-Lake Zurich, LLC, No. 08-C-4972, 2008 WL 4856106, at \*2 (N.D. Ill. Nov. 8, 2008); Vitale v. Bliitt & Gaines, P.C., No. 08-C-5413, 2008 WL 5100316, at \*1 (N.D. Ill. Dec. 1, 2008); Tempco Elec.

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Heater Corp. v. J.L. Becker Co., No. 08-C-2870, 2008 WL 5111195, at \*1 (N.D. Ill. Dec. 3, 2008); Salata v. City of Berwyn, No. 08-C-7448, 2009 WL 855634, at \*1 (N.D. Ill. Mar. 30, 2009); Targin Sign Sys., Inc. v. Preferred Chiropractic Ctr., Ltd., No. 09-C-1399, 2009 WL 1010450, at \*1 (N.D. Ill. Apr. 14, 2009); Cobra Cap., LLC v. Pomp's Servs., Inc., No. 08-C-6884, 2009 WL 1098716, at \*1 (N.D. Ill. Apr. 23, 2009); Moede v. Pochter, No. 07-C-1726, 2009 WL 1449054, at \*1 (N.D. Ill. May 22, 2009); Nash v. Fair Collections & Outsourcing, Inc., No. 09-C-294, 2009 WL 1636950, at \*1 (N.D. Ill. June 11, 2009); Sauk Valley Bank v. Borchardt, No. 09-C-2144, 2009 WL 1767934, at \*1 (N.D. Ill. June 23, 2009); Bryndal v. Experian Info. Sols., Inc., No. 09-C-3075, 2009 WL 1904385, at \*1 (N.D. Ill. July 1, 2009); Pena v. Williams, No. 08-C-7389, 2009 WL 2163463, at \*1 (N.D. Ill. July 20, 2009); Fish v. Greatbanc Tr. Co., No. 09-C-1668, 2009 WL 2487073, at \*1 (N.D. Ill. Aug. 12, 2009); Claisse v. Boeing Co., No. 09-C-3722, 2009 WL 2916828, at \*1 (N.D. Ill. Sept. 2, 2009); Sabani v. Nw. Airlines, Inc., No. 09-C-4633, 2009 WL 3007676, at \*1 (N.D. Ill. Sept. 18, 2009); Favila v. City of Chicago, No. 09-C-3265, 2009 WL 3066595, at \*1 (N.D. Ill. Sept. 23, 2009); Vitale v. Palisades Collection, L.L.C., No. 09-C-3233, 2009 WL 3255307, at \*1 (N.D. Ill. Oct. 6, 2009); Jackson v. Subway No. 25488, No. 09-C-3276, 2009 WL 3788894, at \*1 (N.D. Ill. Nov. 12, 2009); Jasper v. Saint Anthony Hosp., No. 09-C-4445, 2009 WL 3857434, at \*1 (N.D. Ill. Nov. 18, 2009); Trustees of Auto. Mechs. Loc. No. 701 Pension & Welfare Funds v. Union Bank of California, N.A., No. 08-C-7217, 2009 WL 4668580, at \*1 (N.D. Ill. Dec. 2, 2009); Barakat v. Martin, No. 09-C-7625, 2009 WL 4894597, at \*1 (N.D. Ill. Dec. 11, 2009); Performance Proxy Rsch., LLC v. Microsoft Corp., No. 09-C-6884, 2010 WL 4193272, at \*1 (N.D. Ill. Jan. 11, 2010); Sullivan v. Life Fitness, Inc., No. 09-C-7787, 2010 WL 747620, at \*1 (N.D. Ill. Mar. 2, 2010); Bell v. Delta Mgmt. Assocs., Inc., No. 10-C-513, 2010 WL 1611088, at \*1 n.2 (N.D. Ill. Apr. 21, 2010); Coach, Inc. v. City of Chicago, No. 10-C-3108, 2010 WL 2610668, at \*1 (N.D. Ill. June 25, 2010); Amer Sports Winter & Outdoor Co. v. Nordica U.S.A. Corp., No. 10-C-1534, 2010 WL 2635785, at \*1 (N.D. Ill. June 28, 2010); Western v. United Parcel Serv., Inc., No. 10-C-374, 2010 WL 2720760, at \*1 n.1 (N.D. Ill. July 8, 2010); Galvez v. Kovalchuk, No. 10-C-4381, 2010 WL 2891669, at \*1 (N.D. Ill. July 21, 2010); Bisharat v. Vill. of Niles, No. 10-C-594, 2010 WL 3019962, at \*1 (N.D. Ill. July 29, 2010); J & J Sports Prods., Inc. v. Blancarte, No. 09-C-7310, 2010 WL 3025224, at \*1 (N.D. Ill. Aug. 2, 2010); Boose v. Oak Park Elementary Sch. Dist. No. 97, No. 10-C-3495, 2010 WL 3034673, at \*1 (N.D. Ill. Aug. 3, 2010); Young v. Marianjoy, Inc., No. 10-C-4427, 2010 WL 3715148, at \*1 (N.D. Ill. Sept. 14, 2010); Drager v. PNC Bank, N.A., No. 10-C-4155, 2010 WL 3734015, at \*1 (N.D. Ill. Sept. 16, 2010); Davis v. ABM Sec. Servs., Inc., No. 10-C-5958, 2010 WL 3880675, at \*1 (N.D. Ill. Sept. 29, 2010); Lengor v. St. Mary's & St. Elizabeth Hosp. Med. Ctr., No. 10-C-3077, 2010 WL 3855181, at \*1 (N.D. Ill. Sept. 30, 2010); Hyatt v. Experian Info. Sys., No. 10-C-5602, 2010 WL 4038825, at \*1 (N.D. Ill. Oct. 14, 2010); Gburek v. Litton Loan Servicing LP, No. 08-C-3188, 2010 WL 4286277, at \*1 (N.D. Ill. Oct. 18, 2010); Channon v. Smith & Nephew, Inc., No. 10-C-6963, 2010 WL 4483348, at \*2 (N.D. Ill. Nov. 1, 2010); C.S. v. Vill. of Arlington Heights, No. 10-C-7395, 2011 WL 13382832, at \*1 (N.D. Ill. Apr. 26, 2011); Moore v. Vendor/Aramark Corr. Food Servs., No. 11-C-2327, 2011 WL 2601582, at \*1 (N.D. Ill. June 30, 2011), *supplemented*, No. 11-C-2327, 2011 WL 2637242 (N.D. Ill. July 6, 2011); Williams v. Raheel Foods Inc., No. 11-C-4965, 2011 WL 4945008, at \*2 (N.D. Ill. Oct. 18, 2011); Juhasz v. Groupon, Inc., No. 11-C-6577, 2011 WL 7713912, at \*1 (N.D. Ill. Nov. 4, 2011); United Cent. Bank v. JJST Inc., No. 10-C-5550, 2012 WL 171128, at \*1 (N.D. Ill. Jan. 20, 2012); O'Toole v. Sears Roebuck & Co., No. 11-C-4611, 2012 WL 1511766, at \*1 (N.D. Ill. Apr. 26, 2012); Carolina Cas. Ins. Co. v. ABS Freight Transp., Inc., No. 12-C-6838, 2012 WL 4754955, at \*1 (N.D. Ill. Oct. 4, 2012); Clark v. Enter. Recovery Sys., Inc., No. 12-C-9989, 2013 WL 664044, at \*1 (N.D. Ill. Feb. 21, 2013); Deutsche Bank Nat. Tr. Co. v. Dionicio, No. 13-C-521, 2013 WL 1282785, at \*1 (N.D. Ill. Mar. 27, 2013); Xiamen Lota Int'l Co. v. Integrated Sales Sols. LLC, No. 13-C-2778, 2013 WL 3819641, at \*1 (N.D. Ill. July 23, 2013); Kalmes v. MKM Oil, Inc., No. 13-C-363, 2013 WL 3975289, at \*1 (N.D. Ill. Aug. 1, 2013); FirstMerit Bank N.A. v. Wolf, No. 13-C-2661, 2013 WL 4565649, at \*1 (N.D. Ill. Aug. 28, 2013); ADT Sec. Servs., Inc. v. Lisle-Woodridge Fire Prot. Dist., 973 F. Supp. 2d 842, 847 (N.D. Ill. 2014); Payne v. City of Chicago, No. 13-C-8643, 2014 WL 585310, at \*1 (N.D. Ill. Feb. 14, 2014); Stuart v. Loc. 727, Int'l Bhd. of

After 2001, though, Judge Shadur appears to have let references to the *State Farm v. Riley* Appendix carry the instructional weight regarding Rule 8. He had already said what needed to be said. There were exceptions, of course, for new challenges. For example, in 2001, soon after Judge Shadur issued the *State Farm v. Riley* Appendix, a single Chicago firm filed three separate answers on behalf of three different defendants. The Chicago lawyers refused to answer various allegations that, they claimed, were “not directed against this Defendant.”<sup>193</sup>

A defense lawyer’s refusal to respond to allegations about someone other than his or her client is not an issue that Shadur specifically addressed in the Appendix. This particular dodge is common. In my study of answers in Colorado car crash answers, insurance defense lawyers did the same thing in 48.2% of the cases in which there were codefendants.<sup>194</sup> They claimed that they need not respond to an allegation that, in their determination, was directed at someone other than their client.<sup>195</sup> The Chicago case is an extreme extension of this view, because the lawyers demonstrated that they *could* answer when they admitted or denied on behalf of Defendant 1 but clammed up regarding the same issue when they got to Defendants 2 and 3. Perhaps we could call this denying in the alternative? The Chicago lawyers also claimed, unsuccessfully, that at least one document “speaks for itself.”<sup>196</sup> Judge Shadur struck their answers; ordered them to replead a single answer for the three defendants; and noted that “it is of course far easier for Azza’s counsel and this Court to identify any areas of divergence among the defendants from a single answer than to be compelled to leaf back and forth among three pleadings . . . .”<sup>197</sup>

From time to time, Judge Shadur would express disappointment that

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Teamsters, No. 13-C-9262, 2014 WL 1089117, at \*1 (N.D. Ill. Mar. 18, 2014), *rev'd*, 771 F.3d 1014 (7th Cir. 2014); Hicks v. Clark, 107 F. Supp. 3d 905, 907 n.4 (N.D. Ill. 2015); Hobbs v. Bayer Healthcare Pharms., Inc., No. 15-C-4933, 2015 WL 4429185, at \*1 (N.D. Ill. July 20, 2015); First Merit Bank, N.A. v. Teets Fam. P’ship, No. 15-C-1573, 2015 WL 4508575, at \*1 (N.D. Ill. July 24, 2015); Chaban v. Williams, No. 15-C-1926, 2015 WL 5897858, at \*1 (N.D. Ill. Oct. 7, 2015); Sharifi v. Stellar Recovery, Inc., No. 15-C-10587, 2016 WL 246134, at \*1 (N.D. Ill. Jan. 20, 2016); Murphy v. Vill. of Univ. Park, No. 15-C-8673, 2016 WL 317082, at \*1 (N.D. Ill. Jan. 27, 2016); Okere v. Chicago Transit Auth., No. 14-C-10115, 2016 WL 3538931, at \*3 (N.D. Ill. June 29, 2016); Robinson v. Hyundai of Matteson, LLC, No. 16-C-5821, 2016 WL 4366601, at \*2 (N.D. Ill. Aug. 16, 2016); Moore v. City of Chicago, No. 16-C-7143, 2016 WL 5792528, at \*1 (N.D. Ill. Oct. 4, 2016); TCF Inventory Fin., Inc. v. SS/T Auto LLC, No. 16-C-8315, 2016 WL 6124453, at \*2 (N.D. Ill. Oct. 20, 2016); Sanchez v. Spex 3624, Inc., No. 16-C-8834, 2016 WL 6395583, at \*1 (N.D. Ill. Oct. 28, 2016); Webb v. Mediacredit, Inc., No. 16-C-11125, 2017 WL 74854, at \*1 (N.D. Ill. Jan. 9, 2017).

193. *Azza Int’l Corp. v. Gas Research Inst.*, 204 F.R.D. 109, 110 (N.D. Ill. 2001).

194. Russell, *supra* note 7, at Section III.B.

195. *Id.*

196. *Azza Int’l Corp.*, 204 F.R.D. at 110.

197. *Id.*

his efforts with the Appendix were unavailing. In 2016, for example, he explained that “[f]or many years this Court has been calling the attention of lawyers (1) to the very different function of ‘counts’ as set out in Rule 10(b) . . . and (2) to the distinction between the federal ‘claim for relief’ and the state law concept of ‘causes of action . . . .’”<sup>198</sup> This, like the Rule 8 issue he addressed in the Appendix, was a pleading issue. “Regrettably this Court’s efforts to stanch the flow of wrongly conceived and wrongly asserted complaints in that respect,” Judge Shadur lamented, “has had much the same degree of success as Mickey Mouse in Walt Disney’s classic *Fantasia*, seeking to sweep back the sea with a broom to the tune of Dukas’ *Sorcerer’s Apprentice*.”<sup>199</sup> He must have felt the same way about stanching the flow of frivolous pleading, although he never deployed the *Fantasia* reference regarding Rule 8. He had, however, cited Mickey Mouse, Dukas, and *Fantasia* at least three other times.<sup>200</sup>

Judge Shadur’s final citation of the Appendix, on January 9, 2017, just about a year before he died, was a lot. He started his Memorandum Order by recounting that

[s]omething more than a decade and a half has elapsed since this Court, in large part to spare its then secretary the chore of repeatedly transcribing of this Court’s efforts to address a number of venial (not mortal) sins committed by all too many defense lawyers who view pleading as a sort of shell game, rather than as a means for identifying what is or is not at issue between the litigants, published a multipart Appendix to its opinion in *State Farm Mut. Auto. Ins. Co. v. Riley* . . . .<sup>201</sup>

Perhaps, at this point, he was whistling the tune of the *Sorcerer’s Apprentice* or imagining Mickey Mouse sweeping the sea. “Regrettably,” the ninety-two-year-old jurist continued, “the filing of such defensive pleadings still continues apace, and this Court has concluded that egregious examples of such questionable practices ought to be considered for possible sanctions under Fed. R. Civ. P. (‘Rule’) 11(c)(3).”<sup>202</sup>

Sua Sponte Shadur went to work on the answer that Taylor Nicole Rollinson, Esq., from the Chicago law firm of Ogletree Deakins Nash Smoak & Stewart, PC, had filed on behalf of Medicredit, Inc. Just how any Chicago lawyer filed an answer in Judge Shadur’s courtroom without

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198. *Keesler v. Electrolux Home Prods., Inc.*, No. 16-C-199, 2016 WL 3940114, at \*1 n.1 (N.D. Ill. July 21, 2016).

199. *Id.*

200. *Betts v. Container Corp. of Am.*, No. 94-C-242, 1994 WL 66113, at \*3 n.1 (N.D. Ill. Mar. 2, 1994); *Haven v. Rzeczpospolita Polska*, 68 F. Supp. 2d 947, 961 n.6 (N.D. Ill. 1999), *aff’d* 215 F.3d 727 (7th Cir. 2000); *Haven v. Rzeczpospolita Polska*, No. 99-C-1727, 1999 WL 965719, at \*2 n.6 (N.D. Ill. Oct. 14, 1999).

201. *Webb v. Medicredit, Inc.*, No. 16-C-11125, 2017 WL 74854, at \*1 (N.D. Ill. Jan. 9, 2017).

202. *Id.* Judge Shadur was born June 25, 1924. *Shadur, Milton Irving*, *supra* note 1.

knowing of his predilections is hard to fathom. In 2001, Mr. DeMoon felt blindsided; sixteen years later, lawyers would have had their eyes wide shut to provoke Judge Shadur. Applying arguments from the Appendix, Judge Shadur first addressed “some problematic aspects of the Answer” and then turned to a “grab bag of nine purported defenses.”<sup>203</sup>

The answer that Ms. Rollinson filed on behalf of her client ran afoul first of Rule 8(b)(5).<sup>204</sup> This part of Rule 8(b) specifies that “[a] party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.”<sup>205</sup> Judge Shadur complained that Ms. Rollinson pleaded lack of “knowledge or information sufficient to form a belief” but then with her responses to nine different allegations added the phrase “and, therefore, denies the same.”<sup>206</sup> A picayune point, perhaps, but Judge Shadur was right that the lawyer’s addition of the denial was “of course oxymoronic—how can a party disclaim knowledge or information even to form a belief as to the truth of an allegation and then go on to deny it?”<sup>207</sup> “Accordingly,” he ordered, “the offending addition is stricken from all paragraphs of the Answer where it appears.”<sup>208</sup> Forty-five words—gone. Judge Shadur reminds me of a professor nearing the end of his life dutifully—and stubbornly—marking every passive verb in a draft of a student’s paper.

More darkly, Judge Shadur commented that although “this Court will credit most of Medicredit’s disclaimers as apparently advanced in the objective and subjective good faith called for by Rule 11(b), that would seem questionable as to at least a couple of them.”<sup>209</sup> With commendable acuity not just for an old judge but for any judge, Judge Shadur observed that the plaintiffs alleged that they had listed Medicredit, Ms. Rollinson’s client, in their bankruptcy petition and “that the Clerk of the Bankruptcy Court mailed a notice of the bankruptcy petition to Medicredit . . . .”<sup>210</sup> Pushing Rule 11 and Rule 8, Judge Shadur questioned, not rhetorically: “[H]ow can lawyers acting as Medicredit’s counsel assert their client’s lack of knowledge (or even more, its lack of information sufficient to form a belief) of those facts?”<sup>211</sup> He also doubted Medicredit’s claim to

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203. *Webb*, 2017 WL 74854, at \*1.

204. FED. R. CIV. P. 8(b)(5).

205. *Id.*

206. *Webb*, 2017 WL 74854, at \*1.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* In a footnote, Judge Shadur emphasized that “it is of course Medicredit’s duty to proffer such disclaimers responsibly and not as a form of cop out. Medicredit’s counsel are expected to

lack knowledge of its telephone credit collection activities. “Although this instance is less troubling[]” than the denial of sufficient information about Medicredit’s listing in the bankruptcy petition, Judge Shadur noted that “a comparable disclaimer is advanced as to the Complaint ¶ 15 allegation that someone at Medicredit telephoned the Webbs in early October 2016 to collect the indebtedness referred to in the Complaint. In that respect it may well be,” Judge Shadur skeptically noted, “that Medicredit’s business practice does not maintain detailed records as to such debt collection efforts, so that this memorandum order simply raises a query in that respect.”<sup>212</sup> For the plaintiffs in this matter, Lisa and Jason Webb, this is remarkable attention from an Article III judge in his ninth decade.

Judge Shadur next turned to Ms. Rollinson’s decision regarding four of the complaint’s paragraphs “that ‘no response is required’ to what they regard as a ‘legal conclusion . . . .’”<sup>213</sup> Again, could no lawyer or paralegal at Rollinson’s firm have warned her? Regarding her refusal to respond to a legal conclusion, Judge Shadur intoned—or thundered— “[t]hat is of course dead wrong—see App’x ¶ 2 to State Farm.”<sup>214</sup> Predictably, he then caught counsel contradicting herself because she “found no difficulty in responding with an admission to the ultimate legal conclusion—one that alleges subject matter jurisdiction (see Complaint and Answer ¶ 1).”<sup>215</sup> Counsel’s answers to two more paragraphs, he noted, “compound the felony by nevertheless denying the corresponding Complaint allegations, which appear accurate on their face.”<sup>216</sup>

Not finished, Judge Shadur turned his attention to the “grab bag” of affirmative defenses that Medicredit’s attorney had included. He swept away the first affirmative defense, noting that it was “not only unnecessary but does not qualify as an A[ffirmative] D[efense] within the purview of Rule 8(c) and the case law applying and construing that Rule—in that regard also see App’x ¶ 5 to *State Farm*.”<sup>217</sup> He hammered the second affirmative defense, which must have simply mouthed that the complaint had failed to state a claim, and, as noted above, called it “not only frivolous in its approach to the ‘notice pleading’ concept that underpins federal pleading but . . . also flawed as a conceptual matter.” If Ms. Rollinson “really believes that the Webbs’ complaint is vulnerable in

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question their client on that score in preparing the amended responsive pleading ordered hereafter.”  
*Id.* at \*1 n.1.

212. *Id.* at \*1.

213. *Id.* at \*2.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

Rule 12(b)(6) terms,” he wrote, “that should have been advanced up front in a properly supported motion, rather than simply being planted as a prospective bomb available to explode the Complaint at some future date.”<sup>218</sup>

Next, Judge Shadur jumped on the defense lawyer’s third affirmative defense, which was a “partial laundry list selected from the grab bag of defenses listed in Rule 8(c),” emphasizing, as Judge Manion had in *Heller* in 1989, that this list was “totally uninformative as to the predicate for each of the listed grounds.”<sup>219</sup> Moving right along, he found that the fourth affirmative defense, lettered D, was “at odds with the principle that an A[ffirmative] D[efense] must accept the allegations of a complaint while then asserting some basis for denying liability anyway (in this instance, for example, AD D is at odds with Complaint ¶ 17).”<sup>220</sup> Next, the defendant had pleaded that “the Webbs have failed to mitigate damages, if any,” an assertion that, Judge Shadur noted, “by definition is totally speculative and must be stricken.”<sup>221</sup> Continuing, Judge Shadur busted defense counsel for a cutting and pasting error; the affirmative defenses labeled F and H “provide living evidence of the carelessness with which defense counsel have approached the task of pleading—they are identical to the letter. Moreover,” he exhorted, “their blunderbuss approach is really unacceptable.”<sup>222</sup>

Last, he blasted the ninth purported affirmative defense as “yet another example of poor practice. There is of course no reason to reserve the possibility of future A[ffirmative] D[efense]s that may emerge during the course of litigation,” he noted, without bothering to cite the liberality of Rule 15, “so this too is another illustration of sheer boilerplate rather than thoughtful lawyering.”<sup>223</sup> Oof! But again, nothing surprising here from the senior federal judge.

Fed up, Judge Shadur in his penultimate paragraph complained that “[t]his Court regrets having to waste so much time on a patently thoughtless pleading, which regrettably is the work product of a large national law firm with a number of branches in other countries as well.” Then, “because of the multiple flaws recounted here,” he struck the answer and gave counsel two weeks to replead.<sup>224</sup> Finally, consistent with his practice since issuing the Appendix, Judge Shadur noted that “[c]ounsel are ordered to advise the client that no charge will be made,

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218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

with a copy of counsel's letter of transmittal to be sent to this Court's chambers (purely for informational purposes, not for filing)."<sup>225</sup> Whether the old judge was exasperated by having to go through the same lessons over and over again or whether instead he relished the opportunity is impossible to know.

#### VII. SHADUR'S APPENDIX AMONG HIS NORTHERN DISTRICT COLLEAGUES

Judge Shadur's colleagues on the federal bench also cited his Appendix in *State Farm v. Riley*, though not as often as he himself did. Of the 232 judicial citations of the case, Judge Shadur's colleagues on the bench—both Article III judges and magistrates—cited the case 28 times between 2001 and 2020.<sup>226</sup> This amounts to not quite three citations every two years or about one-seventh the rate at which Judge Shadur cited his own case. I intend no criticism of Judge Shadur for citing his own work; he resembles a professor who posts and refers to suggestions or rules on how to write better final exams.

Judge Shadur's Appendix did not have the status of a local rule in the Northern District of Illinois. For cases assigned to his courtroom, though, his Appendix had the same power as a local rule. Although none of his colleagues went so far as to adopt Judge Shadur's approach of sua sponte review of answers just after their filing, some of his colleagues did present the interpretation of Rule 8 that Judge Shadur offered in his Appendix as general rules either for pleading or within the Northern District.

