

PHANTOM RULES

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INTRODUCTION

The Judicial Conference of the United States is charged with “carry[ing] on a continuous study of the operation and effect” of the national rules of court procedure promulgated under the Rules Enabling Act.¹ The cycle of rulemaking regularly produces amendments that supersede or abrogate rules. Do the now-dead versions of a rule have any continuing significance? Sometimes a prior practice lives on, despite the adoption of a rule designed specifically to supplant it. This Piece takes as an example the persistence, in a particular federal circuit, of the practice of dismissing a civil appeal rather than staying it pending the disposition of postjudgment motions. Federal Rule of Appellate Procedure 4(a)(4) used to require such dismissals, but since 1993 the Rule has mandated the opposite. This Piece designates the pre-1993 Rule 4(a)(4) a “phantom rule” and argues that the phantom in question should be exorcised because the old version of the rule conflicts with the text and purpose of current law. The Piece notes, however, that not all such phantoms are equally undesirable. Now-abrogated Federal Rule of Civil Procedure 84 and the old Appendix of Forms provide examples of no-longer-extant rules that may continue to tell us something about the meaning of current law.

From 1979 to 1993, Appellate Rule 4(a)(4) set a notorious “trap for the unwary.”² It provided that a notice of appeal from a civil judgment, filed while any of certain types of postjudgment motions were pending, had no effect.³ Many would-be appellants—especially those proceeding without a lawyer—filed such premature notices of appeal, failed to realize that they were nullities, and lost the right to appeal as a result.⁴

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1. 28 U.S.C. § 331 (2012).

2. See *Averhart v. Arrendondo*, 773 F.2d 919, 920 (7th Cir. 1985).

3. See *infra* note 13 and accompanying text (quoting the 1979 amendment to Appellate Rule 4(a)(4)).

4. See, e.g., 16A Charles Alan Wright et al., *Federal Practice and Procedure* § 3950.4, at 323–24 (4th ed. 2008) (“The 1979 amendment created a trap for the unwary by

Responding to the justified condemnation of this pitfall, the rulemakers in 1993 amended Rule 4(a)(4).⁵ As a result of the 1993 amendment,⁶ a notice of appeal filed while such a postjudgment motion is pending lies dormant until the trial court's disposition of the last such remaining motion and then springs into effect.⁷ In such instances, the appeal is timely even if the appellant files no new or amended notice of appeal after the disposition of the motion.⁸

That is, except in the Fourth Circuit. In at least two recent instances, that court has dismissed such premature appeals, requiring the would-be appellant to file a new notice of appeal after disposition of the motion.⁹ These dismissals, this Piece argues, manifest the phantom of old Rule 4(a)(4).¹⁰ It is an unfriendly ghost, beckoning litigants into a trap that the 1993 amendments sought to eliminate. In marked contrast stand the phantoms of Civil Rule 84 and the old forms. Their demise did not necessarily betoken an official judgment about their lack of fit with the current rules of pleading. Thus, we can expect that litigants will continue to point to the old forms as support for a pleading's sufficiency. Whether courts will continue to pay heed to those forms may depend on the context of the case.

nullifying notices of appeal filed before disposition of a timely post-judgment motion. Many litigants failed to file a new notice of appeal after disposition of the post-judgment motion, with the result that they lost their chance to appeal." (footnote omitted)).

5. See Fed. R. App. P. 4(a)(4) advisory committee's note on 1993 Amendment ("The amendment provides that a notice of appeal filed before the disposition of a specified posttrial motion will become effective upon disposition of the motion.").

6. As amended in 1993, the salient portion of Appellate Rule 4(a)(4) read:
A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last such motion outstanding.

Fed. R. App. P. 4(a)(4) (1993) (amended 2016); see also *infra* note 23 and accompanying text (quoting Appellate Rule 4(a)(4)(B)(i) as restyled in 1998).

7. See Fed. R. App. P. 4(a)(4) advisory committee's note on 1993 Amendment ("A notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals.").

