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William V. Dorsaneo III
Southern Methodist University, Dedman School of Law

C. Paul Rogers III.
Southern Methodist University, Dedman School of Law

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William V. Dorsaneo III & C. Paul Rogers III*

* William V. Dorsaneo III, Chief Justice John and Lena Hickman Distinguished Faculty Fellow and Professor of Law, Dedman School of Law, Southern Methodist University. C. Paul Rogers III, Professor of Law and former Dean, Dedman School of Law, Southern Methodist University. Many helpful comments were provided by Elizabeth Thornburg, Gregory Crespi, and Roy Ryden Anderson, all of whom reviewed prior drafts of this article. We also want to give special thanks to Gregory Ivy, Senior Research Librarian, and the research staff and the Underwood Law Library for their work in reviewing Advisory Committee minutes, working papers and reports as well as Dean Charles Clark's personal records. Able research assistance was provided by our research assistants, Elizabeth Mills Viney, Carrie Jensen, David Dotson, and Bradley Purcell. We are grateful to the Lidji Endowment at the Dedman School of Law which provided funding for this project.

I. INTRODUCTION

Contract law and civil procedure are two of the cornerstones of our legal system. Both are required first-year law school courses and both are fundamental to the adjudication of commercial disputes. Contract law determines what promises the law will enforce and provides remedies for breach of contract. Procedural law is the primary formal mechanism through which commercial disputes are funneled and resolved by our judicial system. It is intended to "secure the just, speedy, and inexpensive determination of every action and proceeding."[1] Thus, it is axiomatic that contract law and procedural law must be interpreted and applied in a harmonious manner so that they work together to resolve commercial disputes. This article takes the position that they do not do so, to the detriment of all concerned.

The primary purpose of this Article is to examine the relationship between basic contract principles and procedural rules that are generally applicable to contract litigation. The evolution of claims and defenses in contract cases has produced contradictions in burdens of pleading and proof in garden-variety contract cases, particularly with respect to the important issue of the plaintiff's performance. The continued evolution of substantive contract law and terminology, and the failure of the rule-making process to take these developments into account has exacerbated the problem. As a result, the federal pleading rules adopted in 1938 and many state procedural rules and statutes modeled on the Federal Rules of Civil Procedure[2] no longer provide satisfactory guidance to practitioners

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1. FED. R. CIV. P. 1.

2. Most states have adopted FED. R. CIV. P. 8(c) and FED. R. CIV. P. 9(c). For example, over forty states have adopted failure of consideration as an affirmative defense. *See, e.g.*, ALA. R. CIV. P. 8(c); ALASKA R. CIV. P. 8(c); ARIZ. R. CIV. P. 8(c); ARK. R. CIV. P. 8(c); COLO. R. CIV. P. 8(c); DEL. SUP. CT. R. CIV. P. 8(c); D.C. SUP. CT. R. CIV. P. 8(c); FLA. R. CIV. P. 1.110(d); GA. CODE ANN. § 9-11-8(c) (2011); HAW. R. CIV. P. 8(c); IDAHO R. CIV. P. 8(c); IND. R. TR. P. 8(c); KAN. STAT. ANN. § 60-208(c); KY. R. CIV. P. 8.03; LA. CODE CIV. PROC. ANN. art. 1005 (2011); ME. R. CIV. P. 8(c); MASS. R. CIV. P. 8(c); MICH. R. CIV. P. 2.111(F)(3)(a); MINN. R. CIV. P. 8.03; MISS. R. CIV. P. 8(c); MO. R. CIV. P. 55.08; MONT. R. CIV. P. 8(c); NEB. CT. R. § 6-1108(c); NEV. R. CIV. P. 8(c); N.M. R. CIV. P. 1-008(C); N.C. R. CIV. P. 8(c); N.D. R. CIV. P. 8(c); OHIO R. CIV. P. 8(c); OKLA. STAT. tit. 12 § 2008(C) (2011); OR. R. CIV. P. 19B; PA. R. CIV. P. 1030(a); R.I. SUP. CT. R. CIV. P. 8(c); TENN. R. CIV. P. 8.03; TEX. R. CIV. P. 94; UTAH R. CIV. P.

and courts alike on burdens of pleading and proof in basic breach of contract cases.

Specifically, this Article argues that Federal Rule 8(c) should be amended to eliminate the poorly understood defense of failure of consideration from the list of affirmative defenses. Similarly, Federal Rule 9(c) should be amended by replacing the term *condition precedent* with terminology that accurately reflects the proper scope and operation of Rule 9(c) under current contract law principles and procedural standards.

II. COMMON LAW AND CODE PLEADING

A. Pleading the Plaintiff's Case in Chief

Under common law pleading practice, plaintiffs were required to allege in pleading causes of action for breach of contract: (1) the making of the contract, (2) consideration, and (3) performance by the plaintiff, and (4) breach of contract by the defendant.[3]

8(c); VT. R. CIV. P. 8(c); WASH. CIV. CT. R. 8(c); W. VA. R. CIV. P. 8(c); WYO. R. CIV. P. 8(c) (all adopting much of the text of federal rule).

Similarly, many states adopted practically all of the text of Rule 9(c). *See, e.g.*, ALA. R. CIV. P. 9(c); ALASKA R. CIV. P. 9(c); 16 ARIZ. R. CIV. P. 9(c); ARK. R. CIV. P. 9(c); CONN. SUP. CT. R. 9(c); DEL. SUP. CT. R. CIV. P. 9(c); D.C. SUP. CT. R. CIV. P. 9(c); FLA. R. CIV. P. 1.120(c); GA. CODE ANN. § 9-11-9(c) (2011); HAW. R. CIV. P. 9(c); IDAHO R. CIV. P. 9(c); KY. R. CIV. P. 9.03; MASS. R. CIV. P. 9(c); MINN. R. CIV. P. 9.03; MISS. R. CIV. P. 9(c); MO. R. CIV. P. 55.16; MONT. R. CIV. P. 9(c); NEB. CT. R. § 6-1109(c); NEV. R. CIV. P. 9(c); N.M. R. CIV. P. 1-009(C); N.C. R. CIV. P. 9(c); N.D. R. CIV. P. 9(c); OHIO R. CIV. P. 9(c); OKLA. STAT. tit. 12 § 2009(C) (2011); PA. R. CIV. P. 1019(c); R.I. SUP. CT. R. CIV. P. 9(c); S.C. R. CIV. P. 9(c); S.D. CODIFIED LAWS § 15-6-9(c) (2011); TENN. R. CIV. P. 9.03; VT. R. CIV. P. 9(c); WASH. CIV. CT. R. 9(c); W. VA. R. CIV. P. 9(c); WYO. R. CIV. P. 9(c) (all adopting much of text of federal rule). Other states have adopted the federal Rule 9(c) with minor changes, including clarification that it is the plaintiff's burden to prove performance or occurrence of conditions identified by the defendant. *See, e.g.*, TEX. R. CIV. P. 54 (requiring pleading party to prove occurrences denied by opposing party). Not all states, however, have adopted Rule 9(c) verbatim. *See, e.g.*, IND. R. TR. P. 9(c) (allowing denial of excuse to be made generally).

3. BENJAMIN J. SHIPMAN, COMMON LAW PLEADING 276 (3d ed. 1923).

Common law pleading regimes insisted on detailed and specific allegations of each element of the plaintiff's cause of action, including "the performance or fulfillment of all conditions precedent to the defendant's duty to perform his promise," or a specific averment of "a sufficient excuse for nonperformance."[4] In the case of bilateral contracts based on reciprocal promises, the plaintiff was required to make specific allegations of "performance of his part of the contract, or a readiness and an offer to perform."[5] Until the enactment of the English Common Law Procedure Act of 1852, a general allegation of performance was not sufficient and was a ground for a demurrer or a post-judgment objection after judgment by default.[6]

The English Common Law Procedure Act of 1852, English rules promulgated under the Supreme Court Judicature Act of 1873, and procedural codes adopted by many American states in the nineteenth century[7] provided a more simplified approach for contract claims.[8] Most state codes permitted plaintiffs to make a general allegation of due performance of all "conditions precedent" in order to simplify the plaintiff's pleading burden, "especially in cases where the conditions are very numerous, as in the case of a contract of insurance . . . ."[9] Under this approach, which was expressly carried forward into Rule 9(c) of the Federal Rules of Civil Procedure,[10] such a general averment placed the burden of pleading on the

4. *Id.* at 246.

5. *Id.*

6. *Id.* at 249.

7. Commencing with the New York Code of 1848, a procedural reform movement in the United States led to widespread adoption of pleading and practice codes in American states and territories as well as in the Federal Rules of Civil Procedure in 1938. CHARLES E. CLARK, CODE PLEADING §§ 7–8, at 21–31 (2d ed. 1947).

8. *See id.* § 45, at 276, 280–81 ("Performance by the plaintiff of all conditions precedent must be alleged specifically and in detail. By statute in many states a general form of allegation is here permitted."). *See also* English Rules Under the Judicature Act (The Annual Practice 1937) O. 19, r. 14, at 360–61 ("An averment of the performance or occurrence of all conditions precedent necessary for the use of the plaintiff . . . shall be implied in his pleading."). *E.g.*, Gates v. W.A. & R. J. Jacobs, 1 Ch. 567 (1920).

9. For example, New York Civil Practice Rule 92 originally stated: "[T]he party may state in general terms, that he, or the person whom he represents, duly performed all the conditions of such contract on his part." THE CODE OF PROCEDURE OF THE STATE OF NEW YORK, AS AMENDED TO 1868 (9th ed. 1868).

10. FED. R. CIV. P. 9(c).

defendant to identify specific conditions that had not been performed in order to require the plaintiff to prove those matters.