For example, in 2006, Judge George Marovich<sup>227</sup> paid quiet tribute to Judge Shadur with the parenthetical text that he included after citing *State Farm v. Riley*.<sup>228</sup> Judge Marovich, whom President Reagan appointed and who now is an inactive senior judge, describes the Appendix simply as “outlining proper way to answer complaint under the Federal Rules of Civil Procedure.”<sup>229</sup>

Judge Joan Humphrey Lefkow,<sup>230</sup> in 2008, fully explained Judge Shadur's Appendix in an effort to head off the repetition of bad pleading

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225. *Id.*

226. *Riley Citing References*, *supra* note 160 (filtering “Cases” by jurisdiction, “N.D. Ill.” and by date range from “01/01/2001 through 12/31/2020” to get 195 cases total, including the 167 citations by Judge Shadur, *supra* note 192).

227. *Marovich, George Michael*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/marovich-george-michael> [<https://perma.cc/PZP6-ZG3B>] (last visited Apr. 5, 2021).

228. *Divane v. Sonake Elec. Contractors, Inc.*, No. 05-C-1211, 2006 WL 2497547, at \*2 (N.D. Ill. Aug. 24, 2006).

229. *Id.*

230. *Lefkow, Joan Humphrey*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/lefkow-joan-humphrey> [<https://perma.cc/LUS3-AKU2>] (last visited Apr. 5, 2021).

in an answer that defendants were going to replead. Class action plaintiffs had sued Playtex, Medela, and some other companies alleging that the companies had used lead-containing plastic in the manufacture of coolers or cases for carrying breast milk.<sup>231</sup> As part of her order to consolidate three separate lawsuits, Judge Lefkow noted that

because Medela and the other defendants might otherwise raise the same or similar issues in their future responsive pleadings, and thus prompt the plaintiffs to file another motion to strike on the same or similar grounds, the court will, in the interest of judicial efficiency, briefly address the concerns raised in plaintiffs' motion.<sup>232</sup>

She then instructed the defendants how to replead their answer. First, the judge noted that "a preliminary statement is generally unnecessary and improper in the context of a defendant's answer to a complaint." Judge Lefkow then reminded the defendants' lawyers to comply with Local Rule 10.1. Next, citing Judge Shadur's Appendix, she instructed the defendants not to use the "state a legal conclusion" gambit; to admit or deny each paragraph per Rule 8(b); "to avoid the use of colloquialisms such as 'the document speaks for itself'"; that "the Rules provide no basis for defendant to 'demand strict proof'"; and last, that the defendants "are instructed to plead their affirmative defenses in accord with Rule 8(c) and to heed Judge Shadur's advice," which she included as an indented block of text:

It is unacceptable for a party's attorney simply to mouth [affirmative defense]s in formula-like fashion ("laches," "estoppel," "statute of limitations" or what have you), for that does not do the job of apprising opposing counsel and this Court of the predicate for the claimed defense-which is after all the goal of notice pleading.<sup>233</sup>

Judge Lefkow, in this instance, deployed Judge Shadur's Appendix prophylactically. In similar fashion, plaintiffs' lawyers faced with a defense attorney's request for an extension of time to answer might say yes but also ask that the defense counsel answer consistently with the expectations of Judges Lefkow and Shadur. Then, after the defense ignores the request, the plaintiff's attorney will have a letter that can serve as a useful exhibit for a motion to deem answers admitted or to strike affirmative defenses.<sup>234</sup>

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231. Ramos v. Playtex Prod., Inc., No. 08-CV-2703, 2008 WL 4066250, at \*1 (N.D. Ill. Aug. 27, 2008).

232. *Id.* at \*5.

233. *Id.* (citing State Farm Mut. Auto. Ins. Co. v. Riley (*State Farm v. Riley*), 199 F.R.D. 276, 279 (N.D. Ill. 2001)).

234. In 2005, Magistrate Judge Martin C. Ashman granted a motion to strike improperly answered allegations but granted the defense counsel leave to amend the answers. In so doing, he specifically reviewed Judge Shadur's instruction regarding "speaks for itself," "strict proof," and

Several of Judge Shadur's colleagues dealt with the court's local rule 10.1 in orders or other rulings in which they discussed the *State Farm v. Riley* Appendix. In 2002, for example, Judge Elaine Bucklo referred to the "imaginative device of photocopying Ramada's Complaint and inserting paragraph-by-paragraph typewritten responses on the Complaint itself."<sup>235</sup> The defendant's idea was an obvious response to Local Rule 10.1, but Judge Bucklo might have gone further and suggested, consistent with Judge Shadur's Appendix, that plaintiffs include after each paragraph in their complaint three checkboxes, as follows:

- Admit
- Deny
- Insufficient knowledge or information to form a belief.

Three checkboxes, with no catchall "other" box to accommodate departures from the Rules, might channel defense attorneys into Rule 8(b)'s three options.<sup>236</sup>

#### A. Speaking Documents

Over the years, several of Judge Shadur's colleagues, like Judge Lefkow, have cited the *State Farm v. Riley* Appendix in order to complain about defense attorneys who claim that statutes, insurance policies, contracts, or other documents speak for themselves. In July of 2019, after Judge Shadur's death, Magistrate Judge Iain Johnston<sup>237</sup> wrote in a footnote that "[t]he Court would be remiss if it failed to note its distaste for the lawyer phrase that a 'document speaks for itself.'" Paying tribute, Judge Johnston noted that "[t]he late great Milton Shadur led the charge to eliminate this phrase from pleadings."<sup>238</sup> A judge favorite from the Appendix was Judge Shadur's tart sentence that "this Court has been

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"states a legal conclusion." *Donnelly v. Frank Shirey Cadillac, Inc.*, No. 05-C-3520, 2005 WL 2445902, at \*1 (N.D. Ill. Sept. 29, 2005).

235. *Ramada Franchise Sys., Inc. v. Royal Vale Hosp. of Cincinnati, Inc.*, No. 02-C-1941, 2002 WL 737283, at \*1 (N.D. Ill. Apr. 24, 2002).

236. Another Northern District colleague referred to Local Rule 10.1 in an order that cited Judge Shadur's Appendix. Judge Blanche M. Manning noted that "[t]he answer does not satisfy that requirement of Rule 10.1 because single paragraphs of the answer refer to multiple paragraphs of the complaint. In addition," Judge Manning explained, "the paragraphs of the answer fail to concisely summarize the allegations to which they are responding, requiring the court to 'lay two pleadings side by side, and to shift constantly from one to the other, to see just what has and has not been placed in issue,' the very burden the local rule seeks to avoid." *Cont'l Cas. Co. v. Duckson*, No. 11-CV-00459, 2011 WL 2293873, at \*2 (N.D. Ill. June 9, 2011) (citing *Liners Direct, Inc. v. Luxury Bath Liners, Inc.*, No. 04-CV-108, 2004 WL 442605, at \*1 (N.D. Ill. Feb. 25, 2004)).

237. *Johnston, Iain David*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/johnston-iain-david> [<https://perma.cc/4TDQ-PESR>] (last visited Apr. 5, 2021).

238. *PCM Leasing, Inc. v. BelGioioso Cheese, Inc.*, No. 16-CV-50076, 2019 WL 4567576, at \*3 n.2 (N.D. Ill. July 11, 2019) (citing *State Farm Mut. Auto. Ins. Co. v. Riley (State Farm v. Riley)*, 199 F.R.D. 276, 279 (N.D. Ill. 2001)).

attempting to listen to such written materials for years (in the forlorn hope that one will indeed give voice)—but until some such writing does break its silence, this Court will continue to require pleaders to employ one of the three alternatives that are permitted by Rule 8(b).”<sup>239</sup> Three Northern District colleagues—Judge Arlander Keys,<sup>240</sup> Judge Blanche Manning,<sup>241</sup> and Magistrate Judge Martin Ashman<sup>242</sup>—cited this sentence in their own rulings.<sup>243</sup>

### B. Legal Conclusions

Judge Shadur’s fellow jurists from the Northern District of Illinois also cited his *State Farm v. Riley* Appendix in opposition to the defense notion that they need not answer allegations of legal conclusions. In 2002, Judge Bucklo walloped Royal Vale Hospitality of Cincinnati, Inc.’s idea—the lawyers’ idea, that is—that they could refuse to answer six allegations “on the stated premise that the . . . allegations contain legal conclusions rather than facts. But that ignores the universal recognition,” Judge Bucklo lectured using Judge Shadur’s language, “from the highest judicial sources on down, that legal conclusions form an entirely proper component of the federal notice pleading regime.”<sup>244</sup> Two years later, Judge Bucklo was less strident when picking through allegations to which “defendants contend that they need not answer because the paragraph asserts a legal conclusion.”<sup>245</sup> Culling through the defendant’s answer, she decided that the defendants’ coupling, for a majority of the challenged answers, of the “legal conclusion” claim with a denial was sufficient for Rule 8. She decided too, more murkily, that the other six answers that the plaintiff challenged were implicitly denied—or, maybe, would be denied if she forced the defendant to replead them—so she “decline[d] to strike

239. *State Farm v. Riley*, 199 F.R.D. at 279.

240. *Arlander Keys*, BALLOTPEDIA [https://ballotpedia.org/Arlander\\_Keys](https://ballotpedia.org/Arlander_Keys); [<https://perma.cc/D3UM-3N2V>] (last visited Apr. 18, 2021); Patricia Manson, *Retired Judge Motivated by Courts’ Role in Ending Discrimination*, CHI. L. BULL. (May 27, 2014, 2:50 PM), <https://www.chicagolawbulletin.com/archives/2014/05/27/arlander-keys-5-27-14> [<https://perma.cc/P5UQ-FXE5>].

241. *Manning, Blanche M.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/manning-blanche-m> [<https://perma.cc/J3V4-Y742>] (last visited Apr. 5, 2021).

242. Ronnie Reese, *Martin Ashman, 1931–2012*, CHI. TRIB. (June 10, 2012), <https://www.chicagotribune.com/news/ct-xpm-2012-06-10-ct-met-ashman-obit-20120610-story.html> [<https://perma.cc/D2M6-YNPH>].

243. *Rudzinski v. Metro. Life Ins. Co.*, No. 05-C-0474, 2007 WL 2973830, at \*4 (N.D. Ill. Oct. 4, 2007); *Rexam Beverage Can Co. v. Bolger*, No. 06-C-2234, 2008 WL 217144, at \*7 (N.D. Ill. 2008); *Cont’l Cas. Co. v. Duckson*, No. 11-CV-00459, 2011 WL 2293873, at \*2 (N.D. Ill. June 9, 2011).

244. *Ramada Franchise Sys., Inc. v. Royal Value Hosp. of Cincinnati, Inc.*, No. 02-C-1941, 2002 WL 737283, at \*1 (N.D. Ill. Apr. 24, 2002) (citing *State Farm v. Riley*, 199 F.R.D. at 279 “and authorities cited there”).

245. *Holzer v. Prudential Equity Grp. LLC*, 520 F. Supp. 2d 922, 928 (N.D. Ill. 2007).

them.”<sup>246</sup>

Two years later, Magistrate Judge Jeffrey Cole<sup>247</sup> confronted refusal to respond to legal conclusions by lawyers for Telezygology, Inc. The plaintiff, Asta, LLC, sued to enforce a contract under which, Asta claimed, Telezygology was to pay Asta one-half of the base salary of any salesperson whom Telezygology hired.<sup>248</sup> In the complaint’s eighth paragraph, Asta recited a provision of the contract. Even though Telezygology admitted “that it executed the contract, clearly concedes that the provision was a part of the parties’ agreement throughout its brief, and the contract is attached to the Complaint,” the defendant’s lawyers nonetheless refused to admit the eighth paragraph and claimed instead that the legal conclusion required no response.<sup>249</sup> Citing cases from the United States Supreme Court, the Seventh Circuit, and his colleague’s Appendix in *State Farm v. Riley*, Judge Cole held that the defendant was wrong in thinking that legal conclusions required no answer<sup>250</sup> and called the answer oxymoronic for simultaneously claiming legal conclusions required no answer while also denying some of them.<sup>251</sup>

In 2010, Northern District of Illinois Judge Amy St. Eve<sup>252</sup> cited *State Farm v. Riley* in support of the point that allegations of legal conclusions required responses.<sup>253</sup> Attorneys for the Federal Deposit Insurance Company had responded to fourteen different averments by claiming they were “legal conclusions as to which no response is required; to the extent a response is deemed required, FDIC denies the allegations.”<sup>254</sup> Judge St. Eve allowed the FDIC to answer in this convoluted way, although she

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246. *Id.*

247. *Jeffrey Cole*, BALLOTPEdia, [https://ballotpedia.org/Jeffrey\\_Cole](https://ballotpedia.org/Jeffrey_Cole) [<https://perma.cc/SR2A-MEV3>] (last visited Apr. 5, 2021); *Jeffrey Cole*, BLOOMBERG, <https://www.bloomberg.com/profile/person/15879799> [<https://perma.cc/L935-NWXD>] (last visited Apr. 5, 2021).

248. *Asta, L.L.C. v. Telezygology, Inc.*, 629 F. Supp. 2d 837, 839–40 (N.D. Ill. 2009).

249. *Id.* at 840 n.1 (citation omitted).

250. *Id.* (citing *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Jackson v. Marion County*, 66 F.3d 151, 153 (7th Cir.1995); *State Farm Mut. Auto. Ins. Co. v. Riley (State Farm v. Riley)*, 199 F.R.D. 276, 278 (N.D. Ill. 2001)).

251. *Asta, L.L.C.*, 629 F. Supp. 2d at 840 n.1 (citing *Cordero v. Central DuPage Hosp.*, 2006 WL 1765429, \*1 (N.D. Ill. 2006) (striking “oxymoronic” responses)). See also Judge John Grady’s Order in *Illinois Wholesale Cash Register, Inc. v. PCG Trading, LLC*, 08-C-363, 2009 WL 1515290, at \*2 (N.D. Ill. May 27, 2009) (“Rule 8(b) requires that all allegations be responded to; there is no exception for ‘legal conclusions.’”).

252. *St. Eve, Amy Joan*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/st-eve-amy-joan> [<https://perma.cc/2DUY-GEYG>] (last visited Apr. 5, 2021); see also Amy St. Eve & Michael A. Zuckerman, *The Forgotten Pleading*, 7 FED. CTS. L. REV. 149 (2014).

253. *Pavlik v. FDIC*, No. 10-C-816, 2010 WL 3937621, at \*3 (N.D. Ill. Oct. 5, 2010).

254. Opposition of Defendant Federal Deposit Insurance Corporation, in Its Corporate Capacity, to Plaintiffs’ Motion to Strike Defendant FDIC’s Answers and Affirmative Defenses at 2, *Pavlik*, 2010 WL 5624815 (No. 10-C-816).

might have struck all but the final four words of the evasive responses.<sup>255</sup> In 2011, Judge Samuel Der-Yeghiayan<sup>256</sup> cited Judge St. Eve's FDIC order along with Judge Shadur's Appendix when he explained that "[p]ursuant to Rule 8(b) an opponent must respond to all allegations in a pleading and if legal conclusions included in an initial pleading can be responded to in accordance with Rule 8(b), an opposing party must respond to such allegations."<sup>257</sup> Judge Der-Yeghiayan did limit the breadth of legal arguments a plaintiff might include in a complaint and claimed that "[l]egal arguments are not appropriate in an initial pleading if they are such that they 'cannot be answered by a "short and plain" admission, denial, or defense as contemplated by Fed. R. Civ. P. 8(b).'"<sup>258</sup>

Twice now, I have heard the argument that no response to legal conclusions is necessary because *Black's Law Dictionary* defines "averments" as assertions of fact not of law.<sup>259</sup> Most recently, Mr. DeMoon, the assistant attorney general who represented the guardian of Mr. Riley, made this argument to me. The claim seems to be that an averment of law is improper and therefore requires no response. That I have heard this precise argument from lawyers in two different states suggests that there is some common source or lore diffusing this idea.

There are at least three things wrong with the argument, from *Black's Law Dictionary*, that defendants need not answer averments of legal conclusions. First, the current Federal Rules of Civil Procedure do not refer to "averments"; Rules 8 and 9 refer to claim or allegations.<sup>260</sup> Second, before the 2007 amendment of the rules and in 2001 when Judge Shadur created the Appendix, Rule 8(b) did include the word averments, but 8(b) also referred to "averments and paragraphs."<sup>261</sup> Paragraphs

255. *Pavlik*, 2010 WL 3937621, at \*3.

256. *Der Yeghiayan, Samuel*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/der-yeghiayan-samuel> [<https://perma.cc/4MND-BYVA>] (last visited Apr. 5, 2021).

257. *Walker v. Walker*, 11-C-2967, 2011 WL 3757314, at \*2 (N.D. Ill. Aug. 25, 2011) (citations omitted).

258. *Id.* (citing *Norton-Griffiths v. Wells Fargo Home Mortg.*, 2011 WL 884456, at \*6 (D. Vt. Mar. 11, 2011)).

259. As noted above, Rule 8 no longer includes the word "averment." See *supra* note 104; see also *Averments*, BLACK'S LAW DICTIONARY (11th ed. 2019).

260. Federal Rule of Civil Procedure 8(b) uses the word "claim" in subsection (b)(1)(A), "allegations" in (b)(1)(B) and (b)(3), and "allegation" in (b)(2). FED. R. CIV. P. 8(b). Federal Rule of Civil Procedure 9 uses "allege" or "alleging" throughout, not "aver" or "averring." FED. R. CIV. P. 9.

261. **Defenses; Form of Denials.** A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the **averments** upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an **averment**, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the **averments** denied. When a pleader intends in good faith to deny only a part or a

seems to have been a synonym for averments; if so, there is no argument that *Black's* defines “paragraphs” as proper only when alleging facts. Third, the pleading of legal conclusions has always been part of federal pleading, as Judges Shadur and Bucklo explained. Though a plaintiff may not solely plead bare legal conclusions, a plaintiff may include legal conclusions among the factual allegations.<sup>262</sup>

### C. *Strict Proof*

Along with using Judge Shadur’s *State Farm v. Riley* Appendix to push back defense refusals to answer based upon the legal conclusion and speaking documents claims, Northern District of Illinois judges have also used the Appendix to step on demands for “strict proof.” In a July 2013 order in a case with Wells Fargo Bank seeking to recover on a promissory note against a defaulting debtor, Judge Aspen cited the Appendix in a footnote after noting that the debtor included in his answer that he “demands strict proof thereof.” Judge Aspen noted dryly that “[t]his language has no legal effect.” He then cited the Appendix and two other Shadur opinions.<sup>263</sup> In another banking case that same year, Chief Judge Rubén Castillo<sup>264</sup> granted a motion to strike the phrase “demands strict proof thereof” from eight responses that a bank’s lawyers had filed.<sup>265</sup>

Judge Shadur’s colleagues in the Northern District of Illinois also cited the Appendix when confronting defendants’ formulaic claims regarding their lack of knowledge of information. Judge Robert Gettleman,<sup>266</sup> for

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qualification of an **averment**, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the **averments** of the preceding pleading, the pleader may make denials as specific denials of designated **averments or paragraphs** or may generally deny all the **averments** except such designated **averments or paragraphs** as the pleader expressly admits; but, when the pleader does so intend to controvert all its **averments**, including **averments** of the grounds upon which the court’s jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

FED. R. CIV. P. 8(b) (2001) (emphasis added).

262. See *infra* pp. 964–65.

263. Wells Fargo Bank, N.A. v. Morgan, No. 12-C-4797, 2013 WL 3670243 at \*2 n.2 (N.D. Ill. July 12, 2013) (citing *Donnelly v. Frank Shirey Cadillac, Inc.*, No. 05-C-3520, 2005 WL 2445902, at \*2 (N.D. Ill. Sept. 29, 2005); *State Farm Mut. Auto. Ins. Co. v. Riley (State Farm v. Riley)*, 199 F.R.D. 276, 278 (N.D. Ill. 2001); *Gilbert v. Johnston*, 127 F.R.D. 145, 146 (N.D. Ill. 1989)).

264. *Castillo, Rubén*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/castillo-rub%C3%A9n> [<https://perma.cc/CM7Y-9AJ2>] (last visited Apr. 5, 2021).

265. *Sun Life Assurance Co. of Canada v. Great Lakes Bus. Credit LLC*, 968 F. Supp. 2d 898, 904 (N.D. Ill. 2013). Chief Judge Castillo cited the *State Farm v. Riley* Appendix; Judge Shadur’s opinions in *Donnelly*, 2005 WL 2445902, at \*1; *Gilbert*, 127 F.R.D. at 146; and Judge Robert Gettleman’s opinion in *Jones v. Sabis Educ. Sys., Inc.*, No. 98-C-4252, 2000 WL 369720, at \*4–5 (N.D. Ill. Apr. 7, 2000), which itself relied up on the Appendix.

266. *Gettleman, Robert William*, FED. JUD. CTR.,

example, cited the Appendix in a 2012 order in which “[d]efendant’s contradictory answers state a lack of knowledge or information sufficient to form a belief about the truth of the allegations *and* deny the same allegations.”<sup>267</sup> Judge Gettleman, having already cited Rule 11, lectured that “[d]efendant is under an obligation to respond honestly to plaintiffs’ well-pled allegations.”<sup>268</sup> He then quoted Judge Shadur’s explanation that “very often it doesn’t require much in the way of information to form a belief about the truth or lack of truth in someone else’s assertions.”<sup>269</sup> The practice of claiming insufficient information while also denying an allegation vexed Judge Gettleman. In 2013, he criticized the lawyering of AFNI, Inc.’s lawyers, who responded to plaintiff-debtor’s allegation about the defendant-creditor’s knowledge of an address. The judge wrote that “Defendant both denies this and states it is ‘unable to determine the truth or falsity’ of the allegation.”<sup>270</sup> The lawyers should simply have said that they lacked information sufficient to form a belief, which Rule 8 would deem a denial.

#### D. Affirmative Defenses

In addition to citing the *State Farm v. Riley* Appendix in order to combat defense refusals to respond to legal conclusions, claims that documents speak for themselves, demands for strict proof, oxymoronic denials coupled with claims of insufficient information, and other FRCP 8(b)-related questions, Judge Shadur’s colleagues in the Northern District of Illinois also cited the Appendix regarding FRCP 8(c) issues: affirmative defenses. In the answer that prompted the Appendix, Mr. DeMoon had included no affirmative defenses at all—at least none that violated Judge Shadur’s rules. Regarding affirmative defenses, Judge Shadur laid down two rules in the Appendix. The first was that he would strike purported affirmative defenses that did not “*admit*[ ] all of the allegations of a complaint.”<sup>271</sup> That sounds harsh, but he noted that “nothing is lost by defendant in that situation, because the denial of that allegation in the answer has already put the matter at issue.”<sup>272</sup> Second, Judge Shadur knocked as “unacceptable for a party’s attorney simply to mouth A[ffirmative] D[efense]s in formula-like fashion . . . for that does not do the job of apprising opposing counsel and this Court of the

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<https://www.fjc.gov/history/judges/gettleman-robert-william> [<https://perma.cc/7S4J-U43S>] (last visited Apr. 5, 2021).

267. *Coach, Inc. v. Bella*, 11-C-3987, 2012 WL 689266, at \*1 (N.D. Ill. Feb. 29, 2012).

268. *Id.* at \*2.

269. *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Riley* (*State Farm v. Riley*), 199 F.R.D. 276, 278 (N.D. Ill. 2001)).

270. *Burnside v. AFNI, Inc.*, No. 13-C-2957, 2013 WL 5718438, at \*3 (N.D. Ill. Oct. 21, 2013).

271. *State Farm v. Riley*, 199 F.R.D. at 279.

272. *Id.*

predicate for the claimed defense . . . .”<sup>273</sup> Notably, none of Judge Shadur’s fellow judges seem to have adopted his practice of sua sponte review of the answers soon after filing.