8. See *id.* ("[A] notice of appeal filed before the disposition of a posttrial tolling motion is sufficient to bring the underlying case, as well as any orders specified in the original notice, to the court of appeals.").

9. See *infra* Part II (discussing dismissal of two premature appeals: *Cooper v. Astrue*, 480 F. App'x 724 (4th Cir. 2012) (per curiam), and *United States v. Bailey*, 628 F. App'x 212 (4th Cir. 2016) (per curiam)).

10. Procedural phantoms are hardly new to the law. See, e.g., F.W. Maitland, *Equity, Also, The Forms of Action at Common Law: Two Courses of Lectures* 296 (A.H. Chaytor & W.J. Whittaker eds., 1909) ("The forms of action we have buried, but they still rule us from their graves.").

This Piece proceeds in three brief parts. Part I describes the pitfall set by the pre-1993 Rule 4(a)(4) and the way in which the 1993 amendments removed that pitfall. Part II criticizes the Fourth Circuit's erroneous application, in two recent decisions, of the pre-1993 version of Rule 4(a)(4). Part III closes by comparing the malignant effects of old Appellate Rule 4(a)(4) with the potential future role of old Civil Rule 84 and the abrogated Appendix of Forms.

I. APPELLATE RULE 4(A)(4), BEFORE AND AFTER 1993

The story of the 1993 amendment to Appellate Rule 4(a)(4) is a story of rulemaking success: The rulemakers perceived a problem that was causing the loss of appeal rights, and they fixed that problem. Section I.A sketches the contours of the problem and the 1993 amendment's solution. Section I.B reviews the features of the current Rule 4(a)(4).

A. *The Pre-1993 Problem and the 1993 Amendment's Solution*

The old Appellate Rule 4(a)(4) had a logical basis: The specified types of postjudgment motions, if made, might result in a change to the judgment for which the appellant sought review.¹¹ Not only is it improper for a trial court and an appellate court to exercise authority over the same case (or portion of a case) at one time,¹² but such a dual-level process could also be wasteful. Why bother the court of appeals with a judgment that might no longer exist—or exist in the same form—after disposition of the motion? Accordingly, as amended in 1979, Rule 4(a)(4) provided:

If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend a judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. *A notice of appeal filed before the disposition of*

11. The motions in question were: a motion for judgment notwithstanding the verdict (what one would now call a renewed motion for judgment as a matter of law) under Civil Rule 50(b), a postjudgment motion under Civil Rule 52(b) to amend findings or make additional findings of fact after a bench trial, and motions under Civil Rule 59 to amend or alter the judgment or to grant a new trial. See *infra* note 13 and accompanying text (quoting Fed. R. App. P. 4(a)(4) (1979) (amended 2016)). Any of these motions, if granted, could result in the alteration or, in some cases, complete displacement of the judgment.

12. See *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam) (“[A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously.”).

*any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.*¹³

The 1979 amendment was designed to “make it clear that after the filing of the specified posttrial motions, a notice of appeal should await disposition of the motion.”¹⁴

But the rule text, even if clear, posed a hazard for those who did not know to look for it. The rule was complex and counterintuitive, especially for self-represented litigants. In 1985 Judge Richard Posner observed that Rule 4(a)(4) presented “a trap for the unwary into which many appellants, especially those not represented by counsel (and most prisoners are not), have fallen.”¹⁵ As Judge Posner pointed out, a person unfamiliar with the rule likely would not guess that a notice of appeal was a nullity merely because it was filed too early (during the pendency of a postjudgment motion).¹⁶

To make matters worse, filing a timely notice of appeal is a jurisdictional requirement in civil cases.¹⁷ Thus, a sympathetic court of appeals had no authority to excuse an appellant’s failure to refile the notice of appeal after disposition of the motion.¹⁸ Indeed, shortly after the 1979 amendments, the Supreme Court granted certiorari specifically to forbid the Third Circuit’s practice of forgiving such failings absent a showing of harm to the appellee.¹⁹ As the Court held:

Under the plain language of the current rule, a premature notice of appeal “shall have no effect”; a new notice of appeal “must be filed.” In short, it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act.²⁰

13. 20 James WM. Moore, Moore’s Federal Practice § 304App.02 (Daniel R. Coquillette et al. eds., 3d ed. 2015) (emphasis added) (quoting Fed. R. App. P. 4(a)(4) (1979) (amended 2016)).