B. Pleading Defensive Pleas

Under common law pleading, after the 1834 adoption of the "Hilary Rules,"[11] the scope of the "general issue"[12] was limited and the defendant was required to plead affirmatively all matters other than a denial of breach of duty by the defendant.[13] Successor code pleading regimes also required specific defensive pleas of "new matter" to show that the plaintiff had no right to relief.[14] The earlier codes in New York and elsewhere[15] generally made no attempt to

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11. CLARK, *supra* note 7, at § 6, 18.

12. At common law a "general issue" arose on the defendant's filing of a general denial, which questioned the truth of every material allegation in the plaintiff's pleading. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 388 (3d ed. 2003).

13. CLARK, *supra* note 7, at § 6, 18. These defensive pleas were divided conceptually into two categories: (1) pleas in justification or excuse establishing some legal right justifying the defendant's conduct or some conduct of the plaintiff excusing the defendant from liability and (2) pleas in discharge showing that the defendant's duty has been discharged by some subsequent matter of law or of fact. SHIPMAN, *supra* note 3, at 348.

14. *See* CLARK, *supra* note 7, at § 91, 575–77 ("The defendant may file an answer containing a denial of the allegations of the complaint and a statement of any new matter constituting a defense or counterclaim.").

15. *See* N.Y. CODE OF PROC. 1848 (Field Code), § 128. Section 128 provides:

> The answer of the defendant shall contain:
> In respect to each allegation of the complaint controverted by the defendant, a specific denial thereof, or of any knowledge thereof sufficient to form a belief.
> A statement of any new matter constituting a defense, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

Id. See also N.Y. CODE OF REMEDIAL JUSTICE 1876, § 500 ("The answer may also set forth new matter, constituting one or more defenses or counterclaims, in ordinary and concise language without repetition."); WAGNER'S STATUTES OF MISSOURI, Ch. 110, art. V, at 1015–16 (1872) ("The answer of the defendant shall contain: First, a special denial of each material allegation of the petition controverted by the defendant, or of any knowledge or information thereof

define "new matter," leaving its meaning to be settled by precedent.[16] Because there was considerable confusion about what should be considered a "new matter," attempts were made in England, Connecticut, and New York to require specific pleading of certain affirmative defenses rather than simply a general description of "new matter" defenses.[17] As explained in the next section of this Article, Federal Rule 8(c) greatly expanded the enumeration of affirmative defenses.

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sufficient to form a belief; second, a statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition.").

16. CLARK, *supra* note 7, at § 96, 611 ("In the earlier codes no attempt was made to define 'new matter.'"). As Dean Clark explained, the usual code provision required the defendant's answer to contain denial defenses and "[a] statement of any new matter constituting a defense or counterclaim, in ordinary and concise language without repetition." *Id.* at § 91, 575.

17. *See* N.Y. Civ. Prac. Act, § 242 (1921) ("The defendant . . . shall raise . . . fraud, statute of limitations, release, payment, facts showing illegality either by statute, common law or statute of frauds. The application of this section shall not be confined to the instances enumerated."); STATE OF CONN., CONN. PRACTICE BOOK 46–47 (1934) ("Facts which are consistent with [plaintiff's statements of fact] but show . . . that he has no cause of action, must be specially alleged. Thus, accord and satisfaction, [arbitration] and award, coverture, duress, fraud, illegality not apparent on the face of the pleadings, infancy, that the defendant was *non compos mentis*, payment, release, the statute of limitations and *res adjudicata* must be specially pleaded, while advantage may be taken, under a simple denial, of such matters as the statute of frauds, or title in a third person to what the plaintiff sues upon or alleges to be his own."); English Rules Under the Judicature Act (The Annual Practice 1937) O. 19, r. 4, 15 ("The defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defense or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds.").

III. THE FEDERAL RULES OF CIVIL PROCEDURE

A. *Pleading Contract Claims*

1. Application of Rule 8(a)'s General Standard

The Rules of Civil Procedure adopted by the Supreme Court[18] include a general requirement that the complaint must contain "a short and plain statement of a claim showing that the pleader is entitled to relief; and . . . a demand for the relief sought."[19] Designed originally as a rejection of the detailed fact pleading requirements embraced by predecessor procedural codes,[20] Rule 8(a) has recently undergone a significant reinterpretation. In *Bell Atlantic v. Twombly*,[21] the Supreme Court retired *Conley v. Gibson*'s "no set of facts" standard,[22] which was frequently argued to avoid dismissal of generalized complaints, and adopted a more rigorous pleading standard.[23] Under *Twombly*, although "detailed factual allegations" are not required, the complaint must include enough factual information to "raise a right to relief above the speculative level."[24] The Court subsequently explained in *Ashcroft v. Iqbal* that a district court need not accept as true allegations that are no more than abstract recitals of the elements of a cause of action, supported by conclusory statements.[25] Legal conclusions must be supported by factual allegations in order to "'state a claim to relief that is plausible

18. The Federal Rules of Civil Procedure were adopted by the Supreme Court on December 27, 1937, and became effective in September 1938. FED. R. CIV. P. COMM. PRINT VII (2010), *available at* http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulesAndForms.aspx.

19. FED. R. CIV. P. 8(a)(2)–(3).

20. CLARK, *supra* note 7, at § 38, 225–27. *See also* Conley v. Gibson, 355 U.S. 41, 47–48 (1957) (requiring complaint to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests").

21. 550 U.S. 544 (2007).

22. *Conley* states "the accepted rule that a complaint *should not be dismissed* for failure to state a claim unless it appears beyond doubt that the plaintiff *can prove no set of facts in support of his claim* which would entitle him to relief." 355 U.S. at 45–46 (emphasis added).

23. *Twombly*, 550 U.S. at 560–63.

24. *Twombly*, 550 U.S. at 555.

25. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949–50 (2009).

on its face.'"[26] Claims that are merely "possible" or "speculative" are not sufficient to satisfy the plausibility standard.[27]

2. The Scope and Operation of Rule 9(c)

Federal Rule 9(c)[28] was almost certainly intended to continue the practice under many state codes of allowing claimants in breach of contract cases to generally aver the performance of all "conditions precedent," including all terms and obligations (promissory conditions) that plaintiffs must perform when suing for breach of bilateral contracts.[29] This general allegation requirement shifts the burden of pleading specific deficiencies in the plaintiff's case to the defendant. The burden of persuasion of such "conditions," however, was probably intended by the drafters to remain with the plaintiff.

3. The Relationship of Rule 8(a) to Rule 9(c)

Rule 8(a)'s evolving standard of sufficient factual plausibility probably applies to breach of contract claims.[30] But Rule 9(c),

26. *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 570). It is not altogether clear how the new plausibility standard is to be applied. The standard may require a plaintiff to plead enough factual information to allow the court to draw the reasonable inference that the defendant is liable and may require allegations of enough information to survive a motion for judgment as a matter of law on summary judgment or at trial. *Id.* Alternatively, it may require the pleader to convince the trial judge or the reviewing court that the plaintiff's claim is plausible because it is more believable than alternative factual contentions. *Id.* at 1949–50.

27. *Id.* at 1950.

28. FED. R. CIV. P. 9(c) ("In pleading conditions precedent, it suffices to allege generally that all conditions have occurred or been performed. But when denying that a condition has occurred or been performed, a party must do so with particularity.").

29. *See supra* notes 8–10 and accompanying text (discussing origins of current Rule 9(c) and prior rules' pleading requirements concerning conditions precedent).

30. *E.g.*, Golchin v. Liberty Mut. Ins. Co., 950 N.E.2d 853 (Mass. 2011); Kurlanski v. Town of Falmouth, No. AP-10-044, 2011 Me. Super. LEXIS 80 (Me. Super. Ct. Apr. 28, 2011); BB&T Ins. Servs. v. Thomas Rutherfoord, Inc., No. CL09–45502010, 2010 WL 7373709 (Va. Cir. Ct. Feb. 9, 2010); W. Express, Inc. v. Brentwood Servs., 2009 WL 3448747 (Tenn. Ct. App. Oct. 26, 2009); Eigerman v. Putnam Inv., Inc., 877 N.E.2d 1258 (Mass. 2008); Sisney v. State, 754 N.W.2d 639 (S.D. 2008). *Compare, e.g.*, McCurry v. Chevy Chase Bank, 233 P.3d 861 (Wash. 2010); Hoover v. Moran, 662 S.E.2d 711 (W.V. 2008).

which was also promulgated in 1937 to allocate the burdens of pleading and proof in contract litigation in federal district courts, specifically allows a contract claimant to "allege generally that all conditions precedent have occurred or been performed."[31] Presumably, the apparent adoption of heightened pleading requirements by the Supreme Court since 2007 does not affect what Rule 9(c) expressly permits—a conclusory allegation that shifts the pleading burden to the defense to identify unmet conditions.

B. Pleading Defenses in Breach of Contract Cases

1. Relationship of Rules 8(c) and 9(c)

Both Rules 8 and 9 are concerned with the pleading of defenses in breach of contract cases. Rule 9(c) concerns one type of denial defenses, those which must be pleaded specifically if the plaintiff makes a general allegation of the performance or occurrence of "conditions precedent." In contrast, Rule 8(c) deals with the subject of affirmative defenses. Unfortunately, the pertinent provisions of both rules are problematic because they use outdated terminology that is not widely understood and is sometimes misunderstood.[32] The result causes the rules to contradict one another with respect to the allocation of burdens of pleading claims and defenses in contract cases.

2. Rule 8(c)'s List of Affirmative Defenses

As originally promulgated, Rule 8(c)[33] contained a list of nineteen affirmative defenses or avoidances.[34] Although the list is

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31. *Id.*

32. *See infra* Part III.B.5–6. (discussing problems with terms *failure of consideration* in Rule 8 and *condition precedent* in Rule 9).