In 2004, Judge Marvin Aspen<sup>274</sup> noted that “[c]ourts have held time and time again that stringing together a long list of legal defenses is not sufficient to satisfy Rule 8(a)’s short and plain statement requirement,” before quoting Judge Shadur’s Appendix sentence about attorneys who “mouth ADs in formula-like fashion (‘laches,’ ‘estoppel,’ ‘statute of limitations,’ or what have you) . . . .”<sup>275</sup> Before the judge was a lawsuit between banks, with a list of eight affirmative defenses that the original plaintiff bank offered up in response to the defendant’s counterclaims. In the end, Judge Aspen struck three of the counterclaim defendant’s affirmative defenses, including one that mouthed, “Plaintiff is barred under the doctrine of unclean hands, and other equitable doctrines, including waiver, estoppel, and laches, from seeking relief against First Bank.”<sup>276</sup>

Judge Shadur’s Appendix instruction about unacceptable mouthing of affirmative defenses was another judge favorite. In 2006, Judge Manning cited this sentence in an order in which she struck thirteen affirmative defenses.<sup>277</sup> She also added her own criticism of catchall or blanket defenses.<sup>278</sup> “Blanket defenses incorporating ‘each and every’ defense allowed by the relevant sections of the U.S. Code or ‘one or more’ of a laundry list of defenses,” she lectured, “raise alarm bells with the court because the connotation is ‘we’re not sure which ones are applicable so we’re just going to assert all of them.’”<sup>279</sup> She explained that “such an expansive approach is unnecessary given the liberal amendment policy provided in Fed. R. Civ. P. 15,” but, more darkly, the judge also warned that “such ‘catch-all’ defenses could potentially signal that the required investigation under Rule 11 may not have been completed . . . .”<sup>280</sup>

That same year, Judge Castillo, who would later become chief judge, deployed the Appendix’s sentence about the unacceptable mouthing of affirmative defenses when he struck an affirmative defense that said no more than “Reis’s claims are barred or limited by laches, waiver,

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273. *Id.*

274. *Aspen, Marvin E.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/aspen-marvin-e> [<https://perma.cc/3VLH-RE2K>] (last visited Apr. 5, 2021).

275. *Builders Bank v. First Bank & Tr. Co.*, No. 03-C-4959, 2004 WL 626827, at \*6 (N.D. Ill. Mar. 25, 2004)).

276. *Id.* at \*1.

277. *Grayline Housewares, Inc. v. Garden Ridge Corp.*, No. 06-C-699, 2006 WL 8460518, at \*1 (N.D. Ill. Aug. 18, 2006).

278. *Id.* at \*3.

279. *Id.*

280. *Id.*

estoppel, unclean hands, or similar legal or equitable doctrines.”<sup>281</sup> Judge Castillo cited the Appendix and reminded counsel for the defendant, Concept Industries, that “[l]aches, waiver, estoppel, and unclean hands are equitable defenses that must be pled with the specific elements required to establish the defense.”<sup>282</sup> Then, like Judge Aspen, Judge Castillo added another limitation on blanket defenses. The defendant’s sixth affirmative defense was “Concept reserves the right to add additional affirmative defenses as they become known through discovery.” Judge Castillo crisply noted that “[t]his is not a proper affirmative defense. If at some later point in the litigation Concept believes that the addition of another affirmative defense is warranted,” he lectured, “it may seek leave to amend its pleadings pursuant to Rule 15(a) . . . .”<sup>283</sup>

The best endorsement of Judge Shadur’s disruption of the defense attorneys’ appending lists of frivolous defenses to their answers came in 2017. Judge Robert Dow, Jr.,<sup>284</sup> struck the listing of waiver and estoppel as defenses by counterdefendant Chicago Marine.<sup>285</sup> Judge Dow quoted Judge Shadur’s familiar sentence about the unacceptability of mouthing affirmative defenses.<sup>286</sup> Judge Dow then suggested the ultimate absurdity of the prevalent defense practice of pleading laundry lists of fact-free affirmative defenses. “Were it acceptable to allege boilerplate affirmative defenses in this fashion,” the judge wrote, “a party could simply cut and paste Rule 8(c)’s list of affirmative defenses (along with any other recognizable affirmative defenses) into its answer so as to preserve each

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281. *Reis Robotics USA, Inc. v. Concept Indus., Inc.*, 462 F. Supp. 2d 897, 907 (N.D. Ill. 2006).

282. *See id.* (citing *State Farm Mut. Auto. Ins. Co. v. Riley (State Farm v. Riley)*, 199 F.R.D. 276, 279 (N.D. Ill. 2001)).

283. *See id.* (citing *State Farm v. Riley*, 199 F.R.D. at 279). In 2007, Judge Keys cited both Judge Castillo’s order in *Reis Robotics* and Judge Shadur’s sentence about mouthing lists of affirmative defenses when he struck ten of Metropolitan Life Insurance’s affirmative defenses. *Rudzinski v. Metro. Life Ins. Co.*, No. 05-C-0474, 2007 WL 2973830, at \*1 (N.D. Ill. Oct. 4, 2007). *See also* Judge Lefkow’s order in *Ramos v. Playtex Products, Inc.*, No. 08-CV-2703, 2008 WL 4066250, at \*5 (N.D. Ill. Aug. 27, 2008), in which, as noted above, she reviewed Judge Shadur’s order *in toto* in an effort to channel a defendant into proper repleading of an answer. Other Northern District judges who quoted Judge Shadur’s sentence about the “formula-like” mouthing of affirmative defenses included Magistrate Judge Susan Cox in *Kmart Corp. v. Footstar, Inc.*, No. 09-C-3607, 2009 WL 4544700, at \*4 (N.D. Ill. Dec. 1, 2009); Magistrate Judge M. David Weisman in *Crabtree v. Experian Information Solutions, Inc.*, No. 16-C-10706, 2017 WL 11473864, at \*1 (N.D. Ill. Aug. 18, 2017), *report and recommendation adopted*, No. 16-CV-10706, 2017 WL 11473925 (N.D. Ill. Sept. 6, 2017); and Judge Sharon Johnson Coleman, following Judge Shadur’s death, in *Pacific Construction Service, Inc. v. Stone City Ironworks, Inc.*, No. 19-CV-4036, 2020 WL 1139258, at \*1 (N.D. Ill. Mar. 9, 2020).

284. *Dow, Robert Michael Jr.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/dow-robert-michael-jr> [<https://perma.cc/8U9E-9CB4>] (last visited Apr. 7, 2021).

285. *Manley v. Boat/U.S. Inc.*, No. 13-CV-5551, 2016 WL 1213731, at \*5 (N.D. Ill. Mar. 29, 2016).

286. *Id.* (citing *State Farm v. Riley*, 199 F.R.D. at 279).

defense should a plausible argument arise at some point down the road. This,” he continued, “is just the tip of the iceberg of potential abuses that could arise from such a lax pleading standard.”<sup>287</sup> Next, just as Judge Manning had reminded that Rule 11 placed boundaries on pleading defenses unsupported by facts, Judge Dow argued, “[b]ut of course this [lax standard] would be unfair to the nonmovant and contrary to the ‘just, speedy, and inexpensive’ guideposts that govern civil actions.”<sup>288</sup>

Not all Northern District judges were as animated as Judge Dow regarding fact-free laundry lists of affirmative defenses. For example, in 2015, Judge Manish Shah<sup>289</sup> faced the following list of fourteen factless affirmative defenses and purported affirmative defenses that attorneys William Sweetnam, Esq., and Phil Schlichting, Esq., had filed on behalf of their client Mr. Robert Simms:

1. Plaintiff’s Complaint fails to state any claim upon which relief may be granted.
2. Plaintiff’s claims are barred, in whole or in part, by the applicable statutes of limitations and/or the doctrines of laches, estoppel, release and waiver.
3. Plaintiff’s claims are barred by the statute of frauds.
4. Plaintiff failed to give consideration for the covenants and promises alleged in its Complaint.
5. The covenants and promises alleged in Plaintiff’s Complaint were obtained through duress, fraud and/or illegality.
6. Any injury that Plaintiff may have suffered, such being denied, was not a result of any conduct on the part of Defendant.
7. Defendant’s actions or inactions were not the proximate, legal, or substantial cause of any damages, injury, or loss suffered by Plaintiff, the existence of which is denied.
8. Defendant’s actions were not intentional, willful or malicious.
9. Plaintiff has not suffered any injury and otherwise lacks standing.
10. Plaintiff is not entitled to the damages sought in the Complaint.
11. If Plaintiff suffered any damages or losses, such damages or losses were caused, in whole or in part, by Plaintiff’s own conduct, acts or omissions.
12. Plaintiff failed to mitigate its damages.
13. Plaintiff’s claims are subject to arbitration.
14. Plaintiff’s claims are barred by the doctrine of *res judicata*.<sup>290</sup>

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287. *Id.*

288. *See id.* (citing FED. R. CIV. P. 1). Other Northern District judges also cited Judge Shadur’s Appendix approvingly with regard to affirmative defenses. *See Meaden v. Meaden*, No. 12-C-3534, 2012 WL 6019233, at \*3 (N.D. Ill. Nov. 30, 2012) (“Courts have routinely held that simply listing legal defenses is inappropriate.”) (citations omitted); *U.S. Small Bus. Admin. for Cardinal Growth, L.P. v. McInerney*, No. 16-CV-7099, 2017 WL 1710271, at \*6 (N.D. Ill. May 3, 2017); *In re Testosterone Replacement Therapy Products Liab. Litig. Coordinated Pretrial Proceedings*, No. 14-C-1748, 2017 WL 2574057, at \*5 (N.D. Ill. May 22, 2017).

289. *Shah, Manish Suresh*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/shah-manish-suresh> [<https://perma.cc/52NH-9ZGE>] (last visited Apr. 5, 2021).

290. *CDM Media USA, Inc. v. Simms*, No. 14-CV-9111, 2015 WL 3484277, at \*1 (N.D. Ill. June 1, 2015).

This list is what Judge Dow imagined when he complained “a party could simply cut and paste Rule 8(c)’s list of affirmative defenses (along with any other recognizable affirmative defenses) into its answer so as to preserve each defense should a plausible argument arise at some point down the road.”<sup>291</sup>

Judge Shah put the defendant’s lawyers only partway through the wringer. The contrast with Judge Shadur’s approach illustrates, I think, the superiority of Judge Shadur’s method. Plaintiff CDM Media USA, Inc. moved to strike the list of fourteen groundless defenses. The plaintiff’s lawyers, Ryan Mahoney, Esq., and Desmond Curran, Esq., moved to strike the sixth through tenth affirmative defenses because, as Judge Shadur had been teaching for fourteen years, “those defenses are not ‘true’ affirmative defenses.”<sup>292</sup> Judge Shah cited Judge Shadur’s Appendix and admitted that “[i]f a defense merely denies the truth of the plaintiff’s allegations, the defense is not, in the proper sense, an affirmative defense.”<sup>293</sup> Judge Shah then described those five claims by the defendant as “argumentative denials, since their purpose is instead to deny the truth of CDM’s allegations . . . .”<sup>294</sup> “Nevertheless,” Judge Shah ruled, “these defenses will not be stricken because their presence or absence does not alter the case in a meaningful way.”<sup>295</sup> At this point, Dukas’s *Sorcerer’s Apprentice* played in the background. Likewise, Judge Shah refused to strike the second, third, fourth, fifth, eleventh, and twelfth affirmative defenses. Judge Shah agreed that these defenses were “indeed boilerplate” and quoted the defense attorneys’ mouthing “applicable statutes of limitations, laches, estoppel, release and waiver,”<sup>296</sup> but “[o]n the other hand,” Judge Shadur’s colleague stated, “there are no real efficiencies to be gained in striking them now, because discovery on these issues would likely be permitted. Since removing the defenses will not advance the case,” the judge claimed, “and as CDM points to no harm in letting them stand, the motion to strike this group of defenses is denied.”<sup>297</sup> Here, Mickey Mouse stopped sweeping the water altogether.

Judge Shah had signaled his reluctance to grant the motion to strike affirmative defenses earlier in the opinion. He cited the Seventh Circuit’s opinion in *Heller Financial*, but only for the “[t]he general rule is that

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291. *Manley v. Boat/U.S. Inc.*, No. 13-CV-5551, 2016 WL 1213731, at \*5 (N.D. Ill. Mar. 29, 2016).

292. *CDM Media*, 2015 WL 3484277, at \*2.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at \*3.

297. *Id.*

motions to strike are disfavored, since, in many instances, such motions serve only to delay the litigation.”<sup>298</sup> “In my view,” Judge Shah pronounced, “this general rule governs unless the matter to be stricken is mere clutter and there are efficiencies to be gained in removing such clutter from the case.”<sup>299</sup> Further, he explained, “[a] party seeking to strike matter from a pleading must show that the removal will alter the pretrial process in a meaningful way, or that not removing the matter from the litigation will prejudice the moving party.”<sup>300</sup>

Sua Sponte Shadur would have efficiently struck defendant Simms’s list of fourteen frivolous claims—for calling them all affirmative defenses is incorrect—the day the attorneys filed the answer or soon thereafter. Perhaps more likely, the defense attorneys would not have appended this list if the random assignment of the case had landed the plaintiff in Judge Shadur’s courtroom rather than Judge Shah’s, because Judge Shadur would also have required they replead their answer according to the Appendix and also deliver to him a letter promising they had not billed their client for the time they took to fix their errors. By the luck of the draw, then, Messrs. Sweetnam and Schlichting avoided the efficient force of Lord Shadur.

The pace of the Simms matter through Judge Shah’s courtroom suggests the superiority of Judge Shadur’s early-strike-and-replead approach. On October 1, 2014, CDM filed its complaint seeking an injunction against Mr. Simms in the Chancery Division of Cook County’s Circuit Court.<sup>301</sup> Illinois rules required Mr. Simms to answer within thirty days.<sup>302</sup> Assuming the plaintiff served him with the complaint on the date of filing, the answer was due on October 30, 2014.<sup>303</sup> However, CDM’s

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298. *See id.* at \*2 (citing *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989)).

299. *Id.* (citing *Heller Fin., Inc.*, 883 F.2d at 1294). *See generally* KONDO, *supra* note 141.

300. *Id.* Compare Seventh Circuit Court of Appeals Judge Frank Easterbrook, who wrote that “[e]ach claim takes up the time of the legal system and the opposing side. A single claim in an antitrust case may occasion the expenditure of hundreds or thousands of hours, as opposing counsel try to verify or refute the allegations and theories . . . . Rule 11 applies to all statements in papers it covers. Each claim must have sufficient support; each must be investigated and researched before filing.” Judge Easterbrook wrote concerning claims by plaintiffs, but his concerns about cost apply equally to defense claims. *Frantz v. U.S. Powerlifting Fed’n*, 836 F.2d 1063, 1067 (7th Cir. 1987). Judge Shadur quoted Judge Easterbrook’s *Frantz* order in *Integrated Measurement Systems, Inc. v. International Commercial Bank of China*, No. 89-C-9019, 1991 WL 136010, at \*3 n.8 (N.D. Ill. July 15, 1991).

301. Complaint, *CDM Media USA, Inc. v. Simms*, 2014-CH-15903 (Ill. Cir. Ct. October 1, 2014).

302. ILL. SUP. CT. R. 181(a).

303. *Id.* (“[T]he 30-day period shall be computed from the day the copy of the summons is left with the person designated by law . . .”).

attorneys filed an amended complaint on October 20,<sup>304</sup> which likely pushed the answer date into November.<sup>305</sup>

On November 13, 2014—before the date to answer in the Cook County Chancery Division arrived—Mr. Sweetnam, defendant Mr. Simms’s attorney, filed a notice of removal to federal court.<sup>306</sup> On November 14, the federal system of random assignment placed the case on Judge Shah’s docket, and Mr. Sweetnam entered his appearance on behalf of his client that day.<sup>307</sup> A defendant has twenty-one days to answer under the federal rules, so Mr. Sweetnam’s answer would have been due on December 5, just after Thanksgiving weekend.

On November 18, the second business day after Judge Shah received the case, the judge granted Mr. Sweetnam’s motion to extend the time to answer to December 22—eighty-two days after Sweetnam and his client first received the complaint—and, therefore, had an opportunity to begin investigating and collecting the facts and law that would support their responses to the complaint’s allegations and that could support any affirmative defenses they might choose to offer. Many judges and litigants claim that the twenty-one days that Rule 12 allows for the filing of answers is too short. In *Frivolous Defenses*, I found that defendants in car crash cases had an average of around forty-seven days to answer, well over twice the Rule’s limit.<sup>308</sup> The claim that twenty-one days is too short to answer presumes that defendants have no idea that a lawsuit is coming until served with papers, which is an unlikely scenario for nearly every lawsuit. For car crash cases, a claim investigation opens as soon as either or both parties contact their insurance companies.<sup>309</sup>

With Christmas in the air around the Dirksen Federal Building in the Chicago Loop, December 22 arrived and, the answer was due. Did Mr. Sweetnam, the defendant’s attorney, file his answer? No, he filed a motion to dismiss for failure to state a claim.<sup>310</sup> Filing the FRCP 12(b)(6) motion reset the answer clock to fourteen days after Judge Shah would

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304. Amended Complaint, *CDM Media*, 2015 WL 1399050 (No. 14-CV-9111).

305. Federal Rule of Civil Procedure 15(a)(3) gives a defendant at least fourteen days to answer an amended complaint. (“Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.”) There is no corresponding Illinois rule. However, amended complaints would fall under Illinois Supreme Court Rule 182(a), which states that “[a]ny subsequent pleadings allowed or ordered shall be filed at such time as the court may order.”

306. Notice of Removal, *CDM Media*, 2015 WL 1399050 (No. 14-CV-9111).

307. Minute Entry, Case Assigned to the Hon. Manish S Shah., *CDM Media*, 2015 WL 1399050 (No. 14-CV-9111).

308. Russell, *supra* note 7, at Section III.D.

309. *Id.*

310. Motion to Dismiss for Failure to State a Claim, *CDM Media*, 2015 WL 1399050 (No. 14-CV-9111).

decide the motion to dismiss.<sup>311</sup> Judge Shah set a briefing schedule for the motion, with plaintiff's response to the motion due forty-three days after its filing on February 3 and defendant's reply due three weeks later on February 24.<sup>312</sup> Plaintiff timely responded, but as the deadline for the reply approached, the defendant's lawyers sought an extension, which Judge Shah granted to March 10, 2015.<sup>313</sup> On March 25, 2015, Judge Shah granted in-part and denied in-part the motion to dismiss, so the case continued.<sup>314</sup>

Because Judge Shah did not grant the defendant's motion to dismiss the case, the defendant now really had to file an answer. Under Rule 12, as noted above, the defendant had to answer by fourteen days after Judge Shah ruled on the motion to dismiss, and, indeed, the defendant filed an answer on April 8, 2015.<sup>315</sup>

The defendant's lawyers answered more than six months (189 days) after the filing of the complaint in Cook County's Circuit Court, 170 days after the first amendment of the state court complaint, and 145 days after Judge Shah received the removed case in the Northern District. Notwithstanding the passage of several seasons between the first filing of the complaint and the answer, the defendant's lawyers marshaled not a single foundational or predicate fact in support of their laundry list of fourteen purported affirmative defenses. I would say shame on these defense lawyers, except that they were defending against an injunction that CDM Media sought against Mr. Simms, who had been "a member of the company's senior management team" before "he left to work for one of the company's customers . . . ."<sup>316</sup> Delay, among a defendant's most powerful tools, may be the most powerful tool available when fighting an effort to get an injunction. Mr. Simms's lawyers strung out answering from thirty days to six months. In late February of 2016, the case ended with a dismissal with prejudice by the plaintiff, which suggests the parties settled, although the filing of an uncontested bill of costs for \$860.88 by Mr. Sweetnam suggests that his client may have come out ahead.<sup>317</sup>

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311. FED. R. CIV. P. 12(a)(4)(A).

312. See Notification of Docket Entry (Jan. 6, 2015), *CDM Media*, 2015 WL 1399050 (No. 14-CV-9111).

313. See Plaintiff's Response to Defendant's Motion to Dismiss, *CDM Media*, 2015 WL 1399050 (No. 14-CV-9111); Defendant's Motion for Extension of Time to File Reply in Support of His Motion to Dismiss Plaintiff's Amended Verified Complaint, *CDM Media*, 2015 WL 1399050 (No. 14-CV-9111); Notification of Docket Entry (Feb. 20, 2015) *CDM Media*, 2015 WL 1399050 (No. 14-CV-9111).

314. Memorandum Opinion and Order, *CDM Media*, 2015 WL 1399050 (No. 14-CV-9111).

315. Answer and Affirmative Defenses to Amended Verified Complaint, *CDM Media*, 2015 WL 1399050 (No. 14-CV-9111).

316. *CDM Media*, 2015 WL 3484277, at \*1.

317. Order, *CDM Media*, 2015 WL 1399050 (No. 14-CV-9111); Bill of Costs, *CDM Media*, 2015 WL 1399050 (No. 14-CV-9111).

Though the defendant's lawyers seem to have been doing their job well, with all respect due an Article III judge, I might say shame on Judge Shah. Within the Northern District, Judge Shadur provided a good example of what Judge Shah might have done when the defendant's lawyers—who were already playing the delay game—filed their answer on April 14, 2015. Sua sponte, Judge Shadur would have reviewed and rejected the answer, which would have expedited not delayed the case. Instead, the plaintiffs filed their motion to strike the fourteen factless, frivolous defenses two weeks later; the cycle of response and reply ensued; and Judge Shah decided on June 1, 2015, not to strike the frivolous defenses because he did not believe there were “efficiencies to be gained in removing such clutter from the case,” nor that the plaintiff had shown “that the removal will alter the pretrial process in a meaningful way, or that not removing the matter from the litigation will prejudice the [plaintiff].”<sup>318</sup>

In denying the motion to strike affirmative defenses that Judge Shadur would have tossed sua sponte, Judge Shah added an additional burden to the plaintiff's effort to enforce the Rules of Civil Procedure. In a case that reeked of inefficient delay that hurt the plaintiff, the judge might have reflected on the efficiency of Judge Shadur's method of sua sponte review of answers. As well, Judge Shah might have noted that during the twenty-seven weeks between the first filing of the complaint for an injunction and the answer, if the defendant had, through investigation and research, uncovered a single fact every two weeks, then they might have supported thirteen of their fourteen affirmative defenses with a predicate fact.

Even without the Appendix, a local rule, or defendants who read the Rules of Civil Procedure, any judge from whom a defendant seeks an extension of time to answer has an opportunity to ensure efficiency by granting the extension of time subject to an order for proper answers and defenses as Judge Lefkow did with her prophylactic order in advance of repleading. Judges would hasten the identification of the disputed facts and issues in every case if they included a Shadur-style appendix—or even the Appendix itself—with every grant of a motion for extension of time to answer. Judges might make clear that the defendant must include sufficient factual predicate in support of each affirmative defense. If, instead, the defendant's lawyers produce factless, bare-bones allegations, judges should feel comfortable striking frivolous affirmative defenses with prejudice rather than allowing the defendant a second bite to replead. Lawyers understand that they should pay attention to what judges order.

My practice, when opposing counsel asks me to agree to an extension of time to answer, is to agree subject to the condition that the defendant

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318. *CDM Media*, 2015 WL 3484277, at \*2.

answer according to Rule 8 and provide a factual predicate for each affirmative defense. Defendants typically ignore my condition and answer frivolously but would be more likely to do what the judge says.

#### VIII. SHADUR'S APPENDIX IN THE SEVENTH CIRCUIT

Within the Northern District of Illinois, many judges treated Judge Shadur's Appendix as something akin to a local rule. Judge Gettleman, for example, in 2012 noted that a defendant's responses to allegations "are not in the form approved by this district" and then cited Shadur's Appendix as the proper way to answer.<sup>319</sup> Judges adopted—and continue to adopt—the Shadur Appendix with approval and, I believe, to good effect. However, whether Judge Shadur's fellow judges in the Northern District of Illinois were simply being good colleagues by citing his work, we cannot know for sure.