14. Fed. R. App. P. 4(a)(4) advisory committee’s note on 1979 Amendment.

15. *Averhart v. Arrendondo*, 773 F.2d 919, 920 (7th Cir. 1985).

16. See *id.* (“The idea that the first notice of appeal lapses rather than merely being suspended is not intuitive . . .”).

17. For a roughly contemporaneous example of a case holding the civil appeal time limit jurisdictional, see *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (“[T]he taking of an appeal within the prescribed time is mandatory and jurisdictional.”). For a prominent recent example, see *Bowles v. Russell*, 551 U.S. 205, 209 (2007) (“This Court has long held that the taking of an appeal within the prescribed time is ‘mandatory and jurisdictional.’” (quoting *Griggs*, 459 U.S. at 61)).

18. See *Griggs*, 459 U.S. at 61.

19. See *Griggs v. Provident Consumer Disc. Co.*, 680 F.2d 927, 929 n.2 (3d Cir. 1982) (“Appellant did fail to satisfy Rule 4(a)(4) but though a premature notice of appeal is subject to dismissal, we have generally allowed appellant to proceed unless the appellee can show prejudice resulting from the premature filing of the notice.”), vacated, 459 U.S. 56 (1982).

20. *Griggs*, 459 U.S. at 61.

A number of appellate judges chafed at “[t]he harsh result of this mandated rigid application of this seemingly functionless provision of the rule,”²¹ and the rulemakers responded by amending the Rule in 1993. As the 1993 Committee Note explained:

The amendment provides that a notice of appeal filed before the disposition of a specified posttrial motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals.²²

B. *Current Rule 4(a)(4)*

Rule 4(a)(4)(B)(i) now provides:

If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.²³

If the appellant wishes to challenge the disposition of the *motion*, or the *alteration* of the judgment as a result of the motion, he or she must amend the notice of appeal (or file a new one).²⁴ But if the appellant wishes simply to appeal the judgment, the previously filed notice of appeal suffices.²⁵

Appellate Rule 4(a)(4)(B)(i) does not dictate housekeeping details, and the courts of appeals have varying methods of implementing the Rule’s directive. The court might hold the appeal in abeyance and then return the appeal to the court’s active docket after disposition of the

21. *Harcen Barge Co. v. D & G Boat Rentals, Inc.*, 746 F.2d 278, 281 (5th Cir. 1984).

22. Fed. R. App. P. 4(a)(4) advisory committee’s note on 1993 Amendment.

23. Fed. R. App. P. 4(a)(4)(B)(i). The motions listed in Rule 4(a)(4)(A) are timely motions:

- (i) for judgment under Rule 50(b);
- (ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;
- (iii) for attorney’s fees under Rule 54 if the district court extends the time to appeal under Rule 58;
- (iv) to alter or amend the judgment under Rule 59;
- (v) for a new trial under Rule 59; or
- (vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

Fed. R. App. P. 4(a)(4)(A).