33. FED. R. CIV. P. 8(c). In 2010, the Court removed "discharge in bankruptcy" from the list of affirmative defenses. *Compare* FED. R. CIV. P. 8(c)(1) (2007) (listing nineteen affirmative defenses that must be included in a response), *with* FED. R. CIV. P. 8(c)(1) (2010) (deleting "discharge in bankruptcy" from the list). The list has not otherwise been changed since the procedural rules were promulgated in 1938.

much longer than the comparable lists promulgated in other procedural systems before 1937, it is still not intended to be exclusive.[35] The drafters of the list of defenses in Rule 8(c) derived the list only partially from existing procedural codes, which contained much shorter lists, and drew some affirmative defenses from other sources.[36] They regarded the development of the list as an important part of the rule-making process.[37]

At a meeting of the Advisory Committee held at the Supreme Court Building in 1935, Dean Charles Clark[38] explained that the lack

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34. An affirmative defense is an independent legal reason why a claim or a defense should not succeed on the merits. *See* BLACK'S LAW DICTIONARY 482 (9th ed. 2009) (defining "affirmative defense" as "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true"). It is synonymous with the term *plea in avoidance*. *Id.* As recodified in 2010, the list in the federal rules includes: accord and satisfaction; arbitration and award; assumption of risk; contributory negligence; discharge in bankruptcy; duress; estoppel; failure of consideration; fraud; illegality; injury by fellow servant; laches; license; payment; release; res judicata; statute of frauds; statute of limitations; and waiver. FED. R. CIV. P. 8(c)(1) (2010).

35. *See* FED. R. CIV. P. 8(c)(1) (2010) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, *including* . . . .") (emphasis added).

36. CLARK, *supra* note 7, at § 96, 611–12. The overall process used by the Advisory Committee to identify what defenses to include in the list is unclear.

37. Proceedings of the Advisory Committee on Uniform Rules of Civil Procedure, November 16, 1935, 750–59. *See also* Charles E. Clark & James William Moore, *A New Federal Civil Procedure: II Pleadings and Parties*, 44 YALE L.J. 1291, 1306 (1935) ("It is believed that pleading [affirmative defenses] specially affords more adequate notice than a practice which would permit defenses of this type to be raised under a [general] denial . . . .").

38. Dean Clark was the central figure in drafting the Federal Rules. Michael E. Smith, *Judge Clark and the Federal Rules*, 85 YALE L.J. 914, 915 (1970). He was Dean of the Yale Law School and later a judge on the U.S. Second Circuit Court of Appeals. Fred Rodell, *For Charles E. Clark: A Brief and Belated but Fond Farewell*, 65 COLUM. L. REV. 1321, 1323–24 (1965). One of his assistants was James William ("Bill") Moore, who was a graduate student when the federal rules project began in 1934, became a professor of law at Yale Law School in 1938 and taught at Yale until his retirement in 1974. *The Heyday of Legal Realism, 1928–1954*, YALE LAW SCH. (Oct. 10, 2011), http://www.law.yale.edu/cbl/3085.htm. He was the author of numerous publications, the most famous of which is MOORE'S FEDERAL PRACTICE, which was first published in 1938. *Id.* At that time, Professor Moore acknowledged Dean Clark's influence, thanking Clark for permission to use his Yale Law Journal articles in preparation of the first edition of MOORE'S FEDERAL PRACTICE. 1 *Civil Preface to the First Edition* of MOORE'S FEDERAL PRACTICE (3d ed. 2005).

of specificity in the older "new matter" rules created problems, because "it ha[d] been a matter of a great deal of doubt whether a certain situation should be called new matter or should come in as a denial."[39] Hence, in discussing the draft rule before the Advisory Committee, Dean Clark stated: "This is an attempt to particularize, and I think the great value of these rules is probably not in the general provisions, but in the list of specific things."[40] The draft rule provided to the committee was "substantially that of England, New York and Connecticut,"[41] which did not include a number of other affirmative defenses such as contributory negligence, assumption of the risk, and waiver.[42] Based on its discussion of those rules, the committee appears to have added these defenses to the draft by acquiescence.[43] Failure of consideration, however, was not mentioned.[44]

3. The Original Purpose of Rule 8(c)

The history of Rule 8(c) indicates that it was designed to ameliorate controversies over what constitutes an affirmative defense.[45] The principal reason a defending party must plead affirmative defenses specially is to provide notice that it intends to rely on the particular defense.[46] Generally, a procedural requirement of a specific pleading of affirmative defenses is to give the plaintiff notice of defenses that the defendant is required to prove,[47] as distinguished from mere denial defenses.

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39. Proceedings of the Advisory Committee on Uniform Rules of Civil Procedure, November 16, 1935, at 750.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 750–58.

44. *Id.*

45. *See* Clark & Moore, *supra* note 37, at 1305–06 (asserting that a rule is needed to clarify the varied state rules).

46. *See id.* at 1306 ("It is believed that pleading such matters specially affords more adequate notice than a practice which would permit defenses of this type to be raised under a denial").

47. FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE 249–54 (5th ed. 2001).

Although the question is not entirely free from doubt,[48] there is reason to believe that Rule 8(c) was intended to embrace the traditional concept that affirmative defenses must be pleaded and proved by the defendant. In the second edition of *Code Pleading* Dean Clark states that Rule 8(c) was "obviously intended" to place the burden of pleading and the burden of persuasion on defendants.[49] In addition, shortly after *Erie Railroad Co. v. Tompkins*,[50] Professor Moore argued in MOORE'S FEDERAL PRACTICE that Rule 8(c) controlled the burden of persuasion, which should be regarded as procedural, rather than substantive for *Erie* purposes.[51]

But one federal court of appeals disagreed and concluded that *Erie* required the burden of proof on affirmative defenses under Rule 8(c), such as contributory negligence, to follow state practice in diversity cases decided in federal court.[52] Under this analysis, Rule 8(c) could not shift the burden of proof from where state substantive law had placed it. As the First Circuit explained in *Sampson v. Channell*, whatever the drafters may have intended, Rule 8(c) is silent on the issue and the burden of pleading does not necessarily carry with it the burden of proof.[53]

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48. *See* CLARK, *supra* note 7, at § 96, 610–11 ("In a few notable instances [rules as to who must affirmatively plead a particular issue and who must prove it do not correspond], as in a suit for nonpayment of an obligation where the plaintiff must allege, but need not prove, nonpayment.").

49. *Id.* at 610–11 ("The Federal Rules require the defendant to plead contributory negligence as an 'affirmative defense' . . . .").

50. 304 U.S. 64 (1938).

51. 1 MOORE'S FEDERAL PRACTICE § 8.10 (1938) ("It has long been settled that in the federal courts the burden of proving contributory negligence is upon the defendant. Rule 8(c) restates that rule. Now, if the matter of which party has the burden of persuasion is a matter of procedure, Rule 8(c) controls; if that matter is one of the substantive law, then under the doctrine of *Erie R. Co. v. Tompkins*, the federal courts . . . must follow [state court] decisions to the effect that plaintiff must prove freedom from contributory negligence. It is believed that the problem should be regarded as procedural."). *See also id.* at § 43.02 ("In the recent case of *New York Life Ins. Co. v. Gamer*, [303 U.S. 161 (1938)], the court determined the burden of proof and presumption bearing on the issue of suicide by reference to general law on the subject. The fact that this decision preceded the [*Erie*] by only two months is an indication that burdens of proof and presumption are matters within the field of procedure.").

52. Sampson v. Channell, 110 F.2d 754, 758–59 n.9 (1st Cir. 1940), *cert. denied*, 310 U.S. 650 (1940).

53. *Id.* at 757 n.9. The First Circuit also reasoned that, because the Federal Rules of Civil Procedure were transmitted by the Chief Justice to the Attorney General on December 20, 1937, and *Erie* was not argued in the Supreme Court

4. The Unfortunate Impact of *Erie* on Rule 8(c)

Shortly after the decision in *Erie*, the Supreme Court addressed and resolved its impact on the allocation of the burden of persuasion in diversity cases. First, in *Cities Service Oil Co. v. Dunlap*, the Court ruled that a federal district court in Texas was required to apply the Texas rule on the issue of bona fide purchaser for value without notice.[54] The Court reasoned that the burden of proof is on the person who attacks legal title because the issue is not "only one of practice in courts of equity," but under the Texas rule, "relate[d] to a substantial right upon which the holder of recorded legal title . . . may confidently rely . . . ."[55] In other words, because the placement of the burden was regarded as an important right, it was classified as a substantive right and Texas law prevailed.

Two years later, in *Sibbach v. Wilson & Co.*,[56] a bare majority of the Court appeared to have changed its view, and it rejected essentially the same argument in a case interpreting the Rules Enabling Act.[57] Sibbach brought a diversity action for personal injury damages in federal court in Illinois.[58] The district court ordered her to submit to a medical examination.[59] Although Rule 35 authorized such an order,[60] Sibbach refused to comply and argued that Illinois law prohibited the district court from ordering the examination.[61] Contrary to Rule 37(b)(2)(iv), which precluded an order of contempt as a discovery sanction for violation of Rule 35,[62]

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until January 31, 1938, there was no reason to assume that the Supreme Court had the *Erie* doctrine in mind when the Federal Rules, including Rule 8(c), were adopted. *Id.* at 757 n.8.

54. 308 U.S. 208, 212 (1939).

55. *Id.*

56. 312 U.S. 1 (1941).

57. *Id.* The Rules Enabling Act authorizes the Supreme Court to "prescribe general rules of practice and procedure," but it also states that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072 (2006).

58. *Sibbach*, 312 U.S. at 6.

59. *Id.*

60. FED. R. CIV. P. 35 (1938) (authorizing federal courts to order mental or physical examination of party whose mental or physical condition is at issue).

61. *Sibbach*, 312 U.S. at 6.