Outside the Northern District of Illinois, where Judge Shadur's Appendix could have only persuasive force without even the power of a shadow local rule, many judges cite his Appendix approvingly. Some would call citation of the case a measure of Judge Shadur's influence, but I happen to not believe in this model of "influence." My own views of judging incline more toward a realist model than a formalist model.<sup>320</sup> Like Oliver Wendell Holmes, Jr.,<sup>321</sup> I understand doctrinal support more as something that judges add to justify a decision and less as a guide to how they decide. When reviewing the second edition of Professor Langdell's contracts casebook in 1880, Mr. Holmes—then a practicing lawyer and not yet either a professor or justice—wrote that "[t]he form of continuity has been kept up by reasonings purporting to reduce everything to a logical sequence; but that form," Mr. Holmes argued, "is nothing but the evening dress which the new-comer puts on to make itself presentable according to conventional requirements. The important phenomenon is the man underneath it, not the coat;" he continued, "the justice and reasonableness of a decision, not its consistency with previously held views."<sup>322</sup>

Mr. Holmes's view of judging was akin to that of James Kent, who described his practice when he ascended to the position as chief of New

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319. Meaden v. Meaden, No. 12-C-3534, 2012 WL 6019233, at \*2 (N.D. Ill. Nov. 30, 2012) (citations omitted).

320. RICHARD A. POSNER, REFLECTIONS ON JUDGING 108–26 (2013) (ebook) (comparing legalist and realist judging).

321. Holmes, *Oliver Wendell, Jr.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/holmes-oliver-wendell-jr> [<https://perma.cc/YQ3Y-Z4JF>] (last visited June 9, 2021).

322. Oliver Wendell Holmes, Jr., Book Notice, 14 AM. L. REV. 233, 234 (1880) (reviewing CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, WITH A SUMMARY OF THE TOPICS COVERED BY THE CASES (2d ed. 1879)).

York's equity courts. Chancellor Kent wrote, "My practice was, first, to make myself perfectly and accurately (mathematically accurately) master of the facts."<sup>323</sup> He worked through the pleadings and depositions, he explained, until he was "master of the cause and ready to decide it."<sup>324</sup> The chancellor said that he then "saw where justice lay, and the moral sense decided the court half the time: and I then sat down to search the authorities until I had examined my books."<sup>325</sup> Sometimes, he admitted, he "might once in a while be embarrassed by a technical rule, but I most always found principles suited to my views of the case . . ."<sup>326</sup> Chancellor Kent, of course, sounds a bit like the legal realist Judge Joseph Hutcheson,<sup>327</sup> who rather famously wrote:

I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.<sup>328</sup>

Whether one believes that Judge Shadur's Appendix influenced judges to rule against frivolous defenses or, by contrast, that hunches, justice, or a moral sense guided judges who then cited Shadur's Appendix as "evening dress" is probably of little importance. The pattern of citations suggests that judges who agreed with Shadur cited his work, while those who did not rarely did so.

For simplicity's sake, we can sort citation of Judge Shadur's Appendix into three principal categories: speaking documents, legal conclusions, and affirmative defenses.

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323. WILLIAM KENT, MEMOIRS AND LETTERS OF JAMES KENT 158–59 (1898).

324. *Id.*

325. *Id.*

326. *Id.*

327. *Hutcheson, Joseph Chappell Jr.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/hutcheson-joseph-chappell-jr> [<https://perma.cc/7T5W-W2ZS>] (last visited Apr. 5, 2021).

328. Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 278 (1929).

*A. Speaking Documents*

The judges of the nearby Northern District of Indiana have been particular fans of Shadur's Appendix. In 2006, Magistrate Judge Paul Cherry<sup>329</sup> noted that "[c]ourts have expressly held that a response indicating that a document 'speaks for itself' is insufficient under the Federal Rules."<sup>330</sup> He cited the Appendix and two other Shadur orders.<sup>331</sup> In 2008, Judge Cherry focused the geographic scope to say that "[d]istrict courts within the Seventh Circuit have consistently found that a responsive pleading indicating that a document 'speaks for itself' is insufficient and contrary to the Federal Rules of Civil Procedure."<sup>332</sup> He then cited Shadur's Appendix, the same two Shadur orders he had cited in 2006, and an opinion by one of his Indiana colleagues, which may have established broader currency within the circuit.<sup>333</sup>

In 2013, Magistrate Judge Roger Cosby<sup>334</sup> of the Northern District of Indiana joined in citing Judge Shadur. Magistrate judges handle much of the routine motions work, including fights over pleadings and discovery, so they are likely producers of orders related to the issues that concerned Shadur.<sup>335</sup> However, by herself, a magistrate judge would lack the authority to review answers as they arrived unless a district court judge referred the task to the magistrate judge.<sup>336</sup> Judge Cosby stated that "[a]s both parties recognize, district courts within the Seventh Circuit Court of Appeals have consistently found that responses that an allegation is a 'legal conclusion' or that a document 'speaks for itself' are insufficient

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329. IL Staff, *Retired Magistrate Judge Cherry to Serve Southern District as Criminal Duty Magistrate*, IND. LAW. (Oct. 15, 2020), <https://www.theindianalawyer.com/articles/magistrate-judge-cherry-to-serve-southern-district-as-criminal-duty-magistrate> [https://perma.cc/4NMX-RBDR].

330. *Indiana Reg'l Council of Carpenters Pension Tr. Fund v. Fid. & Deposit Co. of Maryland*, No. 06-CV-32, 2006 WL 3302642, at \*2 (N.D. Ind. Nov. 9, 2006) (citations omitted).

331. *Indiana Reg'l Council*, 2006 WL 3302642, at \*2 (citing *Banske v. Tarka*, No. 02-C-7359, 2003 WL 23149, at \*1 (N.D. Ill. Jan. 2, 2003) (providing that several assertions in the Answer that a document 'speaks for itself' 'are also not permissible responses'); *State Farm Mut. Auto. Ins. Co. v. Riley (State Farm v. Riley)*, 199 F.R.D. 276, 279 (N.D. Ill. 2001) (providing that a party may not respond to complaint allegations about contents of document by saying that the 'document speaks for itself'); *Donnelly v. Frank Shirey Cadillac, Inc.*, No. 05-C-3520, 2005 WL 2445902, at \*1 (N.D. Ill. Sept. 29, 2005) (same)).

332. *N. Indiana Metals v. Iowa Exp., Inc.*, No. 07-CV-414, 2008 WL 2756330, at \*3 (N.D. Ind. July 10, 2008).

333. *N. Indiana Metals*, 2008 WL 2756330, at \*3 (citing *Donnelly*, 2005 WL 2445902, at \*1; *Banske*, 2003 WL 23149, at \*1; *State Farm v. Riley*, 199 F.R.D. at 279; *McGrath v. Godshalk*, No. 07-CV-34, 2007 WL 2746865, at \*12 (N.D. Ind. Sept. 18, 2007)).

334. *The Honorable Roger B. Cosby*, AM. CONF. INST. <https://www.americanconference.com/speakers/the-honorable-roger-b-cosbey/> [https://perma.cc/44RP-5SMW] (last visited Apr. 5, 2021).

335. 28 U.S.C. § 636 (b)(1)(A).

336. *Id.*

and contrary to the Federal Rules of Civil Procedure.”<sup>337</sup> He cited Magistrate Judge Cherry’s two orders on this issue, Shadur’s Appendix, and another Shadur order.<sup>338</sup>

In *Do It Best Corp. v. Heinen Hardware*, Judge Cosbey confronted weasel words. The defendant’s lawyers argued that they had coupled each assertion that a document spoke for itself with a denial of the allegation. Not quite, said the magistrate judge. The defense lawyers had responded to the eleventh paragraph of the complaint by “deny[ing] the material allegations contained in the corresponding paragraph of Plaintiff’s Complaint; the same calls for a legal conclusion and documents or other items therein speak for themselves.”<sup>339</sup> Judge Cosbey pointed out that “[n]ot only are there no documents or other items referenced in this paragraph, but,” citing Judge Cherry’s order in *Indiana Regional Council of Carpenters Trust Fund*, “[t]his cryptic answer begs the question: according to the Defendant[s], what allegations are material in ¶ [11]?”<sup>340</sup> Judge Cosbey cited Judge Cherry to make clear that “by responding to only the material allegations contained in a specific paragraph, Defendants ‘fail to provide adequate substantive guidance to the Plaintiff as to the Defendant[s]’ position on the allegations in that respective paragraph.”<sup>341</sup> The magistrate judges understood Rule 8 to require the defendant to communicate a clear position to the plaintiff, that is, to answer.

Another Magistrate Judge from the Northern District of Indiana, Susan Collins,<sup>342</sup> piled on in 2015. Citing nine different cases from the Northern Districts of Indiana, Illinois, and Georgia, Judge Collins described what she found in the answer: “After reciting that the document ‘speaks for itself,’ [Defendant] Hartford Iron states: ‘To the extent that further response may be required, the paragraph is denied.’” Quoting Judge

337. *Do It Best Corp. v. Heinen Hardware, LLC*, No. 13-CV-69, 2013 WL 3421924, at \*5 (N.D. Ind. July 8, 2013).

338. *Do It Best Corp.*, 2013 WL 3421924, at \*5 (citing *N. Ind. Metals*, 2008 WL 2756330, at \*3–4; *Indiana Reg’l Council of Carpenters Pension Tr. Fund v. Fid. & Deposit Co. of Maryland*, No. 06-CV-32, 2006 WL 3302642, at \*2 (N.D. Ind. Nov. 9, 2006); *Donnelly*, 2005 WL 2445902, at \*1; *State Farm v. Riley*, 199 F.R.D. at 278).

339. *Do It Best Corp.*, 2013 WL 3421924, at \*5 (citing Amended Answer ¶ 11, *CDM Media*, 2015 WL 1399050 (No. 14-CV-9111)).

340. *Do It Best Corp.*, 2013 WL 3421924, at \*5 (citing Complaint ¶ 11, *CDM Media*, 2015 WL 1399050 (No. 14-CV-9111) (citing *Indiana Reg’l Council of Carpenters Pension Tr. Fund v. Fid. & Deposit Co. of Maryland*, No. 06-CV-32, 2006 WL 3302642, at \*3 (N.D. Ind. Nov. 9, 2006))).

341. *Do It Best Corp.*, 2013 WL 3421924, at \*5 (citing *Ind. Reg’l Council*, 2006 WL 3302642, at \*3).

342. *Susan Collins (Federal Judge, Indiana)*, BALLOTEDIA [https://ballotpedia.org/Susan\\_Collins\\_\(Federal\\_judge,\\_Indiana\)](https://ballotpedia.org/Susan_Collins_(Federal_judge,_Indiana)) [<https://perma.cc/AAAY3-ZJGM>] (last visited Apr. 5, 2021); *Susan L. Collins*, BLOOMBERG L., <https://www.bloomberg.com/profile/person/19160583> [<https://perma.cc/K6K7-X3UJ>] (last visited Apr. 5, 2021).

Cherry's order in *Northern Indiana Metals*, she wrote that a "response that the document speaks for itself could either be interpreted as an admission or denial and does not directly respond to the allegations in the [c]omplaint."<sup>343</sup> "Therefore," she explained, "in stating that the document 'speaks for itself' and '[t]o the extent that further response may be required, the paragraph is denied,' Hartford Iron could be denying none, some, or all of the paragraph."<sup>344</sup> Sounding like Judge Shadur, Judge Collins wrote: "Valley Forge and the Court are left to wonder which it is."<sup>345</sup> Again, the goal of pleading is to clarify not obscure the facts and issues in contention.<sup>346</sup>

Wisconsin's federal judges also cited Judge Shadur's Appendix approvingly. In 2008, District Judge J. P. Stadtmueller<sup>347</sup> of the Eastern District of Wisconsin cited Judge Shadur's Appendix and another of his orders in support of his writing that "Rule 8 does not permit a defendant to respond that the document 'speaks for itself.'"<sup>348</sup> "Such a response is," he noted tersely, "inadequate."<sup>349</sup>

Likewise, Judge Catherine Furay,<sup>350</sup> United States Bankruptcy Judge for the Western District of Wisconsin, cited Shadur's Appendix in 2020 when finding that "a party's response that 'documents speak for themselves' is 'insufficient and contrary to the Federal Rules of Civil Procedure.'"<sup>351</sup> Judge Furay also explained that judges need not let defendants replead answers that departed from the Rules, that is, no fresh start for frivolous pleaders in her bankruptcy court. "A party's response that fails to properly deny allegations in a complaint may be stricken and

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343. *Valley Forge Ins. Co. v. Hartford Iron & Metal, Inc.*, No. 14-CV-00006, 2015 WL 5730662, at \*3 (N.D. Ind. Sept. 30, 2015) (quoting *N. Indiana Metals v. Iowa Exp., Inc.*, No. 07-CV-414, 2008 WL 2756330, at \*3 (N.D. Ind. July 10, 2008)).

344. *Id.*

345. *Id.*

346. Other citations of Judge Shadur's Appendix regarding documents speaking for themselves include *Keller v. Enhanced Recovery Co.*, No. 18-CV-15, 2018 WL 5650036, at \*2 (N.D. Ind. Oct. 31, 2018); and *Axis Insurance v. American Specialty Insurance & Risk Services, Inc.*, No. 19-CV-00165, 2019 WL 5783355, at \*2 n.2 (N.D. Ind. Nov. 6, 2019).

347. *Stadtmueller, Joseph Peter*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/stadtmueller-joseph-peter> [<https://perma.cc/7ZEG-2YL4>] (last visited Apr. 5, 2021).

348. *Thompson v. Ret. Plan for Employees of S.C. Johnson & Sons, Inc.*, No. 07-CV-1047, 2008 WL 5377712, at \*2 (E.D. Wis. Dec. 22, 2008) (citing Judge Shadur's appendix in *State Farm Mutual Automobile Insurance Co. v. Riley*, 199 F.R.D. 276, 279 (N.D. Ill. 2001) and his order in *Rudzinski v. Metropolitan Life Insurance Co.*, No. 05-C-0474, 2007 U.S. Dist. LEXIS 75668, at \*10–11, 2007 WL 2973830 (N.D. Ill. Oct. 4, 2007)).

349. *Thompson*, 2008 WL 5377712, at \*2.

350. *Catherine J. Furay*, BALLOTPEdia, [https://ballotpedia.org/Catherine\\_J\\_Furay](https://ballotpedia.org/Catherine_J_Furay) [<https://perma.cc/6W2X-R24K>] (last visited Apr. 5, 2021).

351. *Garnett v. Harvey (In re Harvey)*, No. 18-13398-7, 2020 WL 1237936, at \*4 (Bankr. W.D. Wis. Mar. 13, 2020) (citing *Do It Best Corp. v. Heinen Hardware, LLC*, 2013 U.S. Dist. LEXIS 94567, No. 13-CV-69, 2013 WL 3421924, at \*5 (N.D. Ind. July 8, 2013); *State Farm Mut. Auto. Ins. Co. v. Riley (State Farm v. Riley)*, 199 F.R.D. 276, 279 (N.D. Ill. 2001)).

the referenced allegations may be regarded as admitted,” Judge Furay explained.<sup>352</sup>

The judges within the Seventh Circuit—district court judges, magistrate judges, and, most recently, a bankruptcy judge—have cited Judge Shadur’s Appendix approvingly for the proposition that defendants may not answer allegations by claiming that documents speak for themselves.

### B. Legal Conclusions

Outside the Northern District of Illinois, judges and magistrate judges within the Seventh Circuit have also cited Judge Shadur’s Appendix regarding the refusal of some defense attorneys to answer pleaded legal conclusions.

As discussed above regarding documents speaking for themselves, Judge Stadtmueller, of the Eastern District of Wisconsin, cited Judge Shadur’s Appendix in his 2008 order in *Thompson v. Retirement Plan for Employees of S.C. Johnson & Sons, Inc.* Judge Stadtmueller cited the Appendix when he held that “Rule 8 does not permit a defendant to respond only by stating that the plaintiff’s allegations ‘constitute conclusions of law.’”<sup>353</sup> He also cited a different Shadur order from 1999<sup>354</sup> and a 1995 opinion by Chief Judge Richard Posner<sup>355</sup> of the United States Court of Appeals for the Seventh Circuit in which Judge Posner stated, simply, that “a plaintiff in a suit in federal court need not plead facts; he can plead conclusions.”<sup>356</sup> Judge Posner further specified that “although plaintiffs can plead conclusions, the conclusions must provide the defendant with at least minimal notice of the claim.”<sup>357</sup> Of course, since 1995, the United States Supreme Court has tightened pleading standards to require factual specificity and not mere bare-bones conclusory allegations in pleading.<sup>358</sup> But neither *Iqbal* nor *Twombly* disallowed the pleading of legal conclusions; they are simply insufficient bases alone for complaints. Nothing about *Iqbal* or *Twombly* undermines

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352. *Garnett*, 2020 WL 1237936, at \*4 (citing *Rudzinski*, 2007 WL 2973830, at \*4). Judge Furay acknowledged that some “courts allow for the filing of an amended answer to cure any impermissible pleadings.” *Id.* (citing *Clarendon Am. Ins. Co. v. All Bros. Painting, Inc.*, No. 13-CV-0934-ORL-22, 2013 WL 5921538, at \*4 (M.D. Fla. Nov. 4, 2013); *Thompson*, 2008 WL 5377712, at \*4).

353. *Thompson*, 2008 WL 5377712, at \*1 (citing *State Farm v. Riley*, 199 F.R.D. at 278).

354. *Hotel Emps. & Rest. Emps. Int’l Union Welfare Fund v. Aramark Servs., Inc.*, No. 99-C-5726, 1999 WL 1016260, at \*1 (N.D. Ill. Nov. 4, 1999).

355. *Posner, Richard Allen*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/posner-richard-allen> [<https://perma.cc/XHX6-2QKM>] (last visited Apr. 5, 2021).

356. *Jackson v. Marion Cnty.*, 66 F.3d 151, 153 (7th Cir. 1995) (citing FED. R. CIV. P. 8(a)(2)).

357. *Id.* at 154.

358. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

Judge Stadtmueller's order, which states that "legal conclusions must be addressed in one of the three ways contemplated by Rule 8."<sup>359</sup>

In 2013, Magistrate Judge Andrew Rodovich,<sup>360</sup> from the Northern District of Indiana, used Judge Shadur's Appendix to support his striking of seven paragraphs of a defendant's answer while noting that "[d]istrict courts within the Seventh Circuit consistently have found that responses that an allegation is a 'legal conclusion' or that a document 'speaks for itself' are insufficient and contrary to the Federal Rules of Civil Procedure."<sup>361</sup> Further, Judge Rodovich dealt with additional weasel words that the defendant had added. For seven different paragraphs, defendants' lawyers answered: "The allegation that [synopsis of allegation] is a legal conclusion, and therefore, Defendant is not required to respond. To the extent a response is required, Defendant denies the allegations contained in Paragraph [X] of the Amended Complaint." The plaintiff's lawyers called these responses "impermissible qualified responses" and "argued that due to [defendant] Enhanced Recovery's use of the language 'to the extent' the court and the plaintiff are unable to determine what facts it is admitting or denying."<sup>362</sup>

Judge Rodovich considered but ultimately disagreed with the plaintiff's lawyers regarding the defense lawyers' appending of the words "to the extent that further response may be required, the allegations in this paragraph are denied" to its refusal to respond to allegations of legal conclusions. Instead, concerning "impermissible qualified denial[s]," Judge Rodovich first cited three cases from the Seventh Circuit's district courts.<sup>363</sup> Judge Rodovich cited Judge Collins's order in *Valley Forge Insurance*,<sup>364</sup> Judge Castillo's *Reis Robotics*,<sup>365</sup> and Judge Shadur in *Trustees of Automobile Mechanics Local No. 701 Pension & Welfare Funds v. Union Bank of California*, for which Judge Rodovich included a parenthetical quotation from Judge Shadur who wrote, with characteristic color, that the phrase "'to the extent that' is a telltale tipoff

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359. *Thompson*, 2008 WL 5377712, at \*1. *See also id.* at \*2 (striking the response to paragraph 10 for the same reason).

360. *Andrew P. Rodovich*, VALPARAISO UNIV. L., <https://www.valpo.edu/law/about-us/full-time-faculty/andrew-p-rodovich/andrew-p-rodovich> [<https://perma.cc/TBH2-GQKR>] (last visited Apr. 5, 2021).

361. *Keller v. Enhanced Recovery Co.*, No. 18-CV-15, 2018 WL 5650036, at \*2 (N.D. Ind. Oct. 31, 2018) (citing *N. Indiana Metals v. Iowa Exp., Inc.*, No. 07-CV-414, 2008 WL 2756330, at \*1 (N.D. Ind. July 10, 2008); *Donnelly v. Frank Shirey Cadillac, Inc.*, No. 05-C-3520, 2005 WL 2445902, \*1 (N.D. Ill. Sept. 29, 2005); *State Farm Mut. Auto. Ins. Co. v. Riley (State Farm v. Riley)*, 199 F.R.D. 276, 278 (N.D. Ill. 2001)).

362. *Keller*, 2018 WL 5650036, at \*2.

363. *Id.*

364. *Valley Forge Ins. Co. v. Hartford Iron & Metal, Inc.*, No. 14-CV-6, 2017 WL 1101096, at \*2 (N.D. Ind. Mar. 21, 2017).

365. *Reis Robotics USA, Inc. v. Concept Indus., Inc.*, 462 F. Supp. 2d 897 (N.D. Ill. 2006).

that [the party] has failed to comply with the notice pleading requirements that the federal system imposes on defendants as well as plaintiffs.”<sup>366</sup> Judge Rodovich then noted that “Federal Rule of Civil Procedure 8(b)(1)(B) requires that the responding party admit or deny the allegations. Despite, using the language ‘to the extent a response is required,’” he explained, “Enhanced Recovery unequivocally has denied the allegations contained in paragraphs 10, 11, 12, 14, 15, 16, and 18.”<sup>367</sup> Though the defendant qualified its denials, and although the cases he cited from other of the Seventh Circuit district courts suggested those qualifications were impermissible, Judge Rodovich allowed the responses to stand as denials.<sup>368</sup>

Sua sponte, Judge Shadur would have struck Enhanced Recovery’s answer, required the defendant to replead, and, in place of qualified denials, they would have answered like this: denied. In Judge Rodovich’s courtroom, arriving at the determination that the sentences “the allegation . . . is a legal conclusion, and therefore, Defendant is not required to respond. . . . To the extent a response is required, Defendant denies the allegation” means “denied” was a much longer and costlier process.<sup>369</sup> The plaintiff could not know in advance whether Judge Rodovich would tolerate the defendant’s claim that legal conclusions required no response. If the judge did, then the plaintiff would be left with no response to those allegations. If the judge did not tolerate the “legal conclusion, no response needed” answer, then the judge’s response would mean that “a response is required.” In which case, the defendant denied the allegation. To push through the decision tree that the defendant created, the plaintiff had to confer with the defendant about the answer, file a motion, await a response, file a reply, perhaps have a hearing, and then await the judge’s decision. Both the work and the wait are costly to the plaintiff as well as to the defendant and the court, whereas a single, true word—denied—costs just six keystrokes and takes almost no time.

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366. *Keller*, 2018 WL 5650036, at \*2 (quoting *Trs. of Auto. Mechs. Loc. No. 71 Pension & Welfare Funds v. Union Bank of Cal., N.A.*, No. 08-C-7217 2009 WL 4668580, at \*1 (N.D. Ill. Dec. 2, 2009)).

367. *Id.*

368. *Id.* (discussing how Enhanced Recovery’s answers are ascertainable, and therefore the court denies the motion to strike the relevant paragraphs).

369. *Id.*

What did Judge Rodovich decide that Enhanced Recovery had denied? These are the allegations defendant claimed required no answers because they were legal conclusions but, if required to answer, the defendant denied:

9. Jurisdiction of this court arises under 28 U.S.C. § 1337.
10. Jurisdiction of this court arises under 28 U.S.C. § 1367.
11. Declaratory relief is available in this Court pursuant to 28 U.S.C. §§ 2201–2202.