62. FED. R. CIV. P. 37(b)(2)(iv) (1938). Under the current rules, this provision is located at FED. R. CIV. P. 37(b)(2)(vii).

the district court held Sibbach in contempt and ordered that she must be incarcerated until her compliance or discharge.[63] The Seventh Circuit affirmed.[64] On appeal to the Supreme Court, Sibbach contended that, under the Rules Enabling Act, the trial court could not abridge or modify any "substantial" or "important" right that Illinois law gave her, including the right under Illinois law to refuse to submit to a medical examination.[65] The Supreme Court disagreed.[66]

> The asserted right . . . is no more important than many [other procedural rights] . . . . If we were to adopt the suggested criterion of the importance of the alleged right, we should invite endless litigation and confusion worse confounded. The test must be whether a rule really regulates procedure . . . .[67]

Another two years later, in *Palmer v. Hoffman*, the Supreme Court considered a diversity case involving the question of whether the plaintiff or the defendant railroad had the burden of persuasion on the issue of the plaintiff's contributory negligence.[68] There, the Court squarely held that the burden of proof in a diversity case is a matter of substantive law under *Erie*, regardless of the inclusion of the defense in Rule 8(c).[69] The Supreme Court's "analysis" of the issue in *Palmer* consists entirely of the following two sentences: "Rule 8(c) covers only the matter of pleading. The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases . . . must apply."[70]

Thus, regardless of what the drafters intended, Rule 8(c) could not control the burden of persuasion for affirmative defenses listed in the procedural rule in diversity cases because the *Erie* doctrine precluded it from doing so. To avoid the invalidation of Rule 8(c), the Court read it narrowly to control only the manner of

63. *Sibbach*, 312 U.S. at 7.
64. *Id.*
65. *Id.* at 9–11.
66. *Id.* at 14.
67. *Id.*
68. 318 U.S. 109 (1943).
69. *Id.* at 116–20.
70. *Id.* at 117 (internal citations omitted).

pleading the defenses listed within it.[71] As a result, Rule 8(c) became a pleading rule that says nothing about the burden of persuasion. Unfortunately, this solution to the perceived *Erie* problem robbed Rule 8(c) of most of its original intended meaning.

The Court in *Palmer* cites *Cities Service Oil*[72] but otherwise does not mention the policies on which the *Erie* doctrine rests or any assessment of the consequences of its application to Rule 8(c). The Court's opinion also makes no mention of the standards devised for the Court's rule-making power under the Rules Enabling Act. Accordingly, it is unclear and perhaps even unlikely that the same conclusion would be reached today under more developed *Erie* jurisprudence.[73]

5. The Need to Remove Failure of Consideration from Rule 8(c)'s List

Two of the affirmative defenses ultimately included in the list now contained in federal Rule 8(c) have particular application to breach of contract litigation—the statute of frauds[74] and failure of

71. *Id.*

72. *Id.*

73. *See generally* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010) (demonstrating conflict of opinion among current Supreme Court Justices regarding interpretation of federal rules). Justice Scalia's plurality opinion, which is joined by Chief Justice Roberts, and Justices Thomas and Sotomayor, concludes that under *Sibbach v. Wilson*'s test of the validity of federal rules under the Rules Enabling Act, if a federal rule "really regulates procedure" the rule is valid, regardless of whether it offends state policies and values or whether application of the federal rule as written would encourage forum-shopping or promote the inequitable operation of the laws. *Id.* at 1444. In contrast, Justice Ginsburg's dissenting opinion, joined by Justices Breyer, Kennedy, and Alito, would be sensitive to state policies in determining the proper interpretation of the federal rule and, thus, whether the federal rule conflicts with state law. *Id.* at 1463. Justice Stevens' concurring opinion agrees that some degree of sensitivity is required in interpreting the federal rules, but reasons the courts must not "contort" the "meaning of the federal rules" under the guise of interpreting them. *Id.* at 1452–54.

74. *See* FED. R. CIV. P., Rules and Commentary, Appendix A, Rule 8 (stating that the statute of frauds was included in N.Y.C.P.A., § 242 (1937) and in the English Rules Under the Judicature Act (The Annual Practice 1927) O. 19, r. 15).

consideration.[75] The inclusion of the statute of frauds in the list has a solid historical pedigree and has caused no particular problem.[76] In contrast, despite its common law origin, inclusion of failure of consideration as an affirmative defense has turned out to be a very bad idea and appears to have been both ill-considered and a mistake from the inception of the Federal Rules.[77]

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75. *See supra* notes 38–44 and accompanying text (explaining that list of affirmative defenses was an attempt to clarify whether a situation should be classified a new matter or denial). The Advisory Committee Notes do not identify the source of failure of consideration as an enumerated defense. Under the direction of Senior Research Librarian Gregory Ivy, the library staff of the Underwood Law Library at Southern Methodist University's Dedman School of Law conducted an exhaustive search of more than 2,000 pages of minutes and reports from 1935 through 1939 of the records of the Advisory Committee on the Federal Rules of Civil Procedure, available at http://www.uscourts.gov/RulesandPolicies/FederalRulemaking/Overview.aspx, and Dean Clark's papers at Yale Law School containing more than 1,000 pages of Advisory Committee correspondence from September 1934 through January 1936 to identify material indicating why failure of consideration was included in Rule 8(c)'s list of affirmative defenses. The only relevant discussion is contained in Volume III of the November 1935 minutes, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-1935-min-Vol3.pdf. Excerpts from the ADVISORY TENTATIVE DRAFTS I (Oct. 15, 1935) and II (Dec. 23, 1935), which indicate the inclusion of failure of consideration in the committee drafts and ultimately in Rule 8(c), also do not identify its source. *See* Tentative Draft I (Oct. 15, 1935) *in* RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS No. CI-804-002, at 28 (Cong. Info. Serv.) (allowing failure of consideration to be raised as an affirmative pleading); *see also* Tentative Draft II (Dec. 23, 1935) *in* RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS No. CI-805-052 (Cong. Info. Serv.) (listing failure of consideration as an affirmative defense). It is, however, clear that such an avoidance or affirmative defense was recognized under the substantive law of contracts. RESTATEMENT (SECOND) OF CONTRACTS § 274 cmt. d (1979). *See, e.g.*, Batsakis v. Demotsis, 226 S.W.2d 673, 674–75 (Tex. Civ. App.—El Paso 1949, no writ) (considering defendant's "plea of failure of consideration").

76. *See* SHIPMAN, *supra* note 3, at 325 (3d ed. 1923) (noting that many states allowed the statute of frauds to be used as a defense). *See also* English Rules Under the Judicature Act (The Annual Practice 1937) O. 19, r. 15 ("Statute of Frauds" listed as new matter in avoidance required to be alleged specifically to avoid surprise).

77. *See* RESTATEMENT (SECOND) OF CONTRACTS § 237 cmt. a ("What is sometimes referred to as 'failure of consideration' by courts and statutes . . . is referred to in this Restatement as 'failure of performance' to avoid confusion with the absence of consideration."). *See, e.g.*, CHARLES A. WRIGHT, ARTHUR R.

The inclusion of a non-exclusive list of affirmative defenses was an innovation that was intended to simplify the otherwise complex process of differentiating between denial defenses and affirmative defenses.[78] To the extent that the list is intelligible to modern litigants and their counsel, its inclusion remains a good idea, even after *Palmer*, because most jurisdictions probably regard most of the defenses in the list as matters on which defendants have the burdens of pleading and proof because of the fundamental distinction between the denial of the elements of a claim and the avoidance of it.[79] But this does not mean that the inclusion of the term *failure of consideration* in the list is a good idea. It is a confusing term that contracts scholars have long disfavored.[80]

The confusion arises primarily due to the term's similarity to *want of consideration*, *lack of consideration*, or *absence of*

MILLER & EDWARD H. COOPER, 5 FEDERAL PRACTICE AND PROCEDURE 565–67 (3d ed. 1998) (misdescribing defense of failure of consideration as "the contract fails and cannot be enforced for want of consideration").

78. Clark & Moore, *supra* note 37, at 1306 ("A rule defining the practice as to these ordinary and oft recurring issues would be helpful.") (citing STATE OF CONN., CONN. PRACTICE BOOK 46 (1937); N.Y. Civ. Prac. Act § 242 (1921); AM. JUDICATURE SOC'Y RULES OF CIV. PROC. BULLETIN 14, art. 15, § 27 (1919)). *See also* WRIGHT ET AL., *supra* note 77, at 560–61 (explaining that Rule 8(c)'s list of enumerated defenses was crafted in a "conscious effort by the draftsmen of the federal rules to avoid controversy over the question of what constitutes an 'affirmative defense' and . . . [to] make it clear that certain regularly occurring matters must be set forth affirmatively before they will be considered by the [court]").

79. *See* JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR MILLER, CIVIL PROCEDURE § 5.20, 308–09 (4th ed. 2005) ("From a logical point of view . . . one can distinguish a matter that must be raised by affirmative defense from one that can be raised by denial merely by determining whether the particular fact controverts one of the plaintiff's allegations or whether it deals with entirely new matter . . . .").