....

13. ERC is subject to the personal jurisdiction of this Court.
14. ERC resides in the State of Indiana and this judicial district under the provisions of 28 U.S.C. § 1391(c)(2).
15. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b)(1).

....

17. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b)(2).<sup>370</sup>

Denying these allegations about jurisdiction and would seem, to me at least, to run afoul of Rule 11.<sup>371</sup>

By contrast, earlier the same year, in *Do It Best Corp. v. Heinen Hardware*, Judge Cosbey did it better. He opened a section of the order titled “Defendants’ Formulaic Responses Will Be Stricken” by recounting that “Defendants respond to thirteen of Plaintiff’s allegations in essentially the same way; they ‘deny material allegations contained in the corresponding paragraph of Plaintiff’s Complaint’ and state that ‘the same calls for a legal conclusion and documents or other items therein speak for themselves.’”<sup>372</sup> Judge Cosbey then recited Rule 8(b)(1)(B) that a party must admit or deny, Rule 8(b)(5) about lack of “knowledge or information sufficient to form a belief,” and noted, “[a]s both parties recognize, district courts within the Seventh Circuit Court of Appeals have consistently found that responses that an allegation is a ‘legal conclusion’ or that a document ‘speaks for itself’ are insufficient and contrary to the Federal Rules of Civil Procedure.”<sup>373</sup> He cited Magistrate Judge Cherry’s orders in *Northern Indiana Metals* and *Indiana Regional*

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370. Complaint at 2, *Keller*, 2018 WL 5650036 (No. 18-CV-15).

371. See FED. R. CIV. P. 11 (requiring that all pleadings, motions, or papers are not being presented for improper purposes and are warranted by existing laws and arguments).

372. *Do It Best Corp. v. Heinen Hardware, LLC*, No. 13-CV-69, 2013 WL 3421924, at \*4 (N.D. Ind. July 8, 2013).

373. *Id.* at \*4–5.

*Council of Carpenters* and then Judge Shadur's orders in *Donnelly v. Frank Shirey Cadillac* and the Appendix.<sup>374</sup>

Next, as noted above, Judge Cosbey focused attention on the defendant's filtered or layered denial of the allegations. The defendant first had denied "the material allegations contained in the corresponding paragraph of Plaintiff's Complaint," appended the refusal to answer the legal conclusions, and thereby left unclear which "immaterial" allegations might be left standing.<sup>375</sup> Unlike Judge Rodovich, Judge Cosbey was not willing to just throw a blanket denial over the allegations and instead ordered the defendant to replead with clarity. Like Judge Shadur, Judge Cosbey's goal was that the pleadings yield a clear statement of what facts and issues remained to be contested. That goal should not be controversial.

In 2017, in the Central District of Illinois, District Judge Sue Myerscough<sup>376</sup> clarified the relationship of *Iqbal* to the pleading of legal conclusions. In a bit of a turnabout, "Defendants Decatur Boys & Girls Club and America Boys & Girls Club request[ed] that the Court . . . strike paragraphs 42, 43, 44, 48, 68, 69, and 70 because those paragraphs are legal conclusions."<sup>377</sup> Judge Myerscough explained that, consistent with *Iqbal*, "[p]laintiffs are required to plead facts that indicate they have a plausible, as opposed to a speculative, right to relief"; however, she continued, "they are not prohibited from also pleading legal conclusions that might help to provide Defendants with notice of the claims brought against them or provide context for the factual allegations."<sup>378</sup> Here, the judge cited the versatile Shadur Appendix and a 1989 Supreme Court of the United States opinion, which Judge Shadur cited in the Appendix to show that "legal conclusions are an integral part of the federal notice pleading regime . . ."<sup>379</sup> Judge Myerscough then refused the defense request to strike the allegations of legal conclusions from the complaint.<sup>380</sup>

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374. *Id.* at \*5 (citing *N. Ind. Metals v. Iowa Express, Inc.*, No. 07-CV-414, 2008 WL 2756330, at \*3-4 (N.D. Ind. July 10, 2008); *Ind. Reg'l Council of Carpenters Pension Tr. Fund v. Fid. & Deposit Co. of Md.*, No. 06-CV-32, 2006 WL 3302642, at \*2 (N.D. Ind. Nov. 9, 2006); *Donnelly v. Frank Shirey Cadillac, Inc.*, No. 05-C-3520, 2005 WL 2445902, at \*1 (N.D. Ill. Sept. 29, 2005); *State Farm Mut. Auto. Ins. Co. v. Riley (State Farm v. Riley)*, 199 F.R.D. 276, 278 (N.D. Ill. 2001)).

375. *Id.*

376. *Myerscough, Sue Ellen*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/myerscough-sue-ellen> [<https://perma.cc/ZP7S-V6NP>] (last visited Apr. 5, 2021).

377. *T.K. ex rel. Killings v. Boys & Girls Clubs of Am.*, No. 16-CV-03056, 2017 WL 2464435, at \*5 (C.D. Ill. June 7, 2017).

378. *Id.*

379. *Id.* (citing *State Farm v. Riley*, 199 F.R.D. at 278 (citing *Neitzke v. Williams*, 490 U.S. 319, 325 (1989))).

380. *Id.* (discussing the court's decision to only strike paragraph 27 of the Seconded Amended Complaint, as duplicative of paragraph 25).

Fewer judges have cited Judge Shadur's Appendix with regard to answering pleaded legal conclusions than regarding documents speaking for themselves. Any number of reasons might account for this. Judges may believe the defendants need not answer legal conclusions, or, if they do, they may cite other cases. To be sure, Judge Shadur was a self-styled oracle on Rule 8 issues, but other judges have addressed the issue as well. This Article tracks Judge Shadur's Appendix into various jurisdictions but does not attempt to canvass the entire web of orders and opinions addressing the issues that Judge Shadur tackled in the Appendix. Perhaps, too, there are fewer citations of Judge Shadur's view about answering legal conclusions because none of his sentences about legal conclusions were as snappy as the one he began by recounting that "[t]his Court has been attempting to listen to such written materials for years (in the forlorn hope that one will indeed give voice)—but until some such writing does break its silence," the Judge's lessons about pleading would continue.<sup>381</sup>

### C. Affirmative Defenses

In 2008, Magistrate Judge Byron Cudmore<sup>382</sup> of the Central District of Illinois cited the Shadur Appendix regarding affirmative defenses. Doing the grunt work of a magistrate judge, Judge Cudmore combed through the fourteen affirmative defenses that Alan Silberman, Esq., of the Chicago firm of Sonnenschein Nath & Rosenthal, and William B. Koffel, Esq., of Boston's Foley Hoag, had filed on behalf of their client, Patni Computer Systems, Inc.<sup>383</sup> Notably, the defendant's attorneys neither admitted nor denied nine of the complaint's 108 allegations "as they call[ed] for conclusions of law . . . ."<sup>384</sup> Plaintiff's attorneys might have but did not seek to have the magistrate judge deem these allegations admitted.

Judge Cudmore first reviewed the Seventh Circuit Judge Manion's 1989 opinion in *Heller Financial, Inc. v. Midwhhey Powder Co.*,<sup>385</sup> which had set forth requirements for pleading affirmative defenses. He noted the Seventh Circuit had made clear that Rule 12(f) motions to strike "are disfavored," but, again, that removal of clutter that speeds the case along was okay.<sup>386</sup> Again citing *Heller*, Judge Cudmore explained that "[a]ffirmative defenses are pleadings and, therefore, are subject to all

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381. *State Farm v. Riley*, 199 F.R.D. at 279.

382. *Byron Cudmore*, BALLOTPEdia, [https://ballotpedia.org/Byron\\_Cudmore](https://ballotpedia.org/Byron_Cudmore) [<https://perma.cc/UG4N-EURX>] (last visited Apr. 5, 2021).

383. *Goel v. Patni Comput. Sys., Inc.*, No. 07-CV-1034, 2008 WL 11365217, at \*1 (C.D. Ill. Nov. 13, 2008).

384. Answer at 1–3, *Goel*, 2008 WL 11365217 (No. 07-CV-1034).

385. *Heller Fin., Inc. v. Midwhhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989).

386. FED. R. CIV. P. 12(f); *Goel*, 2008 WL 11365217, at \*1.

pleading requirements of the Federal Rules of Civil Procedure.”<sup>387</sup> He also explained that “bare bones conclusory allegations” were insufficient under Rules 8 and 12, citing *Heller* and Judge Castillo’s order in *Reis Robotics*.<sup>388</sup> However, he also cited an order from a district judge in the Central District of Illinois, Michael Mihm,<sup>389</sup> “declining to strike bare bones statute of limitation defense at an early stage in litigation.”<sup>390</sup> The magistrate judge also noted, citing *Heller*, that a judge might properly strike affirmative defenses “if they repeat arguments made in a motion to dismiss that have been rejected by the Court.”<sup>391</sup>

With the rules thus set out before him, Judge Cudmore addressed the fully briefed motion. The Chicago and Boston defense lawyers had first typed—or cut and pasted—“[t]he First Amended Complaint fails to state claims upon which relief may be granted” into their laundry list.<sup>392</sup> Citing an order by Northern District Judge James Alesia,<sup>393</sup> Judge Cudmore struck the first affirmative defense because “Defendant’s ‘bare bones’ recitation does not give notice of the grounds upon which it rests.”<sup>394</sup> The defendant’s attorneys argued that they had already presented the grounds for this defense in their motion to dismiss, and, likewise, they had similarly supported their second through fifth affirmative defenses when briefing the motions to dismiss. Why the defense attorneys relied upon that argument is unclear, because Judge Cudmore reminded that these were “arguments that were already addressed and rejected by this [Magistrate] Court and the District Court.”<sup>395</sup>

“The sixth affirmative defense,” Judge Cudmore continued, “states that ‘Plaintiffs were “exempt” employees under applicable Federal and State law who were not entitled to receive additional pay for “overtime” hours of work.’”<sup>396</sup> However, he noted that “Defendant does not state any

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387. *Goel*, 2008 WL 11365217, at \*1 (citing *Heller*, 883 F.2d at 1294).

388. FED. R. CIV. P. 8; FED. R. CIV. P. 12(f); *Goel*, 2008 WL 11365217, at \*1 (citing *Heller*, 883 F.2d at 1295; *Reis Robotics USA, Inc. v. Concept Indus., Inc.*, 462 F. Supp. 2d 897, 905–07 (N.D. Ill. 2006)).

389. *Mihm, Michael Martin*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/mihm-michael-martin> [<https://perma.cc/5CGC-GM3N>] (last visited Apr. 5, 2021).

390. *Goel*, 2008 WL 11365217, at \*1 (citing *Jackson v. Methodist Med. Ctr. of Ill.*, No. 06-1235, 2007 WL 128001 (C.D. Ill. Jan. 11, 2007)).

391. *Id.* (citing *Heller*, 883 F.2d at 1295).

392. *Id.*

393. *Alesia, James Henry*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/alesia-james-henry> [<https://perma.cc/E9TM-UXXG>] (last visited Apr. 5, 2021).

394. *Goel*, 2008 WL 11365217, at \*1 (citing *Renalds v. S.R.G. Rest. Grp.*, 119 F. Supp. 2d 800, 803 (N.D. Ill. 2000)). Judge Shadur would also have struck this 12(b)(6) claim masquerading as an affirmative defense, because the claim does not admit the allegations of the complaint. *See supra* pp. 941–42.

395. *Goel*, 2008 WL 11365217, at \*2.

396. *Id.*

grounds for this conclusion. Defendant should presumably have some idea why Plaintiffs are not entitled to overtime.”<sup>397</sup> He therefore ordered—or more properly, recommended to the district judge—the striking of the defense with leave to replead.<sup>398</sup>

Likewise, the judge recommended the striking of “the seventh (laches/unclean hands) and eighth (estoppel) affirmative defenses [because they] merely recite[d] the name of defense.”<sup>399</sup> For these cut-and-paste laundry list items, Judge Cudmore observed that “[n]o factual grounds are pled to suggest that Defendant is entitled to relief on those defenses. There is no hint of what conduct by Plaintiffs might support these defenses,” he continued, “nor is it otherwise apparent.”<sup>400</sup> He offered guidance that “[d]etailed allegations are not required, but Defendant should be able to set forth a short statement of the facts supporting these defenses.”<sup>401</sup>

With eight of fourteen affirmative defenses already gone, Judge Cudmore allowed the ninth—failure to mitigate damages—to remain. Appearing to make the argument for the defendant’s Chicago and Boston lawyers, the judge claimed that “it is at least arguable that discovery might be needed to uncover the factual basis for this defense.”<sup>402</sup> Here, Judge Cudmore cited three cases—none of them Judge Shadur’s—with two supporting not striking bare-bones affirmative defenses early in the litigation and a third supporting their striking.<sup>403</sup> Notwithstanding Rule 11’s requirement of investigation before pleading and Rule 15’s liberal amendment provision, Judge Cudmore allowed the bare-bones failure-to-mitigate affirmative defense to remain pending more discovery.<sup>404</sup>

With the eleventh affirmative defense—the statute of limitations—Judge Cudmore also allowed the bare-bones pleading to remain even though “Defendant does not identify the applicable statute of limitations [n]or explain why Goyal’s claim is barred. However,” the judge predicted that the plaintiff “presumably knows when his claim accrued and knows

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397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.* (citing *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989); *Builders Bank v. First Bank & Tr. Co.*, No. 03-C-4959, 2004 WL 626827 \*6 (N.D. Ill. Mar. 25, 2004)).

402. *Goel*, 2008 WL 11365217, at \*3.

403. *Id.* (citing *AAR Intern., Inc. v. Vacances Heliades S.A.*, 202 F. Supp. 2d 788, 800 (N.D. Ill. 2002); *Codest Eng’g v. Hyatt Int’l Corp.*, 954 F. Supp. 1224, 1230 (N.D. Ill. 1996); *Surface Shields, Inc. v. Poly-Tak Prot. Sys., Inc.*, 213 F.R.D. 307, 308 (N.D. Ill. 2003)).

404. *Goel*, 2008 WL 11365217, at \*2. In Colorado, where the author teaches and practices law, Rule 8 requires the pleading of details to support failure to mitigate damages. *Rule 8—General Rules of Pleading*, COLO. R. CIV. P. 8 (“Any mitigating circumstances to reduce the amount of damage shall be affirmatively pleaded.”).

the applicable statute of limitations. Goyal therefore has sufficient notice of this defense,” he concluded.<sup>405</sup> Whether there were arguments between the parties as to the applicable statute of limitations is unclear, but the judge did not require the defendant’s lawyers to plead the statute or the date that statute started running—minimal facts that would have taken almost no research or investigation. Again violating the norm of party presentment by making the defendant’s argument, the magistrate judge noted that “[i]t may also be that Defendant needs some discovery to determine whether the statute of limitations applies, though Defendant does not specifically assert this.”<sup>406</sup> He then again cited Judge Mihm’s order “declining to strike bare bones statute of limitations defense at early stage in litigation and discussing cases,” but also included, with a *cf.* signal, citation to Judge Shadur’s Appendix and quotation of his language on the unacceptable mouthing of statute of limitations and other defenses “in formula-like fashion.”<sup>407</sup>

The only other affirmative defense that the magistrate judge preserved was the thirteenth, which stated that “Counts III and VI [of the First Amended Complaint] are barred by the ‘doctrine of contract.’”<sup>408</sup> What that defense might mean is a mystery to me, and I teach Contracts. However, the magistrate judge found that though this was a repetition of the defendant’s attorneys’ argument in their motion to dismiss, the district judge had not dismissed this argument, and therefore the defense could remain. The gist, which the Chicago and Boston attorneys failed to present in their pleading, may have been that plaintiff’s unjust enrichment claim was invalid because there was a contract between the parties that would serve as the basis for the claim. Could not the attorneys have fleshed out their defense with a few more words?

That leaves the tenth, twelfth, and fourteenth affirmative defenses, all of which Judge Cudmore discussed and recommended striking. The tenth responded to claims that the court had already dismissed and therefore was unnecessary.<sup>409</sup> The twelfth failed to “give notice of the grounds upon which the ‘unjust enrichment’ defense rests,”<sup>410</sup> which the magistrate judge found problematic (though mouthing “doctrine of contract” was not). And, last, the fourteenth “simply reserves the right to

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405. *Goel*, 2008 WL 11365217, at \*3.

406. *Id.*

407. *Id.* (citing *Jackson v. Methodist Medical Center of Ill.*, No. 06-1235, 2007 WL 128001, at \*3 (C.D. Ill. 2007); *State Farm Mut. Auto. Ins. Co. v. Riley* (*State Farm v. Riley*), 199 F.R.D. 276, 278 (N.D. Ill. 2001)).

408. *Goel*, 2008 WL 11365217, at \*4; *see also* Complaint at 18, 20, *Goel*, 2008 WL 11365217 (No. 07-CV-1034).

409. *Goel*, 2008 WL 11365217, at \*3.

410. *Id.*

amend the Answer to add affirmative defenses revealed in discovery.”<sup>411</sup> Judge Cudmore noted, “That is not an affirmative defense and the reservation is unnecessary.”<sup>412</sup> Indeed, that’s what Rule 15 is for.<sup>413</sup>

Of course, had Judge Cudmore been a magistrate judge assigned to a case in Judge Shadur’s courtroom, he would not have had to have gone through the tedious examination of the defendant’s laundry list of affirmative defenses. Sua Sponte Shadur would have done the work had the attorneys been foolish enough to ignore his Appendix. Without additional charge to the defendant, and without the plaintiff’s attorney having to file a motion and, later, a reply in support of the motion, Judge Shadur would have directed the defense lawyers to plead proper affirmative defenses supported by foundational facts and, along the way, would have required they answer the allegations they dodged with the claim they were conclusions of law.

Back in the Northern District, Judge Cosbey demonstrated he was a complete Shadur acolyte with his handling of the affirmative defenses in *Do It Best v. Heinen Hardware*, which I discussed above.<sup>414</sup> He wrote that “[a]pplying the three-part [*Heller*] test to the instant case, all of Defendants’ fifteen affirmative defenses should be stricken.” Kaboom! “[T]he fifteenth affirmative defense, in which Defendants reserve the right to assert additional affirmative defenses discovered during the litigation,” he explained while unsheathing his sword, “fails the first part of the test because reserving the right to add additional affirmative defenses is not a proper affirmative defense.”<sup>415</sup> He then noted that “[t]he remaining fourteen affirmative defenses are merely one word or a phrase identifying the defenses, but wholly failing to set forth a short and plain statement of their nature . . . .”<sup>416</sup> At the end of his discussion of the affirmative defenses, Judge Cosbey cited Shadur’s Appendix and quoted him on the unacceptable, formula-like mouthing of purported affirmative defenses.<sup>417</sup>

Likewise, in 2013, Judge Cosbey used Shadur’s Appendix to dispatch other fact-free, frivolous affirmative defenses en masse. In *Malibu Media v. John Doe*, the defendant was nameless but did have the IP address of

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411. *Id.* at \*4.

412. *Id.* (citing *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989)).

413. See FED. R. CIV. P. 15.

414. See *Do It Best Corp. v. Heinen Hardware, LLC*, No. 13-CV-69, 2013 WL 3421924, at \*3–5 (N.D. Ind. July 8, 2013); *supra* pp. 962, 967.

415. *Do It Best Corp.*, 2013 WL 3421924, at \*3 (citing *United States v. Global Mortg. Funding, Inc.*, No. 07-CV-1275, 2008 WL 5264986, at \*5 (C.D. Cal. May 15, 2008); *Reis Robotics USA, Inc. v. Concept Indus., Inc.*, 462 F. Supp. 2d 897, 907 (N.D. Ill. 2006)). On the use of this purported defense, see Russell, *supra* note 7, at Part IV.

416. *Do It Best Corp.*, 2013 WL 3421924, at \*3 (citing *Heller*, 883 F.2d at 1294).

417. *Id.* at \*4.

50.148.89.255. Malibu Media’s attorneys moved to strike 50.148.89.255’s “second affirmative defense—that ‘Plaintiff’s claims are barred by the equitable doctrines of laches, unclean hands, waiver and estoppel’—as a bare conclusory allegation unsupported by any factual basis.”<sup>418</sup> Without belaboring the analysis or worrying whether discovery might turn up facts that could support these four, foundationless, and therefore frivolous affirmative defenses, Judge Cosbey cited Shadur’s Appendix as he chopped the second affirmative defense with all its subparts.<sup>419</sup>

In 2017, Magistrate Judge Cherry, a regular user of Shadur’s Appendix, struck two defenses masquerading as one but, at the same time, demonstrated how easily defense attorneys might avoid having judges strike their defenses. First, he cited *Reis Robotics* and Shadur’s Appendix and noted that “[f]ormula-like statement of the defenses listed in Rule 8(c) will not do.”<sup>420</sup> The attorney for defendant Ms. Rau, David Holub, Esq., had pleaded the series “reformation, waiver, or estoppel” as an affirmative defense. There being no predicate facts for either waiver or estoppel, Judge Cherry struck them both. However, “[r]egarding reformation, Rau has provided a basis for the defense. She asserts,” Judge Cherry explained, “that the absence of the vehicle from the policy was due to MIC’s errors or mistakes and are [*sic*] subject to equitable reformation.”<sup>421</sup> For Judge Cherry, for me, and, I think, for Judge Shadur, that is a sufficient predicate or foundational fact to move the defense from frivolous to legitimate. The plaintiff has a factual basis on which to investigate the absence of the vehicle from the policy. A little predicate goes a long way.

#### IX. SHADUR’S APPENDIX OUTSIDE THE SEVENTH CIRCUIT

Judge Shadur used his Appendix to discipline—in a Foucaultian sense—and punish defense attorneys who answered in his courtroom.<sup>422</sup> He cited the Appendix freely and often. His colleagues in the Northern District of Illinois also cited the Appendix, though they have less aggressively enforced Judge Shadur’s rules, particularly concerning affirmative defenses. Likewise, judges in his home circuit cited the

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418. *Malibu Media, LLC v. Doe*, No. 13-CV-30, 2013 WL 4048513, at \*2 (N.D. Ind. Aug. 9, 2013).

419. *Id.* (citing *Reis Robotics*, 462 F. Supp. 2d at 907 (citing *State Farm Mut. Auto. Ins. Co. v. Riley* (*State Farm v. Riley*), 199 F.R.D. 276, 279 (N.D. Ill. 2001))).

420. *Markel Ins. Co. v. United Emergency Med. Servs., LLC*, No. 16-CV-220, 2017 WL 942723, at \*3 (N.D. Ind. Mar. 10, 2017) (citing *Reis Robotics*, 462 F. Supp. 2d at 907 (quoting *State Farm v. Riley*, 199 F.R.D. at 279)).

421. *Id.*

422. See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (2d ed. 1995).

Appendix in order to ensure, as Judge Cherry explained, that the answer provides “adequate substantive guidance to the Plaintiff as to the Defendant[s’] position on the allegations . . . .”<sup>423</sup> More succinctly, Judge Cherry did not want either the plaintiff or the court to be “left to wonder” just what position defendants were adopting.