80. *See, e.g.*, ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 5.20 (1952) (contrasting lack of consideration, defined narrowly as when a promise is given with no consideration with a failure of the consideration, which is any "case where an exchange of values is to be made and the exchange does not take place"); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS, § 108 (1974) ("To avoid needless confusion, the Restatement 2d properly rejects the phrase 'failure of consideration' . . . ."); Edwin W. Patterson, *Constructive Conditions in Contracts*, 42 COLUM. L. REV. 903, 921–22 (1942) (criticizing the use of the term *failure of consideration*).

consideration, terms commonly used to mean that no consideration was given for the promise, and hence no contract ever existed; the promises given in an agreement alleged to be a contract are thus not enforceable.[81] First-year contracts students learn that consideration is required to form a contract, and that consideration consists of some bargained-for benefit to one party or some forbearance or detriment to the other party.[82] They are taught nothing about failure of consideration.[83]

Under traditional analysis, the term *failure of consideration* refers to a material failure of performance of a contractual obligation by one party to a contract that excuses the other party's subsequent contractual nonperformance.[84] In other words, failure of consideration refers to post-contract formation situations in which the promised performance has not occurred.[85] The *absence*, *lack*, or *want of consideration* phrases refer instead to the consideration, whether it is a promise or performance or forbearance, that must be present at the time of contract formation. If a promise made at the time of the formation of an alleged contract does not bind the promisor to provide something of value, then that illusory promise is

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81. *See, e.g.*, Lake Land Emp. Grp. of Akron, LLC v. Columber, 804 N.E.2d 27, 32 (Ohio 2004) (holding that contract is not binding without consideration); Cent. Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28, 33 (Tenn. 1984) (holding that enforceability of contract turns on adequacy of consideration). However, justifiable reliance on a promise can give rise to recovery under the doctrine of promissory estoppel. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1979).

82. *See, e.g.*, Fiege v. Boehm, 123 A.2d 316, 321 (Md. 1956) (holding that "forbearance to sue for a lawful claim or demand is sufficient consideration"); Hamer v. Sidway, 27 N.E. 256, 257 (N.Y. 1891) (holding that "consideration . . . may consist [of] some right, interest, profit, or benefit accruing the one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other").

83. Most modern contracts casebooks make no mention of "failure of consideration."

84. *See* MURRAY, *supra* note 80, at § 108(A) ("The term 'failure of consideration' is an example of the common law's misleading economy of language.").

85. *See, e.g.*, *In re* Estate of Levine, 118 A.2d 741, 742–43 (Pa. 1955) (explaining that want of consideration includes instances where no consideration was intended to pass, while failure of consideration implies that a valuable consideration was contemplated); *In re* Killeen's Estate, 165 A. 34, 35 (Pa. 1932) (reasoning that "want of consideration embraces transactions . . . where none was intended to pass, while failure of consideration . . . shows that the consideration contemplated was never received").

not consideration for the other party's promise, and no contract is formed.[86]

Failure of consideration as a legal doctrine has a complex history.[87] Professor Patrick Atiyah explained that the doctrine is traceable to Chief Justice Holt's 1691 opinion in *Martin v. Sitwell*, in which the court held that a policyholder could recover a premium paid on a void insurance policy.[88] Thus, the doctrine began its life as a claim available to a claimant who paid money for nothing.[89] Over time, the doctrine developed or expanded in several ways. First, failure of consideration was used in a quasi-contractual sense to establish the right of a claimant to recover money paid or property conveyed to a promisor who failed to perform a contractual obligation for some reason.[90] Second, the remedy of failure of

86. *See, e.g.*, Strong v. Sheffield, 39 N.E. 330, 331–32 (N.Y. 1895) (stating that "a request followed by performance is sufficient, and mutual promises . . . are not essential, unless it was the understanding that the promisor was not to be bound, except on condition that the other party entered into an immediate and reciprocal obligation to do the thing requested"). *Compare* Mattei v. Hopper, 330 P.2d 625, 625 (Cal. 1958) (holding that without mutuality of obligation, no contract exists), *with* Wood v. Lucy, Lady Duff Gordon, 118 N.E. 214, 214 (N.Y. 1917) (holding that contract is not void for want of mutuality).

87. *See* PATRICK S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 181–84 (1979) (tracing the genesis of the doctrine of failure of consideration in 1691 and its development in quasi-contract theory, which during the late eighteenth century came to dominate English contract law); A.G. GUEST, ANSON'S LAW OF CONTRACT 462 (26th ed. 1984) (summarizing the jurisprudential and statutory evolution of failure of consideration in England from *Chandler v. Webster* in 1904 to the Law Reform Act in 1943); GUNTER H. TREITEL, THE LAW OF CONTRACT 746–47 (9th ed. 1995) (listing English contract cases turning on a party's failure or refusal to perform); Samuel J. Stoljar, *The Doctrine of Failure of Consideration*, 75 LAW Q. REV. 53, 53–76 (1959) (describing development of doctrine of failure of consideration from medieval times through the nineteenth century).

88. ATIYAH, *supra* note 87, at 181 (citing Martin v. Sitwell, 90 Eng. Rep. 912, 913 (1691)) ("The money was received without any reason, occasion or consideration, and consequently it was originally received to the plaintiff's use.").

89. *See* Stoljar, *supra* note 87, at 53 (explaining that failure of consideration describes a remedy available to a promisee seeking to recover money from a promisor who failed to deliver his part of a bargain).

90. *See* Tomkins v. Bernet, 91 Eng. Rep. 21, 21 (1693) (allowing payment on usurious bond if it was purchased as result of mistake or deceit); *Sitwell*, 90 Eng. Rep. at 913 (awarding insurance premium refund when policy was found to be void). Before 1773, covenants or contractual promises were considered to be

consideration was applied to situations in which the promisor breached a contract by total or partial nonperformance, entitling the promisee to rescission and restitution.[91] Ultimately, the doctrine lost much of its importance as a specific remedy because of the development of other contractual remedies, such as actions for damages for breach of express and implied warranties.[92]

In the United States, the doctrine also supported an action for the return of money or other property received without consideration. In 1912, Professor Corbin explained that the doctrine was applied as a quasi-contractual remedy in a number of situations in which the plaintiff performed its part of a bargain but did not receive the consideration bargained for because the defendant failed to perform.[93]

The defendant's failure to perform a promise could have occurred because: (1) the performance was impossible;[94] (2) the defendant's promise was unenforceable because of contractual defenses, such as the statute of frauds or the defendant's lack of capacity to contract;[95] (3) a breach was committed by the plaintiff, but not so serious a breach as to justify the defendant's nonperformance;[96] (4) the plaintiff failed to satisfy a condition

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independent rather than dependent, and thus, prior breach of a contract by one party was not a defense and required a separate action for the breach of contract. Kingston v. Preston, 99 Eng. Rep. 437, 438 (1773). Therefore, it is not surprising that failure of consideration developed as a quasi-contractual right to get money back after the other party failed to perform.

91. *See generally* Stoljar, *supra* note 87 (discussing failure of consideration doctrine, including historical origins and limits of restitution). *See also* Rowland v. Divall, 2 K.B. 500 (1923) (holding that plaintiff who received motor car, but not good title, did not get what he paid for and could recover "whole of the purchase money and was not limited to his remedy in damages . . . ."). *But see* Hunt v. Silk, 5 East. 449, 452 (1804) ("Where a contract is to be rescinded at all, it must be rescinded in toto, and the parties put in status quo. But here was an intermediate occupation [of the property], a part execution of the agreement, which was incapable of being rescinded.").

92. *See* Stoljar, *supra* note 87, at 74–76 (discussing marginalization of doctrine of failure of consideration because of new contractual remedies).

93. *See* Arthur L. Corbin, *Quasi-Contractual Obligations*, 21 YALE L.J. 533, 543–44 (1912) (citing examples of quasi-contractual obligations arising when plaintiff performs but defendant does not).

94. *Id. See also* Reina v. Cross, 6 Cal. 29, 30–31 (1856) (noting that shipper did not perform promised delivery of cargo due to loss of the ship at sea).

95. Corbin, *supra* note 93, at 540–41.

96. *Id.* at 542. The promisee's right of restitution was limited to circumstances in which the promisee's breach did not justify repudiation by the

precedent to the defendant's liability that did not constitute an actionable breach by the plaintiff;[97] (5) the defendant committed a material breach without any acceptable excuse; or (6) performance was illegal.[98]

As Professor Corbin also explained, American courts reasoned that if a defendant breaches a contract without excuse, that is, in modern terminology, if a defendant commits a material breach of contract, the plaintiff has two possible remedies: a claim under the contract for damages based on the defendant's breach or repudiation of the contract, or a claim for return of the benefit the plaintiff conferred on the defendant in quasi-contract.[99] As between the two remedies, a claim for damages for breach of contract is often the more desirable remedy, if it is available.[100]

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promisor, giving the promisee an action in restitution for any benefit conferred less the damages for the non-material breach. *See* Clark v. Manchester, 51 N.H. 594, 596 (1872) ("The plaintiff had the right to rescind the whole contract, and sue in *indebitatus assumpsit* to receive back a consideration paid, or on a *quantum meruit* to recover what his services were worth.").

97. Corbin, *supra* note 93, at 542. *See also* N.Y. Life Ins. Co. v. Statham, 93 U.S. 24, 30 (1876) (holding that insured who could not pay scheduled life insurance payments due to outbreak of Civil War was still entitled to refund of equitable value of paid premiums); Butterfield v. Byron, 27 N.E. 667, 669 (Mass. 1891) (holding that breach of executory employment contract by defendant gave plaintiff the right to rescind and sue only for value of labor already performed); *Clark*, 51 N.H. at 595–96 (holding that worker could recover what his services were reasonably worth after employer broke the contract in the middle of the agreement).

98. *See* White v. Franklin Bank, 39 Mass. (22 Pick.) 181, 184–85 (1838) ("[B]oth parties are in *pari delicto*[;] neither of them can recover . . . ."); Musson v. Fales, 16 Mass. (1 Tyng) 332, 334–36 (1820) ("[T]he parties are generally in *pari delicto*, and neither can maintain an action against the other."); Corbin, *supra* note 93, at 542–43 (stating that right in restitution stemming from illegal contract requires that plaintiff is not in *pari delicto* with defendant).

99. Corbin, *supra* note 93, at 542. *See Clark*, 51 N.H. at 595–96 (holding that plaintiff was entitled to recover in quantum meruit for his services).

100.The injured party in a breach of contract action typically recovers expectation damages, giving it the benefit of its bargain. *See, e.g.*, Vitex Mfg. Corp. v. Caribtex Corp. 377 F. 2d 795, 799 (3d Cir. 1967) (holding that overhead expenses were within contemplation of losses in breach of contract claim); Laredo Hides Co. v. H & H Meat Prods., Inc., 513 S.W.2d 210, 221 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.) (stating that a buyer may recover damages incurred by covering in good faith and without unreasonable delay any goods purchased in substitution for those due from the seller). Thus, if the plaintiff has

At the time of the adoption of the First Restatement of Contracts in 1932, failure of consideration was still a well-recognized doctrine. Comment a to § 274 of the First Restatement defines failure of consideration as "a generic expression covering *every case* where an exchange of values is to be made and the exchange does not take place, either because of the fault of a party or without his fault."[101] The comment specifies that where there is a failure of consideration, the other party "may refrain from giving any part of the exchange, which he has not yet given, and generally may reclaim what he has given, or its value."[102] Comment b explains that failure of consideration is simply the failure to receive the agreed-upon exchange.[103] Thus, under the First Restatement, failure of consideration could refer to a material or non-material breach, or to situations in which the party's nonperformance was legally excused.

Section 274 of the First Restatement uses the term *material failure of performance* as a partial synonym for the term *failure of consideration*.[104] Subsection 1 of § 274 provides that: "In promises for an agreed exchange, any material failure of performance by one party not justified by the conduct of the other discharges the latter's duty to give the agreed exchange. . . . An immaterial failure does not operate as such a discharge."[105]

Subsection 2 of § 274 recognizes the broader historical use of the term *failure of consideration* by stating that "[t]he rule of Subsection (1) is applicable though the failure of performance is not a violation of legal duty."[106] The subsection's comment explains that even if a party's failure to perform his contractual obligation is

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entered into a favorable contract, the plaintiff will prefer expectation damages to secure the benefit of the contract. A quasi-contract remedy will be in restitution and will merely enable the plaintiff to get back the benefit it conferred on the breaching party, which is often the return of money paid for goods not delivered or services not performed. Corbin, *supra* note 93, at 550.

101. RESTATEMENT (FIRST) OF CONTRACTS § 274 cmt. a (1932) (emphasis added).

102. *Id.*

103. § 274 cmt. b. The Comment also states that "[i]n the present connection the consideration in question is the promised performance of one party agreed to be exchanged for that of the other." *Id.*

104. § 274(1); Stoljar, *supra* note 87, at 53 n.2.

105. *Id.* The First Restatement, like the Second, provides guidance for ascertaining whether a breach is material or not. RESTATEMENT (FIRST) OF CONTRACTS § 275 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 241 (1979).

106. RESTATEMENT (FIRST) OF CONTRACTS § 274(2) (1932).

"blameless in law and fact" and is excused because of a legal defense such as "infancy, insanity, [or] impossibility," that party "should not have what is promised in exchange for his performance."[107]

In response to the adoption of the First Restatement, Professor Edwin Patterson criticized the term *failure of consideration* as a "misleading economy of language" and argued that to say that there once was consideration but it later failed was "contradictory or at least confusing."[108] Again, the confusion arises in bilateral contracts, in which a party's promise furnishes the consideration that makes the contract binding, but the party's failure to perform is said to be a failure of consideration.[109]

Professor Williston defended the use of the term, but acknowledged it had been, at times, used "loosely."[110] He argued that it was "not inaccurate" when generically used to cover any case in which a promised exchange did not take place, whether or not either party was at fault.[111] Professor Williston's treatise correctly explains that the "charge of inaccuracy against the term" arises from the incorrect assumption that the consideration that fails is the consideration for a promise, when, in fact, it is the consideration for the promised performance that is not forthcoming and thus fails.[112]

In other words, the consideration for a bilateral contract comes from the exchange of promises, whereby each party promises to do something in the future in exchange for the other's promised performance. A failure of consideration occurs when one of the promised performances is not forthcoming, for whatever reason.

The Second Restatement of Contracts abandoned the term

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107. § 274(2) cmt. c.

108. Patterson, *supra* note 80, at 921–22. Corbin also noted the confusion arising from use of the term. CORBIN ON CONTRACTS, *supra* note 80, at § 658.

109. *See, e.g.*, Pressey v. Heath, 114 A.2d 16, 18 (N.J. Super. 1955) (stating that defendant's promise to support plaintiff was consideration for the plaintiff's promise to convey land). *See also* Patterson, *supra* note 80, at 921–22 ("To say that the requirement of consideration is not satisfied until all promises have been performed would abolish the bilateral contract.").

110. SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 814 (3d ed. 1957).

111. *Id. See also* Durkee v. Busk, 355 P.2d 588, 591 (Alaska 1960) ("Absence or failure of consideration is a matter of defense as against any person not a holder in due course . . . .") (citing Uniform Negotiable Instruments Act § 27-1-35 (1949)).

112. WILLISTON, *supra* note 110, at § 814.

failure of consideration and replaced it with the term *failure of performance* "to avoid confusion with the absence of consideration."[113] Under the Second Restatement, failure of performance is used in the broader sense of identifying a promised performance that is not forthcoming, whether or not the failure is justified.[114]

Not surprisingly, given the linguistic similarity of the term *failure of consideration* to other terms that refer to the absence of consideration, the courts and commentators have sometimes confused the affirmative defense of failure of consideration with the entirely distinct defense of want of consideration.[115]

The confusion and uncertainty over the term arises in at least two ways. First, the term *failure of consideration* uses the word *consideration* to refer to post-contract-formation performance even though the word *consideration* is also used to refer to the distinct requirement that consideration must be present for a contract to be formed. Second, the multiple meanings of the term *failure of consideration* itself create additional ambiguity and cause confusion about the term's content and meaning.[116] The term *failure of consideration* has even confused some very well-known procedural experts.[117] By the time of the adoption of the Second Restatement, contract law scholars and the American Law Institute had broadly abandoned the term.[118]

One solution to the confusion emanating from Rule 8(c) would be to change the name of the defense to failure of performance, or perhaps, prior material breach, even though use of

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113. RESTATEMENT (SECOND) OF CONTRACTS § 237 cmt. a (1979).

114. *See id.* (referencing impracticability of performance as justification for failure to perform).

115. *See, e.g.*, Bergen v. Davis, 287 F. Supp. 52, 54–57 (D. Conn. 1968) (confusing "giving of consideration" for ship mortgage with defense of failure of consideration). *See also* R.T. Dabbs v. Int'l Minerals & Chem. Corp., 339 F. Supp. 654, 663–70 (N.D. Miss. 1972), *aff'd*, 474 F.2d 1344 (5th Cir. 1973) (finding failure of consideration was not valid defense when something of value was furnished to support promise).

116. Stoljar, *supra* note 87, at 53 n.2.

117. *See, e.g.*, WRIGHT ET AL., *supra* note 77, at § 1270, 567 (misdescribing defense of failure of consideration: "[T]he contract fails and cannot be enforced for want of consideration.").

118. *See supra* notes 113–14 and accompanying text (explaining that failure of consideration was called *failure of performance* in the Second Restatement in order to avoid confusion).

some historical precedent may be weakened by the latter change.[119] A better solution would be to eliminate altogether the failure of consideration defense from Rule 8(c), because many courts, if not most, still place the burden on the plaintiff to prove performance as an element of its claim for breach of contract.[120] That is, the plaintiff must establish its performance or the ability to perform its contractual obligations to recover for breach of contract.[121] Without proof of ability to perform, the plaintiff seeking relief is unable to show that an injury or loss actually occurred.[122]

As explained by the Supreme Court in *Gomez v. Toledo*, the allocation of the burden of pleading a defense depends on whether the burden should be imposed on the plaintiff "to anticipate such a defense."[123] No such anticipation occurs when the defense "depends on facts peculiarly within the knowledge and control of the defendant."[124] The plaintiff's performance or readiness to perform contractual promises, however, does not fall automatically within the defendant's knowledge or control. Although *Gomez* did not state that the burden to plead an affirmative defense is strongly influenced by the burden of persuasion under substantive law, it is clear that the

119. *See, e.g.*, Parker v. Dodge, 98 S.W.3d 297, 301 (Tex. App.—Houston [1st Dist.] 2003, no pet.) ("Generally, failure of consideration occurs when, because of some supervening cause after an agreement is reached, the promised performance fails.").

120. *See infra* notes 136–42 and accompanying text (discussing use of the term *failure of consideration* in contract cases).

121. *See, e.g.*, United States v. Penn Foundry & Mfg. Co., 337 U.S. 212, 213 (1949); Swiss Bank Corp. v. Dresser Indus., 141 F.3d 689, 692 (7th Cir. 1998); Kanavos v. Hancock Bank & Trust Co., 479 N.E.2d 168 (Mass. 1985); Commercial Credit Corp. v. Harris, 510 P.2d 1322, 1325 (Kan. 1973); Ersa Grae Corp. v. Fluor Corp., 2 Cal. Rptr. 2d 288, 295 (Ca. Ct. App. 1991). The requirement appears to be especially strong in cases in which the plaintiff is seeking specific performance. *See, e.g.*, DiGiuseppe v. Lawler, 269 S.W.3d 588, 595 (Tex. 2008); Gaffi v. Burns, 563 P.2d 726, 728-29 (Or. 1977); Cornelius v. Oliver, 220 S.W.2d 632, 635 (Tex. 1949); Buford v. Pounders, 199 S.W.2d 141, 144-45 (Tex. 1947).

122. Brunswick-Balke-Collender Co. v. Foster Boat Co., 141 F.2d 882, 884–85 (6th Cir. 1944); Petersen v. Wellsville City, 14 F.2d 38, 39 (8th Cir. 1926).