#### *A. Speaking Documents*

Outside Judge Shadur’s Seventh Circuit home, district court judges and magistrate judges also cited the Appendix in support of their own desire not to be left wondering what defendants meant by their answers. Within the First Circuit, for example, Magistrate Judge John Rich III<sup>424</sup> cited—approvingly might be too strong a word—Judge Shadur’s Appendix in a matter in which the plaintiff was suing the United States Attorney General Eric Holder in 2012. The U.S. Attorney who answered, John Osborn, Esq., deployed “the document speaks for itself” regarding the allegations of seven different paragraphs in the complaint.<sup>425</sup> Judge Rich cited the Appendix and quoted at length Judge Shadur on lawyers avoiding admissions or being lazy by claiming that a document “‘speaks for itself.’ This Court,” Judge Rich quoted, “has been attempting to listen to such written materials for years (in the forlorn hope that one will indeed give voice)—but until some such writing does break its silence, this Court will continue to require pleaders to employ one of the three alternatives that are permitted by Rule 8(b) in response to all allegations about the content of documents (or statutes or regulations).”<sup>426</sup>

The long quotation was a nice endorsement of Judge Shadur’s approach, but David Webbert, Esq., the plaintiff’s lawyer, had bungled and misquoted the documents that were speaking for themselves. Judge Rich “agree[d] with the defendant that Rule 8(b)(4) cannot reasonably be read to require a defendant, faced with a block quotation from a document in one paragraph of a complaint, to deny only those portions that are misquoted or mischaracterized and admit the rest.”<sup>427</sup> I feel that Judge Shadur would likely have agreed; when in federal court, if a lawyer wants to benefit from Shadur’s rule that defendants may not claim documents

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423. *Do It Best Corp. v. Heinen Hardware, LLC*, No. 13-CV-69, 2013 WL 3421924, at \*5 (N.D. Ind. July 8, 2013) (quoting *Indiana Reg’l Council of Carpenters Pension Tr. Fund v. Fid. & Deposit Co. of Maryland*, No. 06-CV-32, 2006 WL 3302642, at \*3 (N.D. Ind. Nov. 9, 2006)).

424. *John Rich*, BALLOTPEdia, [https://ballotpedia.org/John\\_Rich](https://ballotpedia.org/John_Rich) [<https://perma.cc/W4XZ-Y8W4>] (last visited Apr. 5, 2021); *Notice of Re-appointment of Magistrate Judge Rich*, U.S. DIST. CT., DIST. ME., <https://www.med.uscourts.gov/news/notice-re-appointment-magistrate-judge-rich> [<https://perma.cc/G79Z-KP2N>] (last visited Apr. 5, 2021).

425. *Sebunya v. Holder*, No. 12-CV-67, 2012 WL 5993160, at \*2 (D. Me. Nov. 30, 2012).

426. *Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Riley (State Farm v. Riley)*, 199 F.R.D. 276, 279 (N.D. Ill. 2001)).

427. *Id.* at \*3.

speak for themselves, the lawyer ought to quote the documents correctly. Judge Rich, though, was more doubtful. “In any event, even assuming *dubitante* that the rule imposes such a requirement,” he wrote, “I am at a loss to understand how a failure to admit that a document is partially accurately quoted or characterized inflates the cost of discovery: ultimately, there can be no real dispute that the document says what it says.”<sup>428</sup>

Judges within the Fifth Circuit also engaged Judge Shadur’s *State Farm v. Riley* Appendix.<sup>429</sup> In 2018, Professor Lisa Lavie Jordan and her Tulane Law School Environmental Law Clinic students schooled federal government lawyers on how to answer properly under the Federal Rules of Civil Procedure.<sup>430</sup> Professor Jordan and her students, on behalf of and in league with some environmental groups, challenged the United States Environmental Protection Agency’s “approval of Louisiana’s lowered requirements for dissolved oxygen levels in thirty-one water bodies north and west of Lakes Ponchartrain and Maurepas . . . .”<sup>431</sup> The EPA’s lawyers answered the complaint and amended complaint in the familiar, evasive fashion. Professor Jordan and her group moved to strike the answer claiming, *inter alia*, that the answer was “nonresponsive and not properly pleaded,” that the EPA claimed that “documents or reports . . . ‘speak for themselves,’” and, of course, that “the EPA also refused to respond to many of the allegations by contending they are ‘conclusions of law to which no response is required.’”<sup>432</sup>

Mary Ann Vial Lemmon,<sup>433</sup> United States District Judge for the Eastern District of Louisiana, instructed her fellow government employees from the Department of Justice and U.S. Attorney’s Office how to answer complaints. Judge Lemmon first noted, in a header, that “Defendants’ answer does not meet the requirements of Rule 8(b).”<sup>434</sup> She then included Rule 8(b) and its six subsections in her order, lest the government attorneys be unable to find a copy of the Federal Rules of Civil Procedure either online or in print.<sup>435</sup> Next, Judge Lemmon quoted from Federal Rules commentators Professors Steven Gensler and Lumen Mulligan, whose commentary about Rule 8 cites Shadur and sounds a lot

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428. *Id.*

429. I found no citations of the Appendix in opinions or orders concerning speaking documents in the Second, Third, or Fourth Circuits.

430. *Gulf Restoration Network v. United States Env’tl. Prot. Agency*, No. 18-CV-1632, 2018 WL 5297743 (E.D. La. Oct. 25, 2018).

431. *Id.* at \*1.

432. *Id.*

433. *Lemmon, Mary Ann Vial*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/lemmon-mary-ann-vial> [<https://perma.cc/A2LL-UPZW>] (last visited Apr. 5, 2021).

434. *Gulf Restoration Network*, 2018 WL 5297743, at \*1.

435. *Id.* at \*2.

like him: “It is (unfortunately) common for lawyers to use responses other than the three options of admitting, denying, and stating lack of information. For example,” Judge Lemmon continued quoting, “lawyers sometimes will respond to an allegation by saying that ‘it is a legal conclusion that requires no response.’ Also,” the judge continued, “when an allegation concerns the content of a document, lawyers sometimes will respond by saying that ‘the document speaks for itself.’”<sup>436</sup> Next, the judge noted that “[a]s numerous district courts have concluded: Responses that documents speak for themselves and that allegations are legal conclusions do not comply with rule 8(b)’s requirements.”<sup>437</sup> She then cited the Appendix, a number of other Shadur opinions, and some fellow travelers.<sup>438</sup> Applying these cases and principles, Judge Lemmon handed the clinic professor and her students a win and “conclude[d] that the defendants’ answer does not comply with Rule 8(b).”<sup>439</sup> Judge Lemmon struck the government’s answer and ordered the federal attorneys to replead.<sup>440</sup> In so doing, she also handed the students another lesson: when defendants ignore the Federal Civil Rules of Procedure in answering, they usually get a do-over.

Within the Fifth Circuit, a Mississippi Bankruptcy Judge also has cited Judge Shadur’s Appendix. In 2019, Judge Neil Olack<sup>441</sup> observed that “a litigant’s failure to deny that documents are what they purport to be, combined with a statement that the documents ‘speak for themselves,’ may constitute an admission as to their authenticity,” but he did not find that the answering party had thereby admitted signing any of the documents.<sup>442</sup> In a footnote, Judge Olack quoted Judge Shadur’s sentence about “attempting to listen to such written materials for years” and noted that “[w]hether an answer to an allegation in a complaint that a written document ‘speaks for itself’ satisfies the minimum pleading standards of Rule 7008(b) of the Federal Rules of Bankruptcy is not before the

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436. *Id.* (citing and quoting 1 FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY RULE 8).

437. *Id.* at \*3.

438. In addition to twice citing *State Farm Mutual Automobile Insurance Co. v. Riley* (*State Farm v. Riley*), 199 F.R.D. 276, 278 (N.D. Ill. 2001), Judge Lemmon cited *Thompson v. Retirement Plan for Employees of S.C. Johnson & Sons, Inc.*, Nos. 07-CV-1047, 08-CV-0245, 2008 WL 5377712, at \*1–2 (E.D. Wis. Dec. 22, 2008); *Northern Indiana Metals v. Iowa Express, Inc.*, No. 07-CV-414, 2008 WL 2756330, at \*3 (N.D. Ind. July 10, 2008); *Rudzinski v. Metropolitan Life Insurance Co.*, No. 05-C-0474, 2007 WL 2973830, at \*4 (N.D. Ill. Oct. 4, 2007); and *Lane v. Page*, 272 F.R.D. 581, 602–03 (D.N.M. 2011).

439. *Gulf Restoration Network*, 2018 WL 5297743, at \*3.

440. *Id.* at \*4.

441. *Hon. Neil P. Olack*, AM. COLL. BANKR., <https://www.americancollegeofbankruptcy.com/directory/neil-p-olack-311> [<https://perma.cc/DM6G-7RY3>] (last visited Apr. 5, 2021).

442. *In re World Health Jets LLC*, 610 B.R. 118, 143 (Bankr. S.D. Miss. 2019).

Court.”<sup>443</sup> Though the question was not before the court, Judge Olack swung the door open wide. Federal Rule of Bankruptcy Procedure 7008 shares the title “General Rules of Pleading” with FRCP 8. Rule 7008 begins by noting that “[FRCP 8] applies in adversary proceedings.”<sup>444</sup> Thus, Judge Olack connected Judge Shadur’s pleading rules to the United States Bankruptcy Court for the Southern District of Mississippi.

Judge Shadur’s Appendix has also found an audience within the Sixth Circuit’s district courts. In 2009, Judge Denise Page Hood,<sup>445</sup> of the United States District Court for the Eastern District of Michigan, cited the Shadur Appendix approvingly when a plaintiff suing the Ford Motor Company “challenged 19 responses that indicated that the document and testimony ‘speaks for themselves.’” After quoting Judge Shadur’s pithy language about lawyers who engaged in avoidance or laziness by using the “unacceptable device” of “speaks for itself,” Judge Hood ordered Ford to “answer each paragraph of Plaintiffs’ complaint in accordance with the requirements set forth in Rule 8(b).”<sup>446</sup> Again, as in Louisiana, the judge allowed a do-over with no penalty for Ford after the plaintiff and the court expended considerable effort.

In 2013, four years after Judge Hood’s citation of Judge Shadur’s Appendix when she struck Ford’s answers, a Kentucky district court judge, Karen K. Caldwell,<sup>447</sup> noted that “[w]hile some courts have been quite colorful in their opposition to the practice of stating documents ‘speak for themselves,’ the Court has found little, if any, guidance from courts within the Sixth Circuit.”<sup>448</sup> Judge Caldwell considered a plaintiff’s motion seeking to strike forty-four paragraphs of the answer that “state that certain documents ‘speak for themselves’ and that they ‘deny anything stated or implied to the contrary.’ The other paragraphs,” Judge Caldwell noted, “follow a similar pattern.”<sup>449</sup>

Judge Caldwell found and cited the Shadur Appendix in a footnote,<sup>450</sup> but within the Sixth Circuit, Judge Caldwell found only one “speaks for itself” case, which involved a response to a request for admission, not an

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443. *Id.* at 143 n.10.

444. FED. R. BANKR. P. 7008.

445. *Hood, Denise Page*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/hood-denise-page> [<https://perma.cc/9LNA-2X9Q>] (last visited Apr. 5, 2021).

446. *Joseph v. Ford Motor Co.*, No. 06-10274, 2009 WL 10680506, at \*2 (E.D. Mich. Sept. 30, 2009).

447. *Caldwell, Karen K.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/caldwell-karen-k> [<https://perma.cc/LDU7-QGEA>] (last visited Apr. 5, 2021).

448. *Solis v. Hofmeister*, No. 12-CV-250, 2013 WL 12180720, at \*1 (E.D. Ky. Mar. 21, 2013).

449. *Id.* (citation omitted).

450. *Id.* at \*1 n.2 (citing *State Farm Mut. Auto. Ins. Co. v. Riley (State Farm v. Riley)*, 199 F.R.D. 276, 279 (N.D. Ill. 2001)).

answer to a complaint.<sup>451</sup> Notwithstanding Judge Hood’s citation of the *State Farm v. Riley* Appendix in her order involving Ford, Judge Caldwell did not cite her Sixth Circuit colleague’s case. “Recognizing that the Sixth Circuit generally disfavors the striking of pleadings,” Judge Caldwell wrote, “the Court finds such a remedy is not clearly warranted in this case.”<sup>452</sup>

Just a few months after Judge Caldwell decided not to strike any of the forty-four paragraphs that departed from Rule 8’s pathways, District Court Judge Timothy Black,<sup>453</sup> of the Sixth Circuit’s Southern District of Ohio, engaged in the same inquiry. Citing the Shadur Appendix, he noted—perhaps a little disapprovingly—that “[w]hile some courts have strongly opposed the practice of stating documents ‘speak for themselves,’ this Court has found little, if any, guidance from courts within the Sixth Circuit and therefore relies on the persuasive caselaw from other districts.”<sup>454</sup> Judge Black either did not find or chose not to cite the related orders of Judges Caldwell and Hood. Judge Black explained that “[w]hile Defendants’ answer repeatedly states that ‘the policies/documents/ERISA speak for themselves,’ they also either admit or deny each allegation.”<sup>455</sup> Impatient with the whole exercise, Judge Black ordered everyone to plead better. “After careful review of both the complaint and the answer, the Court finds that both documents need to be amended in order to proceed,” he held. “Specifically,” he lectured, “Plaintiff must advance specific allegations from the language of the documents/policy instead of interpreting or paraphrasing to avoid Defendants need to state that the documents/policy ‘speaks for itself.’ Defendants,” he continued, “shall provide less-evasive answers and not rely on ‘the document speaks for itself.’” Raising his tone, Judge Black wrote, “[m]oreover, this Court is not interested in additional satellite litigation. The parties need to work cooperatively to narrow the relevant issues and elicit the relevant facts rather than,” he complained, “engage in a game of litigation semantics.”<sup>456</sup> I understand his exasperation, however, this sort of judicial impatience most often leaves plaintiffs in the dark, not defendants.

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451. *Robert Weiler Co. v. Kingston Twp.*, No. 07-CV-0760, 2008 WL 4758682, at \*5 (S.D. Ohio Oct. 27, 2008).

452. *Solis*, 2013 WL 12180720, at \*1.

453. *Black, Timothy Seymour*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/black-timothy-seymour> [<https://perma.cc/A8RF-3CHJ>] (last visited Apr. 5, 2021).

454. *Alcorn v. Parker Hannifin Corp.*, No. 13-CV-119, 2013 WL 12121515, at \*1 (S.D. Ohio June 27, 2013) (citation omitted).

455. *Alcorn*, 2013 WL 12121515, at \*1 (citing *Pavlik v. FDIC*, No. 10-C-816, 2010 WL 3937621, at \*3 (N.D. Ill. Oct. 5, 2010)).

456. *Alcorn*, 2013 WL 12121515, at \*2.

In 2019, United States Magistrate Judge H. Bruce Guyton<sup>457</sup> of the Sixth Circuit's Eastern District of Tennessee, issued an order in a matter in which the plaintiff sued under the Fair Debt Collection Practices Act.<sup>458</sup> Among the plaintiff's complaints was that for fourteen allegations, the defendant creditor "improperly state[d] that the statute or document speaks for itself and do[es] not require a response."<sup>459</sup> The plaintiff asked "the Court to enter an order requiring the Defendants to amend their Answer to comply with Federal Rule of Civil Procedure 8(b), or for the Court to deem the allegations in the Complaint admitted."<sup>460</sup> Judge Guyton found and cited Judge Hood's order in the *Ford* case,<sup>461</sup> cited Judge Shadur's Appendix, added citations from North Carolina,<sup>462</sup> Texas,<sup>463</sup> and Indiana,<sup>464</sup> and then without hemming or hawing ordered that "Defendants are instructed to amend their answers to the challenged paragraphs to clearly state whether they admit, deny, or lack sufficient information to form a belief as to the truth of an averment."<sup>465</sup>

The Eighth Circuit has thus far not been friendly to Judge Shadur's approach. Only one case cites his Appendix. And not approvingly.

Magistrate Judge Daneta Wollman,<sup>466</sup> from the Western Division of the District of South Dakota, dealt in 2018 with a plaintiff's motion to strike twenty paragraphs of an answer in which the defendant claimed the "documents speak for themselves."<sup>467</sup> Judge Wollman noted that "[i]n support of his motion, Plaintiff relies on caselaw from the Northern District of Indiana, the Northern District of Georgia, the Middle District

457. *Bruce Guyton*, BALLOTPEDIA, [https://ballotpedia.org/Bruce\\_Guyton](https://ballotpedia.org/Bruce_Guyton) [<https://perma.cc/EE67-9VUV>] (last visited Apr. 5, 2021); *H. Bruce Guyton*, BLOOMBERG, <https://www.bloomberg.com/profile/person/15879383> [<https://perma.cc/C3UB-H5SG>] (last visited Apr. 5, 2021).

458. *Forsythe v. First Fin. Inv. Fund Holdings, LLC*, No. 19-CV-79, 2019 WL 3979642, at \*1 (E.D. Tenn. Aug. 22, 2019); 15 U.S.C. § 1692 *et seq.*

459. *Forsythe*, 2019 WL 3979642, at \*1.

460. *Id.*

461. *Joseph v. Ford Motor Co.*, No. 06-10274, 2009 WL 10680506, at \*2 (E.D. Mich. Sept. 30, 2009).

462. *Farrell v. Pike*, 342 F. Supp. 2d 433, 440 (M.D.N.C. 2004).

463. *Nichia Corp. v. Vizio, Inc.*, No. 16-CV-00875, 2017 WL 10442228, at \*2 (E.D. Tex. Nov. 15, 2017).

464. *Do It Best Corp. v. Heinen Hardware, LLC*, No. 13-CV-69, 2013 WL 3421924, at \*6 (N.D. Ind. July 8, 2013).

465. *Forsythe*, 2019 WL 3979642, at \*2.

466. *Daneta Wollmann*, BALLOTPEDIA, [https://ballotpedia.org/Daneta\\_Wollmann](https://ballotpedia.org/Daneta_Wollmann) [<https://perma.cc/43UT-LRZ3>] (last visited Apr. 5, 2021); *U.S. Attorney Attends Investiture of U.S. Magistrate Judge*, U.S. ATT'Y'S OFF., DIST. S. DAK. (May 15, 2018), <https://www.justice.gov/usao-sd/pr/us-attorney-attends-investiture-us-magistrate-judge> [<https://perma.cc/Y9Q4-AUJS>].

467. *Hobbs v. Emps. Mut. Cas. Co.*, No. 17-CV-05040, 2018 WL 1221166, at \*2 (D.S.D. Mar. 8, 2018).

of Pennsylvania, and the Northern District of Illinois.”<sup>468</sup> “However,” Judge Wollman wrote, “Plaintiff fails to identify a single Eighth Circuit case in support of his position.”<sup>469</sup> Judge Wollman then noted that “[o]ther federal district courts have arrived at a conclusion opposite to that urged by Plaintiff,” citing two cases from the Western District of Missouri.<sup>470</sup>

Within the Ninth Circuit, the first citation of Judge Shadur’s Appendix was in 2008 in the Eastern District of California. District Judge Lawrence J. O’Neill<sup>471</sup> stated, as the topic sentence of a paragraph, that “[c]ourts do not tolerate the ‘speaks for itself response . . . .’”<sup>472</sup> Judge O’Neill then inserted Judge Shadur’s sentences about his forlornly hoping over the years that a document might speak after lazy (or concealing) lawyers claimed the document could indeed speak.<sup>473</sup>

In 2015, Judge Susan Watters<sup>474</sup> of the District of Montana cited Shadur’s Appendix regarding an odd argument that the plaintiff really should not have raised. The Billings Clinic had answered a number of the plaintiff’s allegations, which he brought as personal representative of the estate of a woman who died after being admitted to the Billings Clinic. The Clinic’s three lawyers, from the Speare Law Firm in Billings, answered first that “documents speak for themselves” but then either admitted or denied the allegation.<sup>475</sup> Judge Watters noted correctly that Judge Shadur’s Appendix “simply says what Rule 8 says, which is that it is not sufficient for a party to assert *only* that the document ‘speaks for itself.’” Correctly explaining the Appendix, Judge Watters noted that “[t]he party must also still ‘employ one of the three alternatives that are

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468. *Id.* at \*2 n.2 (citing *Valley Forge Ins. Co. v. Hartford Iron & Metal Inc.*, No. 14-CV-00006, 2015 WL 5730662 (N.D. Ind. Sept. 30, 2015); *Sinclair Cattle Co. v. Ward*, No. 14-CV-1144, 2015 WL 6125260 (M.D. Pa. Oct. 16, 2015); *FDIC v. Stovall*, No. 14-CV-00029, 2014 WL 8251465 (N.D. Ga. Oct. 2, 2014); *State Farm Mut. Auto Ins. Co. v. Riley (State Farm v. Riley)*, 199 F.R.D. 276 (N.D. Ill. 2001)).

469. *Hobbs*, 2018 WL 1221166, at \*2.

470. *Id.* at \*3 (citing *Thornburg v. Open Dealer Exch., LLC*, No. 17-CV-6056, 2018 WL 340050 (W.D. Mo. Jan. 9, 2018); *Eternal Invs., LLC v. City of Lee’s Summit*, No. 05-CV-5021, 2006 WL 573919 (W.D. Mo. Mar. 8, 2006)).

471. *O’Neill, Lawrence Joseph*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/oneill-lawrence-joseph> [<https://perma.cc/SJ48-G28N>] (last visited Apr. 5, 2021).

472. *Frank v. Wilbur-Ellis Co. Salaried Emps. LTD Plan*, No. CV-F-080284, 2008 WL 4370095, at \*4 (E.D. Cal. Sept. 24, 2008).

473. *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Riley (State Farm v. Riley)*, 199 F.R.D. 276, 279 (N.D. Ill. 2001)).

474. *Watters, Susan Pamela*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/watters-susan-pamela> [<https://perma.cc/42UN-JJHX>] (last visited Apr. 5, 2021).

475. *Osborne v. Billings Clinic*, No. 14-CV-126, 2015 WL 13466114, at \*2 (D. Mont. Mar. 30, 2015).

permitted by Rule 8(b).”<sup>476</sup> The judge then gave the plaintiff a bit of a swat, saying, “[h]is motion with respect to this issue is denied and it is questionable whether this portion of Osborne’s motion was brought in good faith.”<sup>477</sup>

Within the Tenth Circuit, Judge James Browning<sup>478</sup> of the District for New Mexico was the first judge to cite the Shadur Appendix concerning documents that speak.<sup>479</sup> In a 2011 order in *Lane v. Page*, Judge Browning encountered a variety of evasive defense tactics, including the claims that a Proxy Statement “speaks for itself.”<sup>480</sup> Citing the Shadur Appendix and other support, Judge Browning made the defendants replead their answers.<sup>481</sup> Judge Browning’s order appears in the *FRD*.<sup>482</sup>

In 2018, Judge Browning issued another order—one that also appears in the *FRD*—that cites *Lane v. Page*, includes again citation of the Shadur Appendix, and addresses again the pleading issues that concerned Shadur—speaking documents, refusal to respond to legal conclusions—and is heavy with citations from within the Seventh Circuit.<sup>483</sup> The defendant had answered a number of allegations with this model: “Defendants admit the allegations contained in Paragraph 56 of the Complaint and state that the letter speaks for itself.” The plaintiff moved to strike or for more definite statement. Citing his own order from a 2015 case, Judge Browning makes clear that if a defendant states that an allegation seeks a legal conclusion but also admits or denies the allegation, the response is proper.<sup>484</sup> He mapped that same analysis onto answers that admit or deny before adding that the document speaks for itself.<sup>485</sup>

Last, and hardly least among the federal cases in the various circuits that cite Judge Shadur’s Appendix regarding answers that documents speak for themselves is the 2014 order from the Eleventh Circuit’s Northern District of Georgia. Senior District Judge William C.

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476. *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Riley* (*State Farm v. Riley*), 199 F.R.D. 276, 278 (N.D. Ill. 2001)).

477. *Id.*

478. *Browning, James O.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/browning-james-o> (last visited Apr. 5, 2021).

479. *Lane v. Page*, 272 F.R.D. 581, 603 (D.N.M. 2011), *overruled by* *Tanner v. McMurray*, 429 F. Supp. 3d 1047 (D.N.M. 2019).

480. The phrase “proxy statement” literally mean speaks for someone else, so the lawyers really were answering that the proxy statement spoke for itself when it spoke for someone else.

481. *Lane*, 272 F.R.D. at 603.

482. *Id.* at 581.

483. *Martinez v. Naranjo*, 328 F.R.D. 581 (D.N.M. 2018).