123. 446 U.S. 635, 640 (1980).

124. *Id.* at 641.

allocation of the burden of persuasion should depend on the same factors.[125]

Under common law pleading practice, the plaintiff had the burden to plead and prove the existence of a contract, the plaintiff's performance of all conditions precedent to the defendant's duty to perform the contract, and the defendant's breach of the contract.[126] Although state codes of procedure frequently relaxed the plaintiff's burden to plead performance, the state codes did not shift the burden of persuasion on the issue to the defendant.[127] Most modern cases take the same approach, requiring the plaintiff to plead and prove performance or readiness and ability to perform. For example, in *Kanavos v. Hancock Bank & Trust Co.*, the plaintiff sued a bank for its failure to give the plaintiff a contractually guaranteed right to match any offer for the purchase of stock in a corporation that the bank controlled.[128] The trial court failed to instruct the jury that the plaintiff had to prove he had the ability to pay $760,000 for the stock, which was the amount of the proposed sale to a third party.[129] The Supreme Court of Massachusetts reversed and remanded, ruling that the plaintiff had the burden to prove his ability to finance the purchase of the stock as a prerequisite to his ability to recover for breach.[130]

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125. *See, e.g.*, CLARK, supra note 7, at § 96, 608 (classifying the relevant considerations as historical precedent, logical inference, and views of policy); JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE, §§ 5.15, 5.20, 308–10 (4th ed. 2005) ("[I]n the vast majority of cases, the burden of pleading is on the party who has the burden of proof on the issue.").

126. CLARK, *supra* note 7, at § 45, 276–77; SHIPMAN, *supra* note 3, at §§ 113–15. *See also* JAMES, *supra* note 47, at § 3.20, 125–26 (summarizing claimant's pleading burdens in contract action under common law); Patterson, *supra* note 80, at 921–22 (explaining common law pleading rules).

127. CLARK, *supra* note 7, at § 45, 276–77; JAMES, *supra* note 47, at § 3.20, 125–26. *See also* Patterson, *supra* note 80, at 921–22 ("[T]he plaintiff, if he relies on total or partial performance of his promise, has to allege and prove such promise.").

128. 479 N.E.2d 168, 169 (Mass. 1985).

129. *Id.* at 170.

130. *Id.* at 171–72. *See also* Mayer v. Boston Metro. Airport, Inc., 244 N.E.2d 568, 575 (Mass. 1969) ("It is the general rule that when performance under a contract is concurrent, one party cannot put the other in default unless he is ready, able, and willing to perform and has manifested this by some offer of performance although a tender of performance is not necessary if the other party has shown that he cannot or will not perform." (citations omitted)).

This approach is more sensible than placing the burden of proving non-performance on the defendant. Plaintiffs generally are in as good or better position to plead and prove their own performance or readiness and ability to perform as a condition to recovery as defendants are able to prove the plaintiff's failure of performance as an excuse. The proof of performance or readiness to perform is more likely to be in the hands of the party whose performance or excuse for nonperformance is in question. Thus, Federal Rule 8(c) and its state law counterparts not only use confusing and discarded language by including failure of consideration in their lists of affirmative defenses, but they also should not have included failure of consideration as an enumerated affirmative defense in the first place.

6. The Original Purpose of Rule 9(c)

Federal Rule 9(c), like its predecessors under the English Common Law Procedure Act of 1852 and many American procedural codes adopted in the nineteenth century, was promulgated to simplify the plaintiff's burden to plead satisfaction of conditions precedent to the defendant's duty of performance in breach of contract actions.[131] Rule 9(c)'s similarity to provisions existing in the American procedural codes indicates that no change in the law was intended by its adoption.[132]

In common law pleading and in the state codes, however, the terms *condition* and *condition precedent* had different meanings than they have today under the law of contracts. In common law pleading and under the state codes, the term *condition* was a broad one that referred to all of the terms of a contract, including both promises that were required to be performed by the plaintiff and events that must

131. *See supra* notes 9–10 and accompanying text (discussing origins of Rule 9(c), its placement of pleading burdens on defendant, and the simplification of pleading requirements).

132. *See* JAMES, *supra* note 47, at § 3.11, 202–03 ("[T]he plaintiff is therefore permitted to plead generally the performance of all conditions precedent, and the defending party is required in the pleading to specify any conditions the party desires to put in issue.").

occur before the defendant's duty to perform arose.[133] In contrast, according to the Second Restatement of Contracts, first promulgated as a tentative draft in the 1970s, a condition is "an event, not certain to occur, which must occur, unless occurrence is excused before performance under a contract becomes due."[134] Although Professor Corbin regarded the broad usage of the word *condition* to refer to all contract terms as "slovenly thinking,"[135] there is no doubt that this usage was commonplace in the interpretation of state procedural codes.[136] Accordingly, if the plaintiff met the pleading burden under

133. *See* CLARK, *supra* note 7, at § 45, 280–84 (distinguishing precedent and subsequent conditions, and their relationship to defendant's duty to perform); SHIPMAN, *supra* note 3, at §§ 116–17, 247 (explaining fulfillment and performance of conditions precedent and mutual conditions).

134. RESTATEMENT (SECOND) OF CONTRACTS § 224 (1979).

135. Arthur L. Corbin, *Conditions in the Law of Contracts*, 28 YALE L.J. 739, 743–44 (1919) (claiming broad use of the term *condition* "performs no useful service; instead, it affords one more opportunity for slovenly thinking. In its proper sense the word 'condition' means same operative fact . . . .").

136. *See* CLARK, *supra* note 7, at § 45, 283 ("In the case of the ordinary bilateral contract, it must be decided further whether the mutual promises are dependent or independent; if the former, performance or readiness to perform by the plaintiff must be shown before the defendant is in default."). Although New York no longer has a provision in its procedural law like Rule 9(c), the original Field Code had such a provision. N.Y. CODE CIV. P. § 658 (Weed, Parsons & Co. 1850). In 1921, the New York Civil Practice Law and Rule 92, which was derived from the Code of Civ. Proc. § 533, was adopted, providing: "[T]he party may state in general terms, that he, or the person whom he represents, duly performed all the conditions of such contract on his part." N.Y. Rule Civ. Prac. 92 (published in EDWARD H. WILSON, THE CIVIL PRACTICE MANUAL OF NEW YORK (Edward H. Wilson ed., 1920)). Case law interpretation of Rule 92 required strict and literal adherence to the language of the rule. *See* Louis Prashker, *Pleading Performance of Conditions Precedent*, 13 ST. JOHN'S L. REV. 242, 249–50 (1939) (discussing New York courts' requirement of strict and literal adherence to language of Rule 92). The New York cases also make it plain that the word *condition* was interpreted to mean the plaintiff's performance of the plaintiff's obligations under the contract. *See, e.g.*, Berger v. Urban Motion Pictures Indus., Inc., 201 N.Y.S. 489, 490 (N.Y. App. Div. 1923) (interpreting condition precedent as plaintiff's obligation). *See also* Marx v. Talking Doll & Novelty Co., 160 N.Y.S. 861, 862 (N.Y. Sup. Ct. 1916) ("The provision that the plaintiffs would pay for the machines on delivery was a dependent condition. The complaint states that the plaintiffs demanded the delivery of the machines and were ready . . . to receive and pay for them. This seems to be a sufficient allegation of performance on their part."). In 1948, the provision was changed to state: "The performance or occurrence of a condition precedent in a contract may be pleaded in general terms as a legal conclusion without stating the facts constituting performance or occurrence." N.Y. R. Civ. Prac. 92 (published in J. R. CLEVENGER, CLEVENGER'S

a state code by alleging performance of all conditions precedent to liability, the defendant had to specifically plead the plaintiff's failure to perform specified promises, as well as the nonoccurrence of any extrinsic conditions precedent to performance of the defendant's duties, to place the burden on the plaintiff to prove satisfaction of those promises and conditions.

Under common law pleading principles and under the state codes, the defendant had an independent duty to plead a condition subsequent as a justification for its failure to perform a contract.[137] The traditional meaning of the term *condition subsequent* is an event that extinguishes a duty after performance has become due.[138] For example, if the failure of an insured to take some action, such as filing suit within one year after the insurer became obligated to pay

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ANNUAL PRACTICE OF NEW YORK, 15-42 (J. R. Clevenger ed., 1948)). Current New York law provides:

> The performance or occurrence of a condition precedent in a contract need not be pleaded. A denial of performance or occurrence shall be made specifically and with particularity. In case of such denial, the party relying upon the performance or occurrence shall be required to prove on the trial only such performance or occurrence as shall have been so specified.

N.Y. C.P.L.R. 3015(a) (McKinney 2011). Although the plaintiff no longer has the burden to plead performance of conditions, the term appears to be interpreted in the same manner as the prior law. *See* 1014 Fifth Ave. Realty Corp. v. Manhattan Realty Co., 490 N.E.2d 855, 856 (N.Y. 1986) (holding that while condition precedent need not be pleaded in complaint, burden of proof rests upon plaintiff if defendant denies the performance specifically and with peculiarity). *See also* Moore v. Schoen, 40 N.E.2d 562, 563 (Ill. App. 1942) (treating failure to make specific denial of general allegation of performance as admission of plaintiff's performance of his contractual obligations); Kingston v. Preston, 99 Eng. Rep. 437, 438 (1773) (describing performance of contractual promises as conditions). *Cf.* Halferty v. Wilmering, 112 U.S. 713, 715–16 (1885) (treating failure of defendant to specifically deny plaintiff's nonperformance of contract condition requiring deposit to ensure plaintiff's performance as admission of deposit).

137. *See* CLARK, *supra* note 7, at § 45, 282 (stating that courts tried to construe conditions as conditions subsequent because, in such cases, nonperformance is a defense to be raised by defendants); SHIPMAN, *supra* note 3, at 249 (explaining that plaintiff need not refer to conditions subsequent, but instead may leave it to defendant to plead).

138. GUEST, *supra* note 87, at 118.

for a loss under the policy, discharged the insurer's obligation, the failure to take this required action was regarded as a condition subsequent.[139] The distinction between a condition precedent to liability and a condition subsequent is often (but not always) a matter of form rather than substance.[140] Although the Second Restatement of Contracts has abandoned the distinction, Federal Rule 9(c) has retained it.[141] That rule expressly refers to "conditions precedent" rather than more generally to "conditions,"[142] and thus, it arguably preserves the distinction between conditions precedent and conditions subsequent for pleading purposes.

As explained by Professor Farnsworth, § 230 of the Second Restatement abandoned the term *condition subsequent* in favor of referring to an event that "terminate[s] an obligor's duty of immediate performance or one to pay damages for breach."[143] According to Professor Farnsworth, this new and lengthier terminology is meant to eliminate confusion concerning questions relating to burdens of pleading and proof by "divorcing those questions from substantive contract law."[144] Unfortunately, both the courts and the commentators continue to believe that substantive contract law determines whether a "particular condition" is a "condition precedent" for pleading purposes.[145]

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139. *See* E. ALLAN FARNSWORTH, CONTRACTS § 8.2, 415 (3d ed. 2004) (noting that insurer's duty can be limited by failure of insured to perform condition required to trigger insurer's duty to pay).

140. *See* SHIPMAN, *supra* note 3, at 250 (quoting Professor Williston as stating, "[w]hat are generally called conditions subsequent in contracts are so called with little propriety. They are in substance conditions precedent to the vesting of liability and are subsequent only in form."). *See also* Gray v. Gardner, 17 Mass. 188, 188 (Mass. 1821) (calling requirement that a greater quantity of oil would arrive at specified places within a given time period than had arrived during the same period in the preceding year a "condition subsequent," thus placing burden to show that condition was met was on defendants).

141. *See* Crosney v. Edward Small Prods., 52 F. Supp. 559, 561 (D.C.N.Y. 1942) ("Nonperformance by the assignee, if such exists, is a condition subsequent and not covered by the rule.").

142. *See* FED. R. CIV. P. 9(c) (stating that in pleading conditions precedent, it suffices to allege generally that all conditions precedent have been performed).

143. FARNSWORTH, *supra* note 139, § 8.2, at 421 (citing RESTATEMENT (SECOND) OF CONTRACTS § 230).

144. *Id.*

145. JAMES, *supra* note 47, § 3.20, at 226 ("If substantive law classifies a particular condition as a condition precedent, the plaintiff must plead its fulfillment.").

7. The Need to Amend Rule 9(c)

Rule 9(c) suffers from the same type of problems as Rule 8(c). First, by borrowing the term *conditions* from predecessor state codes, Rule 9(c) does not make clear whether the plaintiff's general pleading of the performance or occurrence of all conditions places the pleading burden on the defendant to allege nonperformance of the claimant's contractual obligations as well as the nonoccurrence of an event that is a prerequisite to the defendant's duty to perform a reciprocal contractual obligation. In fact, by using the term *condition precedent*, Rule 9(c) is at odds with the Second Restatement, which eliminates the term and defines conditions more narrowly to refer to "an event not certain to occur."[146] Second, Rule 9(c) is flawed because it preserves the traditional but troublesome distinction between conditions precedent and conditions subsequent—a distinction rejected by the Second Restatement of Contracts.[147] Third, Rule 9(c) is arguably flawed because it does not expressly explain, the way some state rules do, the consequence of a defendant's failure to specifically allege conditions that have not been performed or have not occurred.[148] Case law suggests that its failure to do so removes the need for the plaintiff to prove performance or fulfillment of the condition.[149]

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146. RESTATEMENT (SECOND) OF CONTRACTS § 224 cmt. e (1979).

147. *Compare id.* § 224 ("Since a 'condition subsequent,' so-called, is subject to the rules of discharge," and not to the rules on conditions, "it is not called a 'condition' in this Restatement."), *with* RESTATEMENT (FIRST) OF CONTRACTS § 250 (1932) (defining "condition precedent" as a condition that "must exist or occur before a duty of immediate performance of a promise arises," and defining "condition subsequent" as a condition that will "extinguish a duty to make compensation for breach of a contract after the breach has occurred").

148. *See, e.g.*, TEX. R. CIV. P. 54 ("When such performances or occurrences have been so plead [sic], the party so pleading same shall be required to prove only such of them as are specifically denied by the opposite party.").

149. *See* Jackson v. Seaboard C.L.R. Co., 678 F.2d 992, 1010 (11th Cir. 1982) ("The plaintiff . . . bears the burden of proving that the conditions precedent, which the defendant has specifically joined in issue, have been satisfied."); Mason v. Connecticut, 583 F. Supp. 729, 733 (D. Conn. 1984) ("[W]here defendant alleges specifically and with particularity . . . that any of the conditions precedent . . . have not been fulfilled, the plaintiff is required under Fed. R. Civ. P. 9(c), to prove they were satisfied."). But in federal diversity cases, the burden of proof on such an issue is probably controlled by state law. *See* Trinity Carton Co. v.

Federal Rule 9(c) can be restored to its original purpose by the inclusion of broader language to make it plain that a general averment of performance of all promises or contractual obligations, as well as of the occurrence of all conditions to liability, is sufficient to impose an obligation on a defendant to specifically plead the matters that have not been performed or that have not occurred.[150] The rule can also be redrafted to erase the distinction between conditions precedent and conditions subsequent, even if it is not revised to explain the consequence of the defendant's failure to specifically identify unmet promises and conditions.[151]

8. Resolving the Current Conflict Between Rule 8(c) and Rule 9(c)

Assuming that Rule 9(c), like its code predecessors, was intended to place the burden on the defendant to plead the plaintiff's particular breach of contract if the plaintiff alleges that "all conditions precedent have occurred or been performed,"[152] Rule 8(c) contradicts Rule 9(c) by listing failure of consideration, i.e. failure of performance by the plaintiff, as an affirmative defense. Under this analysis, Rules 8(c) and 9(c) are inconsistent because the plaintiff's performance can logically be classified as an element of the plaintiff's contract claim, which the plaintiff may be required to prove under Rule 9(c). Likewise, the plaintiff's failure to perform can be treated as an affirmative defense under Rule 8(c). But the

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Falstaff Brewing Co., 767 F.2d 184, 192 n.12 (5th Cir. 1985) (applying Louisiana law on burden of proof issue, even though defendant's burden to plead unmet condition is matter of federal procedural law).

150. For example, the companion procedural rule in Indiana requires defendants to specifically plead the nonperformance of "promissory conditions." *See* IND. R. TR. P. 9(c) ("In pleading the performance or occurrence of promissory or non-promissory conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed, have occurred, or have been excused. A denial of performance or occurrence shall be made specifically and with particularity, and a denial of excuse generally.").

151. *See, e.g.*, TEX. R. CIV. P. 54 (stating that in pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred). *But see* LA. CODE CIV. PROC. ANN. art. 857 (providing that defendant has burden to plead and prove suspensive condition).

152. *See supra* notes 8–10 and accompanying text (discussing the origins of current Rule 9(c) resulting in placement of burden on defendant to specifically plead plaintiff's breach as defense).

plaintiff's performance cannot sensibly be both a part of the plaintiff's claim and an affirmative defense to the plaintiff's claim without creating procedural confusion and uncertainty about the burdens of pleading and persuasion.[153] Thus, by eliminating failure of consideration from Rule 8(c)'s list of affirmative defenses and by clarifying the meaning and operation of Rule 9(c), the burdens of pleading and proving contract claims under current contract law principles can be accomplished.

IV. CONCLUSION

Federal Rules 8 and 9 require revision to ameliorate the confusion and uncertainty about the burdens of pleading and proof in contract litigation. Failure of consideration is and has long been a term that is misunderstood more often than not. Its origins are uncertain and its meaning is confusing. Furthermore, there is good reason to put the burden of pleading the plaintiff's performance or readiness to perform on the plaintiff, rather than on the defendant. Similar and related problems are presented by the current language of federal Rule 9(c). The term *condition precedent* is either misunderstood or too limited to provide useful guidance to the bench and bar in breach of contract cases. Finally, neither the term *failure of consideration* nor the term *condition precedent* is used by contract law scholars or by the Second Restatement of Contracts.

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153. Professor Patterson noticed the contradiction shortly after the federal rules were promulgated:

> The plaintiff is ordinarily required to allege and prove performance of conditions; yet 'failure of consideration' is said to operate as a discharge [of the defendant's liability], which is an affirmative defense. If this means that the plaintiff has the burden of proving that he did perform and that defendant has the burden of proving that plaintiff did not perform, the contradiction is obvious.

Patterson, *supra* note 80, at 922. Although Professor Patterson reasoned that "the requirements are reconcilable," his reasoning is not convincing. Even though defendants may have to prove an excuse for nonperformance, the defendant's excuse would not be the type of failure of consideration that results from the failure of performance by the plaintiff. *Id.*

Under the approach to the pleading and proof of breach of contract claims suggested in this article, the plaintiff would have the burden to plead the existence and the terms of the contract, the plaintiff's performance, which may be done generally as provided in Rule 9(c), and the defendant's breach with sufficient specificity to meet the current pleading requirements needed to show that the plaintiff is entitled to relief. In response, the defendant would have to specifically deny the plaintiff's claim, including the plaintiff's general allegation of performance. The defendant's denial of performance would have to be done with particularity, but the defendant's particularization of the plaintiff's nonperformance would be asserted as a denial rather than an affirmative defense. In that manner, the conflict between substantive contract law and the rules of procedure would be reconciled.