484. *Id.* at 599.

485. See also Judge Browning’s order in *Kassa v. Plans Admin. Comm. of Citigroup, Inc.*, No. CIV 10-0933, 2011 WL 13289818, at \*4 (D.N.M. Apr. 27, 2011), which presents the same analysis using sometimes identical language.

O’Kelley<sup>486</sup> titled the third section of his order “The Document Speaks for Itself.” He then wrote: “A pox upon these words. They have no place in a proper response—whether it be made in response to discovery requests or an allegation in a complaint or counterclaim.”<sup>487</sup> One suspects that he and Judge Shadur were friends.

Judge O’Kelley experienced the frustration that plaintiffs’ lawyers feel when they read answers. “More than half of defendants’ responses to plaintiff’s complaint begin with the statement that ‘[t]he [referenced documents] are written documents that speak for themselves,’” he noted unhappily. “Stating that a document ‘speaks for itself’ is nonsensical and completely contrary to the Federal Rules of Civil Procedure,” he thundered.<sup>488</sup> In a paragraph that cited the Shadur Appendix, the judge tried an analogy: “No reasonable party would deny an allegation describing an event on the basis that ‘the events described in paragraph [x] speak for themselves.’”<sup>489</sup> “There is no reason to change that eminently reasonable position,” he explained, “because a fact is or may have been described in a document rather than described in the abstract.”<sup>490</sup>

Like Judge Shadur, Judge O’Kelley focused on the actual impact of courts allowing bad answers. “The practical implication of these pseudo-responses is that a party must request much broader discovery because the opposing party did not really admit anything,” the senior judge explained. He continued, “Not only does this needlessly increase the costs of litigation—something that this court strives to avoid—but the discovery process may devolve into a battle royale of broad requests against worthless responses. At this juncture,” he explained, “the ‘document speaks for itself’ line may reappear as a faux-answer to a request for admission or interrogatory where it will be equally unwelcome.”<sup>491</sup> He concluded by noting that “[t]wo things are certain: the exercise is a waste of the parties’ money and scarce judicial resources.”<sup>492</sup> Like other judges, Judge O’Kelley focused on the waste of

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486. *O’Kelley, William Clark*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/okelley-william-clark> [<https://perma.cc/2QSH-KN3Z>] (last visited Apr. 5, 2021).

487. *FDIC v. Stovall*, No. 14-CV-00029, 2014 WL 8251465, at \*11 (N.D. Ga. Oct. 2, 2014). See Josh Sundloff, *The Document Speaks for Itself: “A Pox Upon These Words”*, UTAH B.J., September/October 2016, at 30 (2016) (describing the emptiness of the phrase “the document speaks for itself”).

488. *Stovall*, 2014 WL 8251465, at \*11.

489. *Id.* at \*12.

490. *Id.*

491. *Id.* (citing *Lewis v. Michaels Stores, Inc.*, No. 05-CV-1323, 2007 WL 2021833, at \*3 n.1 (M.D. Fla. July 12, 2007) (“The tautological ‘objection’ that the finder of fact can read the document for itself to see if the quote is accurate is not a legitimate objection but an evasion of the responsibility to either admit or deny a request for admission.”)).

492. *Id.*

the court's time—his time—and the additional expense to the plaintiff in investigating, proving, or forcing the admission of allegations that the Rules required defendants to simply admit or deny. Judge O'Kelley understood that plaintiffs, in response to their complaints, ought to receive the truth costlessly. Imposing costs on the plaintiff to receive information that the defendant is obliged to admit for free is inefficient.

Of course, Judge O'Kelley ordered the defendants to replead.<sup>493</sup>

### B. Legal Conclusions

Moving numerically through the circuits again, no judges in the First through Fourth Circuits cited Judge Shadur's Appendix on the issue of answering pleaded legal conclusions. However, district court judges in the Fifth Circuit have twice cited Judge Shadur's Appendix when touching the issue.

As noted above, Professor Jordan of Tulane's Environmental Law Clinic and her students successfully challenged an answer from the United States Department of Justice. The federal government's lawyers claimed unsuccessfully that documents spoke for themselves, and "[l]ikewise, defendants' answer repeatedly states that certain allegations are 'legal conclusions requiring no answer.'"<sup>494</sup> Not so, said Judge Lemmon, citing the Shadur Appendix and other cases that she included when rejecting the speaking documents claim.<sup>495</sup>

In 2019, another judge within the Fifth Circuit cited Judge Shadur's Appendix when forcing a defendant to replead an answer. District Judge Andrew Hanen<sup>496</sup> of the Southern District of Texas considered a motion by the state of New Jersey, as defendant-intervenor, challenging the answers of Justice Department lawyers in *Texas v. United States*.<sup>497</sup> Judge Hanen included some examples. The amended complaint alleged that:

219. The Plaintiff States have standing because they have a "personal stake" in the outcome of this litigation. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014).<sup>498</sup>

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493. *Id.* at \*1.

494. *Gulf Restoration Network v. United States Env'tl. Prot. Agency*, CV 18-1632, 2018 WL 5297743, at \*2-3 (E.D. La. Oct. 25, 2018).

495. *Goel v. Patni Computer Sys., Inc.*, No. 07-CV-1034, 2008 WL 11365217, at \*2 (C.D. Ill. 2008).

496. *Hanen, Andrew S.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/hanen-andrew-s> (last visited Apr. 5, 2021).

497. *Texas v. United States*, No. 18-CV-00068, 2019 WL 10984476, at \*2 (S.D. Tex. Jan. 9, 2019).

498. *Id.* at \*2 (citing Amended Complaint at 52, *Texas*, 2019 WL 10984476).

To which the defendant United States' lawyers responded:

219. Paragraph 219 sets forth Plaintiffs' jurisdictional allegations that present legal conclusions and questions of law to be determined solely by the Court, and to which no response is necessary. Defendants aver that *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014) speaks for itself.<sup>499</sup>

Judge Hanen first educated the government's lawyers about the purpose of pleading. Citing my late colleague Charles Alan Wright and Arthur Miller's treatise, the judge noted that the "theory of Rule 8(b) is that a defendant's pleading should apprise the opponent of those allegations in the complaint that stand admitted and will not be in issue at trial and those that are contested and will require proof to be established to enable the plaintiff to prevail."<sup>500</sup> After this necessary, pedestrian start, he then noted that "[l]egal conclusions, like factual allegations, require a response," and in support cited a case from the Middle District of Pennsylvania, the Tulane Environmental Law Clinic's case, and Judge Shadur's Appendix.<sup>501</sup> Speaking personally, I am disappointed that Justice Department lawyers choose to practice law in this fashion as if they were, for example, auto insurance defense lawyers trying to wear down a TV-advertising plaintiff's lawyer and an injured client.<sup>502</sup> I am naïve, I suppose, in thinking that Justice Department lawyers ought to set a good example for the legal profession. Judge Hanen did not express the same disappointment, but he did make the federal government's lawyers replead their answer.<sup>503</sup>

No district courts within the Sixth Circuit have cited Judge Shadur's Appendix regarding refusal to answer legal conclusions, and I have already discussed the Seventh Circuit. One judge within the Eighth Circuit has cited the Shadur Appendix on the legal conclusions issue.

Within the Eastern District of Missouri, District Judge Charles Shaw<sup>504</sup> cited Judge Shadur's Appendix in 2013 after a defendant's lawyer's evasive answers appear to have gotten under the judge's skin; in response, he gave the defendants pretty much the full Shadur

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499. *Id.* (citing Federal Defendants' Answer at 28, *Texas*, 2019 WL 10984476).

500. *Id.* (citing 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1261 (3d ed. 2018)).

501. *Id.* (citing *Kegerise v. Susquehanna Twp. Sch. Dist.*, 321 F.R.D. 121, 124 (M.D. Pa. 2016); *Gulf Restoration Network v. EPA*, No: 18-1632, 2018 WL 5297743, at \*2-3 (E.D. La. Oct. 25, 2018); *State Farm Mut. Auto. Ins. Co. v. Riley (State Farm v. Riley)*, 199 F.R.D. 276, 278 (N.D. Ill. 2001)).

502. Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1494 n.38 (2009); Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 818 (2011); Russell, *supra* note 7, at Section III.B.

503. *Texas*, 2019 WL 10984476, at \*2.

504. *Shaw, Charles Alexander*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/shaw-charles-alexander> (last visited Apr. 5, 2021).

treatment.<sup>505</sup> In a diversity matter, some Lloyds of London underwriters sought “a declaration that a commercial property insurance policy they issued to defendant SSDD, LLC” was void because of the insured’s misrepresentations and omissions.<sup>506</sup> Judge Shaw noted that, *sua sponte*, he had “ordered Underwriters to amend its complaint to allege, among other things, ‘the state of citizenship of each member of defendant SSDD, LLC, including the state of principal place of business for corporate members, and the state of citizenship of all members of any LLC or partnership members.’”<sup>507</sup> Complying with the Court’s order, the Underwriter’s Amended Complaint alleged:

3. SSDD is the Named Insured under the Policy. SSDD is a limited liability company organized under the laws of Delaware with its principal place of business in Dallas, Texas and SSDD is authorized and/or licensed to do business in Missouri. Paul Weismann is the sole owner, member, manager and shareholder of SSDD and is a citizen of Connecticut.<sup>508</sup>

Apparently oblivious to the Court’s having ordered the plaintiff to upgrade this paragraph of the complaint to identify details sufficient to establish (if admitted) diversity of citizenship, defendant SSDD’s lawyers, from the St. Louis law firm of Behr and McCarter,<sup>509</sup> responded with a paragraph of complete evasion:

3. SSDD admits that it is the named insured on the Policy, but further states that there are legal conclusions contained in Paragraph 3 and, therefore, Paragraph 3 does not require a response. To the extent a response is required, SSDD denies the remainder of Paragraph 3.<sup>510</sup>

After smelling the allegation of a legal conclusion, the St. Louis lawyers refused to address anything other than that their client, SSDD, was the insured. Taken seriously, their denial of “the Remainder of Paragraph 3” was a denial that their client, SSDD, LLC was a limited liability company; that the LLC had organized in Delaware; that the LLC’s principal place of business was in Dallas; and that Paul Weismann, with whom one can presume the lawyers dealt with on a regular basis, lived in Connecticut and was the sole owner, member, manager, and shareholder of the LLC. Imagining how the plaintiff might have alleged that the defendant was a limited liability company or that Mr. Weissman

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505. *Certain Underwriters at Lloyd’s, London Subscribing to Certificate No. IPSI 12559 v. SSDD, LLC*, No. 13-CV-193, 2013 WL 6801832 (E.D. Mo. Dec. 23, 2013).

506. *Id.* at \*1.

507. *Id.* at \*4.

508. Amended Complaint ¶ 3, *Certain Underwriters at Lloyd’s*, 2013 WL 6801832 (No. 13-CV-193).

509. Anthony R. Behr, Esq., and Jason W. Kinser, Esq., of Behr and McCarter, St. Louis, MO, represented the defendant. *Certain Underwriters at Lloyd’s*, 2013 WL 6801832.

510. *Certain Underwriters at Lloyd’s*, 2013 WL 6801832, at \*4.

was the sole member of the LLC without alleging a legal conclusion is difficult—impossible really. Exactly what set of facts the defendant’s lawyers might have been willing to admit that satisfied the diversity jurisdiction requirements—as Judge Shaw had specified—is also impossible to imagine.

Sounding beyond annoyed, Judge Shaw’s order is a Shaduresque order that lawyers within the Eighth Circuit might adapt for their own use when facing frivolous answers. Judge Shaw reviews Rule 8’s three options of admit, deny, or lack of sufficient knowledge or information to form a belief; and the effect of failing to deny.<sup>511</sup> Judge Shaw next covered ground that Judge Shadur did not explore in detail in his Appendix, namely, when a defendant may not claim to lack “sufficient information or knowledge.” Quoting fellow federal judges from Pennsylvania and the District of Columbia as well as Professors Wright and Miller’s treatise, Judge Shaw explained that answering defendants must be honest and may not capriciously claim to lack information; that a defendant cannot claim to lack knowledge that easy investigation will reveal; that defendant may claim to have insufficient information about matters of general knowledge or public record; and that federal courts will treat a corporation as knowing the acts of its agents.<sup>512</sup>

Perhaps writing a draft of his own Shadur-like Appendix, Judge Shaw noted “SSDD’s answer that it need not respond to ‘legal conclusions’ finds no support in the language of Rule 8(b), which requires a response to all allegations.”<sup>513</sup> He cited the Shadur Appendix as well as a magistrate judge’s 2013 order from the Middle District of Florida.<sup>514</sup> In a footnote, Judge Shaw addressed the *Iqbal* issue: “[e]ven under the Supreme Court’s recent pronouncements concerning pleading standards, legal conclusions remain an integral part of a complaint . . . .”<sup>515</sup> Like Judge Shadur, he wrote that “[m]ost notably, a plaintiff’s allegation of subject matter jurisdiction is certainly a legal conclusion, but it must be answered.”<sup>516</sup> Unlike Judge Shadur, Judge Shaw held that “[t]he fact that SSDD’s answer to paragraph 3 concludes with a general denial does not make the otherwise improper response proper.”<sup>517</sup> He further explained

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511. *Id.* at \*3.

512. *Id.* (citing *Djourabchi v. Self*, 240 F.R.D. 5, 12 (D.D.C. 2006); *David v. Crompton & Knowles Corp.*, 58 F.R.D. 444, 446 (E.D. Pa. 1973); WRIGHT & MILLER, *supra* note 500, § 1262).

513. *Id.* at \*4 (citations omitted).

514. *Clarendon Am. Ins. Co. v. All Brothers Painting, Inc.*, No. 13-CV-934, 2013 WL 5921538, at \*3 (M.D. Fla. Nov. 4, 2013).

515. *Certain Underwriters at Lloyd’s*, 2013 WL 6801832, at \*4 n.1 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) and quoting from the case as follows: “While legal conclusions can provide the framework for a complaint, they must be supported by factual allegations.”).

516. *Id.*

517. *Id.* at \*5.

that “the concluding denial leaves plaintiffs and the Court to guess whether SSDD is denying the entire paragraph because it disputes all the averments, or because it disagrees with some part of the paragraph.”<sup>518</sup>

After observing that “many paragraphs of [Plaintiff] Underwriters’ Complaint lend themselves to convoluted answers because they contain multiple factual assertions,”<sup>519</sup> Judge Shaw dissected the denials and refusals to answer of defendant SSDD’s lawyers. “SSDD, as the entity at issue,” Judge Shaw explained, “has ‘knowledge or information sufficient to form a belief about the truth of the allegation,’ Rule 8(b)(5), concerning its states of incorporation and principal place of business, and therefore must either admit or deny those allegations.”<sup>520</sup> Likewise, SSDD had knowledge about its authority to do business in Missouri, a fact—or legal conclusion?—that SSDD had alleged in its own counterclaim.<sup>521</sup>

After all this brain damage, Judge Shaw made the defendants replead their answer properly. In place of their original dodge in responding to the Complaint’s third paragraph, in which SSDD had admitted only to being the insured, SSDD filed an amended answer that crisply stated:

3. SSDD denies that its principal place of business is Dallas, TX. SSDD admits the remainder of the allegations contained in Paragraph 3 of the Complaint.<sup>522</sup>

Of course, SSDD had sufficient information to respond to this allegation in precisely this informative way when the lawyers had answered nearly six months before. After conferrals, a motion, response, reply, and the judge’s labor to create a long order, the defendant-insured’s lawyers answered the complaint’s allegations as *Sua Sponte Shadur* would have required. But getting there took more effort in Judge Shaw’s courtroom than would have been the case in Judge Shadur’s. So far as I can tell, defendant SSDD’s lawyers repleaded their answer without any further sanction; the plaintiff’s lawyers did not receive the costs or fees of their efforts; and Mr. Weissman, the Connecticut man who was the LLC’s sole member, likely received from his lawyers a bill—to quote Judge Shadur—“for the added work and expense incurred in correcting [his] counsel’s own errors.”<sup>523</sup>

On the topic of pleading legal conclusions, Ninth Circuit courts have not cited Judge Shadur’s Appendix, but several in the Tenth Circuit have.

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518. *Id.*

519. *Id.* at \*4.

520. *Id.*

521. *Id.*

522. Defendant SSDD, LLC’s Amended Answer, Affirmative Defenses, and Counterclaims to Plaintiff’s Amended Complaint for Declaratory Judgment and Other Relief, at 2 ¶ 3, *Certain Underwriters at Lloyd’s*, 2013 WL 6801832 (No. 13-CV-193).

523. *State Farm Mut. Auto. Ins. Co. v. Riley (State Farm v. Riley)*, 199 F.R.D. 276, 279 (N.D. Ill. 2001).

As discussed above, Judge Browning parried the defendant's refusal to answer when documents spoke for themselves in *Lane v. Page*.<sup>524</sup> In the same order, he addressed defense refusal to respond to the allegation of legal conclusions. Citing Shadur's Appendix and Judge Stadtmueller's 2008 order in *Thompson v. Retirement Plan*,<sup>525</sup> which I discussed above,<sup>526</sup> he noted that "[r]esponses that documents speak for themselves and that allegations are legal conclusions do not comply with rule 8(b)'s requirements."<sup>527</sup> Carrying this pleading torch for New Mexico, Judge Browning has since written three orders that cite both the Shadur Appendix and his own order in *Lane v. Page*.<sup>528</sup> In 2018, Judge Browning made clear that rather than deeming improperly answered allegations admitted, he would order defendants to replead.<sup>529</sup> I believe his allowing defendants to replead guarantees that defendants will continue to evade answering.

Last, the Eleventh Circuit and Florida. Ms. Lilia Gomez, a pro se plaintiff, sued the United States in the Southern District of Florida seeking a refund of money she had paid to the IRS. Justice Department lawyers answered and counterclaimed, and Ms. Gomez refused to answer seven paragraphs because the allegations were "legal conclusion[s] to which no response is required" and ten paragraphs because the documents spoke for themselves with a qualified denial tacked on to nine of those "to the extent that any response is required."<sup>530</sup> The practice of asserting frivolous defenses is so widespread and so normalized that pro se plaintiffs engage in this evasion of Rule 8!

In 2010, District Judge Marcia Cooke<sup>531</sup> cited Judge Shadur's Appendix and Judge Stadtmueller's order in *Thompson v. Retirement Plan*. Judge Cooke deemed admitted the seven allegations that Ms. Gomez had not answered because the United States had counterclaimed with legal conclusions. Judge Cooke admitted these allegations because Ms. Gomez had not otherwise denied these allegations.<sup>532</sup> By contrast,

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524. See *supra* p. 982; see also *Lane v. Page*, 272 F.R.D. 581, 602 (D.N.M. 2011).

525. *Thompson v. Ret. Plan for Employees of S.C. Johnson & Sons, Inc.*, Nos. 07-CV-1047, 08-CV-0245, 2008 WL 5377712, at \*1–2 (E.D. Wis. Dec. 22, 2008).

526. See *supra* p. 964.

527. *Lane*, 272 F.R.D. at 602 (citing *Thompson*, 2008 WL 5377712, at \*1–2).

528. *Kassa v. Plans Admin. Comm. of Citigroup, Inc.*, 10-CV-0933, 2011 WL 13289818, at \*4 (D.N.M. Apr. 27, 2011); *N. New Mexicans Protecting Land Water & Rights v. United States*, 15-CV-0559, 2015 WL 8329509, at \*10–11 (D.N.M. Dec. 4, 2015); *Martinez v. Naranjo*, 328 F.R.D. 581, 599–600 (D.N.M. 2018).

529. *Martinez*, 328 F.R.D. at 600.

530. *Gomez v. United States*, 09-CV-22148, 2010 WL 3834211, at \*1 (S.D. Fla. Sept. 28, 2010).

531. *Cooke, Marcia G.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/cooke-marcia-g> [<https://perma.cc/J6LS-BZAC>] (last visited Apr. 5, 2021).

532. *Gomez*, 2010 WL 3834211, at \*2.

Ms. Gomez's tacking of denials onto her refusals to respond to documents that "speak for themselves" won her the chance to replead her answers to those counterclaim allegations.<sup>533</sup> Satisfying as it may be for me to see a federal judge use Rule 8(b)(6) to deem admitted improperly refused allegations, I am troubled to find the rule applied against a pro se plaintiff. For the sake of balance, perhaps the judges of the United States District Courts could apply some form of collateral estoppel against the lawyers of the Justice Department going forward.<sup>534</sup> Having enforced Federal Rule of Civil Procedure 8 against Ms. Gomez, federal lawyers can now all be expected to apply the rule correctly and without evasion when answering for the United States. If they step outside the rule as Ms. Gomez did, then wouldn't a fair result be to deem their responses admitted regardless of whether they tacked conditional language of denial? I know that's not going to happen.

In 2013, Magistrate Judge Thomas Smith<sup>535</sup> of Florida's Middle District, also cited Shadur's Appendix regarding the pleading of legal conclusions. For Lion Gables Realty Limited Partnership, Jeremy Springhart, Esq., filed florid, formal, somewhat antique responses to some of the plaintiff's allegations.<sup>536</sup> For example, Mr. Springhart answered that "[p]aragraph 10 of the Amended Complaint does not allege a single statement of ultimate facts to which Lion Gables may either admit or deny. Furthermore," the lawyer continued, "the allegations contained in Paragraph 10 are vague and ambiguous. In an abundance of caution, denied."<sup>537</sup> In a similar vein, Mr. Springhart answered some paragraphs with

Admitted to the extent that the terms and conditions contained in Exhibit [x] speak for themselves. Lion Gables denies any allegation or quotation that is inconsistent with the express language set forth in Exhibit [x]. In all other respects, the allegations contained in Paragraph

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533. *Id.*

534. *See supra* p. 974.

535. Thomas Smith, BALLOTPEDIA, [https://ballotpedia.org/Thomas\\_Smith](https://ballotpedia.org/Thomas_Smith) [<https://perma.cc/N2D6-LMWQ>] (last visited Apr. 5, 2021).

536. Wright and Miller explain that:

The codes [that predated the Federal Rules of Civil Procedure] required the pleader to set forth the facts underlying and demonstrating the existence of his cause of action. *In the parlance fashionable during that era*, the facts that were to be pleaded were the 'ultimate facts'; the inclusion of 'evidence' and 'conclusions of law' was improper. This compartmentalization of pleading categories proved to be a chimera. As a result, much litigant and judicial time and effort were expended in countless cases attempting to distinguish ultimate facts from evidence and conclusions of law.

WRIGHT & MILLER, *supra* note 142, § 1218 (emphasis added).

537. Clarendon Am. Ins. Co. v. All Bros. Painting, Inc., 13-CV-934, 2013 WL 5921538, at \*2 (M.D. Fla. Nov. 4, 2013).

[y] are vague and ambiguous, and Lion Gables is unable to frame a response. However, in an abundance of caution, denied.<sup>538</sup>

Citing Rule 8, the Shadur Appendix, a raft of cases from within the Seventh Circuit, and *Gomez*, Judge Smith ordered Mr. Springhart to replead his answer. Judge Smith noted that “[t]he fact that Lion Gables’ answers conclude with a general denial does not make its otherwise improper responses proper.”<sup>539</sup> He explained that “the manner in which the concluding denial is made leaves the reader to guess whether Lion Gables is denying the entire paragraph because it disputes all the averments, or because it disagrees with some part of the paragraph.”<sup>540</sup> Further, Judge Smith explained the harm to plaintiff Clarendon American Insurance Company and, indeed, to every plaintiff who encounters answers that depart from Rule 8. “Lion Gables’ objectionable answers have prejudiced Plaintiff because,” the judge explained, “proper answers would give Plaintiff notice of Lion Gables’ position on the facts alleged in the amended complaint and potentially allow the parties to narrow the issues and the scope of discovery.”<sup>541</sup>

### C. Affirmative Defenses

Outside the Seventh Circuit, federal judges have not cited Judge Shadur’s *State Farm v. Riley* Appendix with regard to the pleading of affirmative defenses. Even within the Northern District, there were few citations on this topic.<sup>542</sup> There are three likely reasons for the paucity of citations for this part of the Appendix. First, the Seventh Circuit Court of Appeals’ 1989 *Heller* decision covers the ground.<sup>543</sup> Second, other judges may simply disagree with Judge Shadur. Third, other judges may feel that Judge Shadur’s technical emphasis on what constitutes an affirmative defense is unimportant. And fourth, caught up in the issue of whether shifts in pleading after the *Iqbal* and *Twombly* decisions, judges have not landed on the side of requiring that defendants plead predicate or foundational facts with their affirmative defenses.<sup>544</sup>

## X. JUDGE SHADUR’S APPENDIX IN THE STATES

Judge Shadur’s Appendix has received little play in state court. I found only three state court judges cited Judge Shadur’s Appendix. Why? One

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538. *Id.*

539. *Id.* at \*3.

540. *Id.*

541. *Id.*

542. *In re Kmart Corp.*, 318 B.R. 409, 414 (Bankr. N.D. Ill. 2004).

543. *Heller Fin., Inc. v. Midwhay Powder Co.*, 883 F.2d 1286 (7th Cir. 1989); *see also supra* pp. 928–29 (discussing *Heller*).

544. *See In re Kmart Corp.*, 318 B.R. at 414.

obvious reason would be that Judge Shadur's Appendix concerns the *Federal Rules of Civil Procedure*. The Appendix has zero precedential weight in interpreting state rules of civil procedure; indeed, in other federal courts, the Appendix is merely persuasive authority. However, states that have patterned their rules of civil procedure after the federal rules typically agree that interpretations of the federal rules are at least persuasive authority regarding construction of the state rules of civil procedure.<sup>545</sup>

Another reason that Judge Shadur appears not be an influencer at the state level is that within state courts, attorneys—for both plaintiffs and defendants—are more tolerant of departures from Rule 8. Judges, too. State court judges allow defense attorneys to plead the documents speak for themselves, that legal conclusions need no reply, sometimes that strict proof is needed, that fact-free affirmative defenses are fine; and that reserving affirmative defenses until an attorney uncovers one through research is appropriate.<sup>546</sup> In their rules and commentary on the Federal Rules of Civil Procedure, Professors Steven S. Gensler and Lumen N. Mulligan comment that “it is unclear what exactly has led attorneys to think these other responses are sufficient,” and they suggested that “most think it is simply the result of lawyers accustomed to state-court practice taking pleading techniques they learned—and that are tolerated—in state court and assuming those techniques will also work in federal court.”<sup>547</sup> Recall that Judge Shadur speculated in 1989 that defense attorneys were all working from a formbook titled *Federal Rules of Civil Procedure: How Not To Plead*.<sup>548</sup>

Professors Gensler and Mulligan have absorbed Judge Shadur's concerns and style. They write:

It is (unfortunately) common for lawyers to use responses other than the three options of admitting, denying, and stating lack of information. For example, lawyers sometimes will respond to an allegation by saying that “it is a legal conclusion that requires no response.” Also, when an allegation concerns the content of a document, lawyers sometimes will respond by saying that “the document speaks for itself.”<sup>549</sup>

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545. *Montgomery v. State*, 967 So.2d 103, 106 (Ala. Crim. App. 2007); *Smith v. Illinois Cent. R.R. Co.*, 860 N.E.2d 332, 336 (Ill. 2006) (“[O]ur section 2-801 is patterned after Rule 23 of the Federal Rules of Civil Procedure, and federal decision interpreting Rule 23 are persuasive authority with regard to the question of class certification in Illinois.” (citation omitted)); *Exec. Mgmt., Ltd. v. Tigor Title Ins. Co.*, 38 P.3d 872, 876 (Nev. 2002); *Felix v. Galey Chevrolet, Inc.*, 49 N.E.3d 1224, 1230 (Ohio 2015); *Yahnke v. Carson*, 613 N.W.2d 102, 108 (Wis. 2000); *Neylan v. Vorwald*, N.W. 2d 648, 656 (Wis. 1985).

546. *See generally*, Russell, *supra* note 7.

547. STEVEN S. GENSLER & LUMEN N. MULLIGAN, 1 FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY, Rule 8 n.177 (2021).

548. *See Gilbert v. Johnston*, 127 F.R.D. 145, 146 (N.D. Ill. 1989).

549. GENSLER & MULLIGAN, *supra* note 547, at Rule 8, Admitting or Denying the Allegations.

The professors cite several Shadur orders, including the Appendix, in support of their comments on the pleading behavior of state court litigators.<sup>550</sup> Professors Gensler and Mulligan do not speculate on why state judges seem not to care about departures from the pleading rules.

#### A. State Courts

In 2001, Connecticut Judge Trial Referee Howard Zoarski<sup>551</sup> cited Judge Shadur's Appendix in a footnote.<sup>552</sup> The plaintiff moved to strike six paragraphs from the defendant's answer. The defendant's lawyers had responded, Judge Zoarski recounted, "by stating that '[t]he statements in [the paragraphs] consist solely of legal conclusions for which no responsive pleading is required. To the extent a responsive pleading is required, [the defendant] neither admits nor denies the allegations contained in [these paragraphs] as [the statutes] speaks for [themselves].'"<sup>553</sup> Judge Zoarski struck the responses after noting that "only three types of responses are proper in the answer: admit, deny or claim insufficient knowledge."<sup>554</sup> In his footnote citing the Appendix, Judge Zoarski quoted Judge Shadur's popular language about his years listening, forlornly, for documents to speak.<sup>555</sup> He granted the motion.<sup>556</sup>

Maryland is another state in which I found a state court citation of the Shadur Appendix in a judicial opinion or order. In a 2009 opinion for a three-judge panel of the Court of Special Appeals of Maryland,<sup>557</sup> Judge Alexander Wright, Jr.,<sup>558</sup> commented in a footnote that the appellants'

550. See GENSLER & MULLIGAN, *supra* note 547, at Rule 8 nn.178–79 (citing Kegerise v. Susquehanna Twp. Sch. Dist., 321 F.R.D. 121, 122–23, (M.D. Pa. 2016)); Bruce v. Anthem Ins. Cos., 2015 WL 1860002, \*2 (N.D. Tex. 2015); Lane v. Page, 272 F.R.D. 581, 602–03 (D.N.M. 2011); United States v. Vehicle 2007 Mack 600 Dump Truck, 680 F. Supp. 2d 816, 828 (E.D. Mich. 2010); **King Vision Pay Per View, Ltd. v. J.C. Dimitri's Rest., Inc.**, 180 F.R.D. 332, 333 (N.D. Ill. 1998); **State Farm Mut. Auto. Ins. Co. v. Riley (State Farm v. Riley)**, 199 F.R.D. 276, 278 (N.D. Ill. 2001); New Hampshire Ins. Co. v. Marinemax of Ohio, Inc., 408 F. Supp. 2d 526, 530 (N.D. Ohio 2006); Westfield High School L.I.F.E. Club v. City of Westfield, 249 F. Supp. 2d 98, 102 n.4 (D. Mass. 2003)) (Shadur orders in **bold**).

551. *Howard F. Zoarski*, BALLOTPEDIA, [https://ballotpedia.org/Howard\\_F.\\_Zoarski](https://ballotpedia.org/Howard_F._Zoarski) [<https://perma.cc/TL3Q-6AL4>] (last visited Apr. 5, 2021).

552. *Odell v. Wallingford Mun. Credit Union*, No. CV-106012228S, 2011 WL 5842760, at \*6 n.13 (Conn. Nov. 3, 2011).

553. *Id.* at \*6 (alterations in original).

554. *Id.*

555. *Id.* at \*6 n.13.

556. *Id.* at \*6.

557. The Court of Special Appeals is an intermediate appellate court below the Court of Appeals, which is Maryland's highest court. See *About the Maryland Court System*, MD. CTS. <https://mdcourts.gov/courts/about> [<https://perma.cc/4JLZ-MJVR>] (last visited Mar. 20, 2021).

558. *Alexander Wright*, BALLOTPEDIA, [https://ballotpedia.org/Alexander\\_Wright](https://ballotpedia.org/Alexander_Wright) [<https://perma.cc/9JWE-DDDD>] (last visited Apr. 5, 2021); *Hon. Alexander Wright, Jr. (Ret.) Joins the McCammon Group*, MCCAMMON GRP. (June 24, 2020),

answer, which had stated that “the terms of the contract speak for themselves,” might be “problematic in attempting to specify which allegations were, in fact, being denied.”<sup>559</sup> Judge Wright quoted “Maryland Rule 2–323(c), ‘[d]enials shall fairly meet the substance of the averments denied’”<sup>560</sup> and Judge Shadur’s Appendix including, of course, Shadur’s language about the silence of documents to which he listened, forlornly, for years. He also cited Wright and Miller’s comment that “[i]t is also insufficient to . . . claim that ‘the documents speak for themselves.’”<sup>561</sup> Contra, Judge Wright cited District Judge David Allan Katz’s<sup>562</sup> order from the Northern District of Ohio holding “responses that the documents ‘speak for themselves’ to be admissions that the documents read as [the complainant] represents.”<sup>563</sup> Finally, Judge Katz also referred to a late-nineteenth-century Maryland case that appears to have held that failure to deny a signature amounts to an admission, although the applicability of that case is, at best, obscure in my view.<sup>564</sup>

Appropriately enough, the third state judge I found citing Judge Shadur’s Appendix worked in the Richard J. Daley building not quite four blocks north on Dearborn Street from Judge Shadur’s courtroom. In 2012, Mathias Delort was Associate Judge of the Circuit Court of Cook County, where he served mostly in the Chancery Division.<sup>565</sup> Writing during the Great Recession that followed the economic crash of 2008, the judge described the Chancery Division as “the country’s largest and busiest foreclosure court . . . .”<sup>566</sup> The 2012 order citing Judge Shadur’s Appendix, which Judge Delort issued in response to a summary judgement motion that Wells Fargo Bank’s attorney had filed seeking to foreclose on a \$750,000 mortgage,<sup>567</sup> reads like something Judge Delort might have written if he had just lunched with Judge Shadur.

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<https://www.mccammongroup.com/press-releases/hon-alexander-wright-jr-ret-joins-the-mccammon-group/> [<https://perma.cc/8BGH-E52M>].

559. *Thomas v. Cap. Med. Mgmt. Assocs., LLC*, 985 A.2d 51, 61 n.4 (Md. Ct. Spec. App. 2009).

560. *Id.* (quoting Md. Rule 2-323(c)).

561. *Thomas*, 985 A.2d at 61 n.4 (citing 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1264 (3d ed. 2004)).

562. *Katz, David*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/katz-david> [<https://perma.cc/AF2U-KQES>] (last visited Apr. 5, 2021).

563. *Thomas*, 985 A.2d at 61 n.4 (citing *N.H. Ins. Co. v. Marinemax of Ohio, Inc.*, 408 F. Supp. 2d 526, 530 (N.D. Ohio 2006)).

564. *Thomas*, 985 A.2d at 61 n.4; *Banks v. McCosker*, 34 A. 539, 541 (Md. 1896).

565. *Mathias W. Delort*, ILL. CTS., [http://www.illinoiscourts.gov/appellatecourt/judges/bio\\_delort.asp](http://www.illinoiscourts.gov/appellatecourt/judges/bio_delort.asp) [<https://perma.cc/8HPS-W7RW>] (last visited Apr. 19, 2021).

566. *Green Tree Servicing v. Paz*, No. 10-CH-13621, 2011 WL 5077861 (Ill. Cir. Ct. Oct. 18, 2011).

567. *Wells Fargo Bank v. Brown*, No. 09 CH 13581, 2012 WL 3058670 (Ill. Cir. Ct. May 4, 2012).

The Cook County Chancery judge complained that “[z]ealous foreclosure defense attorneys have taken up the notion that if they deny substantive allegations in the complaint for specious reasons they can ‘force’ the lender to formally prove its allegations through time-wasting and laborious formal proofs at a trial. However,” Judge Delort commented that the Illinois’s procedural rules and foreclosure law “render this strategy utterly worthless.”<sup>568</sup>

Judge Delort explained how defense attorneys should answer in Illinois. He first noted that criminal defendants are entitled to plead not guilty “even if they know they are guilty.”<sup>569</sup> “In civil cases, however,” the judge explained, “defendants must admit allegations they know to be true.”<sup>570</sup> Judge Shadur, to my knowledge, never used this simple, useful contrast between civil and criminal cases.<sup>571</sup> Judge Delort then turned to the purpose of pleading: “A civil complaint and a proper truthful answer delimit the factual disputes which the court must adjudicate.”<sup>572</sup> Judge Delort then chided that demanding “strict proof” and claiming that “the document speaks for itself” were “improper,” citing, of course, Judge Shadur’s Appendix.<sup>573</sup> Continuing the lesson, he explained that in Illinois, “[a] proper answer to a complaint must contain an explicit admission, an explicit denial, or an explicit lack of knowledge assertion, of each allegation in the complaint.”<sup>574</sup>

In the paragraph succeeding the pleading lesson, Judge Delort explained that defense counsel may not claim insufficient knowledge about an allegation and then deny the allegation.<sup>575</sup> To support that defense counsel may not deny what they do not know, Judge Delort cited an order of Judge Shadur’s from January 2012, just a few months before Judge Delort issued his order in the foreclosure case. Judge Shadur had opened an order by writing: “This Court has completed the thankless task of wading through the 86-page Answer by a dozen of the defendants to the 200-paragraph First Amended Complaint (‘FAC’) in this multiproperty mortgage foreclosure action brought by United Central Bank (‘Bank’).”<sup>576</sup> Sua Sponte Shadur reviewed the answer, found it

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568. *Id.*

569. *Id.*

570. *Id.*

571. Judge Delort describes the criminal/civil pleading distinction again in *Parkway Bank & Trust Co. v. Korzen*, 2 N.E.3d 1052, 1069 ¶¶ 35–36 (Ill. App. Ct. 2013), as supplemented (Dec. 16, 2013).

572. *Wells Fargo Bank*, 2012 WL 3058670.

573. *Id.*

574. *Id.* (citing 735 ILL. COMP. STAT. 5/2-610(a)).

575. *Id.*

576. *United Cent. Bank v. JJST Inc.*, 10-C-5550, 2012 WL 171659, at \*1 (N.D. Ill. Jan. 20, 2012).

lacking, struck it, ordered the defendants to replead, and, as then had been customary for eleven years, ordered that “[n]o charge is to be made to these defendants by their counsel for the added work and expense incurred in correcting counsel's errors.” And, consistent with the Appendix, ordered “Defendants’ counsel . . . to apprise their clients to that effect by letter, with a copy to be transmitted to this Court's chambers as an informational matter (not for filing).”<sup>577</sup>

Likewise, Judge Delort ordered the defendants to replead their answer.<sup>578</sup> However, by waiting until after the foreclosing bank had filed a motion for summary judgment to scrutinize the answer, Judge Delort gained none of the efficiencies that Judge Shadur’s Appendix and sua sponte reviews created. Indeed, Judge Delort wrote that “while summary judgment is probably warranted on this record, and most of the defendants’ defenses are probably meritless, the better course of action is to strike the defendants’ answer and require them to file an amended answer before the court fully resolves any summary judgment motion.”<sup>579</sup> The delay in the grant of summary judgment was because the defendant’s answer was “problematic” according the Judge Delort.<sup>580</sup> Earlier resolution of the answer’s problems—sua sponte by Judge Delort or through motions by Wells Fargo’s lawyers—might have concluded the action sooner. There is, of course, no shame to be borne by the defense attorneys, as delay is the second-best goal in foreclosure defense.

Later in 2012, Judge Delort won election to the First District Appellate Court of Illinois<sup>581</sup> where he has continued to instruct Illinois defense attorneys to stop with their demands for “strict proof” and to otherwise comply with the rules of civil procedure when answering. The following year, in *Parkway Bank & Trust Co. v. Korzen*, Justice Delort repeated the lessons about pleading that he had offered while a Cook County judge.<sup>582</sup> Edward Margolis, Esq., a partner in the Chicago-based creditors’ rights firm Teller Levit & Silvertrust, describes *Parkway Bank* as “an opinion that should be mandatory reading for every practitioner . . .”<sup>583</sup> In 2018, Justice Delort cited his 2013 order in support of a lower court that had struck a defendant’s affirmative defenses with prejudice. In so doing,

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577. *Id.* at \*2.

578. *Wells Fargo Bank*, 2012 WL 3058670.

579. *Id.*

580. *Id.*

581. See *Mathias W. Delort*, *supra* note 565.

582. *Parkway Bank & Tr. Co. v. Korzen*, 2 N.E.3d 1052, 1069–70 ¶¶ 35–38 (Ill. App. Ct. 2013), *as supplemented* (Dec. 16, 2013) (“A proper answer to a complaint must contain an explicit admission or an explicit denial of each allegation in the complaint.” (citing 735 ILL. COMP. STAT. 5/2-610(a))).

583. Edward S. Margolis, *Pleading Lack of Knowledge: Not A Denial Under Illinois Law*, ILL. B.J., July 2016, at 44, 45.

Justice Delort noted that “[t]he answer contained numerous procedural deficiencies, including improperly demanding ‘strict proof’ of the plaintiff’s allegations.”<sup>584</sup> From Illinois’s First District Appellate Court, Justice Delort appears to have launched a campaign to upgrade the pleading in Illinois’s state courts, just as Judge Shadur had for federal pleading from his courtroom in the Northern District of Illinois.<sup>585</sup>

*B. The Vision Realized! Judge Shadur’s Appendix in Arizona*

The common law’s method to resolve the meaning of Rule 8 is first to await a controversy that turns into a case with an answer that offends the plaintiff’s lawyers so much that the lawyers decide that risking the possible wrath of the judge (and likely the defendant) is worthwhile when balanced against the time- and money-cost of conferring with the other side, drafting and filing a motion, awaiting a response, drafting and filing a reply, and then, perhaps after a hearing, awaiting a decision from the judge that, at best, allows the defendant a do-over, amended answer in which the defendant, now months later, must actually admit or deny or honestly confess insufficient knowledge to the complaint’s allegations, or, at worst, the plaintiff’s lawyers will suffer the disapproval of the judge for having delayed the case, but either way, neither the plaintiff nor the defendant is likely at all to end up with an order that the circuit court of appeals for the district, if in federal court, or the state court of appeals, if in state court, will take up and issue an opinion that just might, perhaps, conflict with the order of a different circuit court of appeals or, in state court, perhaps conflict with another panel of the appellate court, so that the Supreme Court of the United States or the state’s highest court might become sufficiently interested that the high court justices might agree to hear and decide the question of just what answers to complaints ought to resolve.

Instead of awaiting the common law process the preceding paragraph-long sentence describes, the Arizona Supreme Court simply amended Arizona’s Rule 8 in 2018.<sup>586</sup> The Arizona Supreme Court made extensive changes to its civil rules in order to enhance the efficiency of litigation and made specific changes to Rule 8.<sup>587</sup> The new rules took effect on July

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584. *Deutsche Bank Nat’l Tr. Co. v. Steward*, 2018 IL App (1st) 172655-U, ¶ 4 (citing *Parkway Bank*, 2 N.E.3d 1052, 1069, ¶ 36).

585. See also Judge Delort’s orders in *Urban Partnership Bank v. 7725 S. Wolcott Bldg. Corp.*, No. 11-CH-2156, 2011 WL 3269287 (Ill. Cir. Ct. June 16, 2011) (“The defendants’ answer is, however, evasive and improperly pled.”); *Chase Home Finance, LLC v. Johnson*, No. 2007-CH-17120, 2008 WL 3847315 (Ill. Cir. Ct. Feb. 20, 2008) (granting motion to strike answer and ordering defendant to replead).

586. Application Provisions of Order No. R-17-0010, ARIZ. R. CIV. P.

587. See Prefatory Comment to the 2017 Amendments, ARIZ. R. CIV. P.

1, 2018.<sup>588</sup> Before then, Arizona's Rule 8(b)(2) had been identical to FRCP 8(b)(2). Both rules had been: "*Denials—Responding to the Substance*. A denial must fairly respond to the substance of the allegation."<sup>589</sup> But the Arizona Supreme Court changed and renumbered Rule 8(c)(2) to read:

(2) *Denials—Responding to the Substance*. A denial must fairly respond to the substance of the allegation. A denial does not fairly respond to the substance of an allegation if it:

(A) answers an allegation by stating that "the document speaks for itself";

(B) answers an allegation by stating that the answering party "denies any allegations inconsistent with the language of a document"; or

(C) answers a factual allegation, or an allegation applying law to fact, by claiming that it states a legal conclusion.<sup>590</sup>

More efficiently even than the Shadur Appendix, the Arizona rule change closes the mouths of documents that speak for themselves. The rule change forecloses the option of defense lawyers pleading that they deny only allegations inconsistent with the document but give no hint as to what those allegations might be.<sup>591</sup> Likewise, defense counsel may no longer refuse to answer because the plaintiff's allegation calls for a legal conclusion.

The Arizona Supreme Court amended Rule 8 in other ways, too, as part of sweeping changes that introduced limits on discovery based upon a tiered system tied to the complexity of the cases.<sup>592</sup> Arizona has for some time been simplifying discovery in civil litigation. For example, the 2018 changes swept car crash cases—the dominant category of personal injury claims—along with other negligent and intentional torts cases plus related tort cases into tier 1 and also lumped cases seeking \$50,000 or less into this tier.<sup>593</sup> The rule changes allocated the smallest quantum of discovery tools to this tier as well, with limits on the hours of fact-witness depositions and the number of interrogatories, requests for production, and requests for admission.<sup>594</sup> Bigger cases get more discovery.<sup>595</sup>

The Arizona Supreme Court reduced discovery in smaller cases, which could hurt plaintiffs who have complicated, lower-value disputes and also could limit plaintiffs' lawyers whose strategies depend on wearing down

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588. Application Provisions of Order No. R-17-0010, ARIZ. R. CIV. P.

589. ARIZ. R. CIV. P. 8(b)(2) (2016) (amended in 2017 and renumbered as (c)(2)); FED. R. CIV. P. 8(b)(2).

590. ARIZ. R. CIV. P. 8(c)(2).

591. Russell, *supra* note 7, at Section III.C.

592. Tiered Limits to Discovery Based on Attributes of Cases, ARIZ. R. CIV. P. 26.2.

593. ARIZ. R. CIV. P. 26.2(b)(1) and (c)(3)(A).

594. ARIZ. R. CIV. P. 26.2(f)(1).

595. ARIZ. R. CIV. P. 26.2(f)(2) and (3).

defendants and their lawyers (usually insurance lawyers) with waves of pesky discovery requests. But what the court took away in discovery, the court gave with answers. Disallowing the common dodges related to speaking documents and legal conclusions gets plaintiffs actual answers early in the litigation. An admitted fact is costless to the plaintiff. A fact obtained through discovery never is free. The same is true for the court. Having the defendant admit what's true and deny what's not is less costly than involving the court in Rule 12 motions to determine the meaning of the answer or discovery motions that as the plaintiff propounds interrogatories and requests for admission seeking to get the defendant to admit or deny the complaint's allegations. The Arizona Supreme Court has expedited litigation by amending Rule 8.

Is the Arizona change to Rule 8 the apotheosis of Judge Shadur's Appendix? Yes. Nowhere in the documents proposing the sweeping changes to Arizona's rules does Judge Shadur's name appear, nor is there a citation to his Appendix or any of his many rulings on these matters. However, a protagonist in the efforts to reform Arizona's rules told me that, through his buddy who was a former Shadur clerk, he learned of Judge Shadur's positions and approach regarding answers during the amendment process. Although the rule reform memos and documents do not mention Shadur, the Arizona attorney involved in these changes assures me that, as regards Judge Shadur and his Appendix, Arizona's new Rule 8 speaks for itself.