24. See Fed. R. App. P. 4(a)(4)(B)(ii).

25. See *supra* text accompanying note 22 (quoting Fed. R. App. P. 4(a)(4) advisory committee’s note on 1993 Amendment).

motion(s) below.²⁶ The court might stay the appeal and reactivate it after the parties report that the district court has decided the motion(s).²⁷ It might stay the appeal and provide for the appeal's automatic reactivation after the district court decides the motion(s).²⁸ One circuit holds the prematurely filed notice of appeal in abeyance and uses a "limited remand" to the district court to decide the pending motion(s)²⁹—though one might question whether the mechanism of a remand is necessary or appropriate during a time when the effect of the notice of appeal is suspended.³⁰

26. See, e.g., *Swanson Grp. Mfg., LLC v. Jewell*, No. 13-5268 (D.C. Cir. June 3, 2014) (order "return[ing]" appeal "to the court's active docket"); *Swanson Grp. Mfg., LLC v. Jewell*, No. 13-5268 (D.C. Cir. Sept. 24, 2013) (order granting motion to hold case in abeyance) ("[T]his case is hereby held in abeyance pending further order of the court. The parties are directed to file motions to govern future proceedings in this case within 60 days of the completion of the district court proceedings on the pending Rule 59(e) motion.").

27. For example, see the Federal Circuit's orders in *Core Wireless Licensing S.A.R.L. v. Apple, Inc.*, first staying the appeal, No. 15-2037 (Fed. Cir. Nov. 6, 2015) (order granting stay and deactivating appeal) (directing parties "to notify this court within 30 days of the district court's disposition of the Rule 59(e) motion and inform the court how they believe this appeal should proceed"), and later reactivating it, No. 15-2037 (Fed. Cir. Mar. 2, 2016) (order reactivating appeal).

28. See, e.g., *Rumanek v. Indep. Sch. Mgmt.*, No. 14-1472 (3d Cir. Mar. 4, 2014) (order staying appeal) (directing parties "to file written reports addressing the status of the pending motion" every thirty days and providing that "[t]he stay will automatically expire upon entry of the order disposing of the last post-decision motion").

29. See, e.g., *Harris v. Moberly*, 642 F. App'x 386, 387 (5th Cir. 2016) ("Because the district court has not decided the Rule 59(e) motion, this appeal is premature. The case is, therefore, remanded to the district court for the limited purpose of allowing the court to rule on Harris's pending Rule 59(e) motion. Harris's appeal is held in abeyance." (citing Fed. R. App. P. 4(a)(4)(B)(i))).

30. The Fifth Circuit's use of the remand procedure appears to reflect jurisdictional confusion. Appellate Rule 4(a)(4)(B)(i) suspends the effect of the notice of appeal pending disposition of any timely motions of the types listed in Appellate Rule 4(a)(4)(A). Fed. R. App. P. 4(a)(4)(B)(i). If the notice of appeal is not in effect, then the court of appeals does not yet have jurisdiction to proceed with the appeal; this fits with the Rule's evident assumption that the district court can proceed to rule on the motions. This division of labor is reflected in the indicative-ruling mechanism in Civil Rule 62.1 and Appellate Rule 12.1. Those rules provide a process for the district court to voice its view on a motion "that it lacks authority to grant because of an appeal that has been docketed and is pending." Fed. R. App. P. 12.1(a). As the 2009 Committee Note on Appellate Rule 12.1 explains:

Appellate Rule 4(a)(4) lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.

Fed. R. App. P. 12.1 advisory committee's notes on 2009 Amendment. Just as the Committee Note observes that resort to the indicative-ruling procedure is unnecessary, so too is a "limited remand" from the court of appeals unnecessary.

But the redundancy of the "limited remand" seems harmless (at least so long as it does not mislead the district court into thinking that it lacks authority to act on the pen-

In any event, the one thing that a court of appeals plainly cannot do is dismiss an appeal on the ground that a motion listed in Appellate Rule 4(a)(4)(A) is pending in the district court. Such a dismissal would violate Rule 4(a)(4)(B)(i) by preventing the notice of appeal from “becom[ing] effective” upon disposition of the motion.³¹ And yet on two occasions in the past few years, the Fourth Circuit has employed just such a dismissal to dispose of this type of premature appeal.³²

II. THE CONTINUED APPARITION OF OLD RULE 4(A)(4)

The pre-1993 version of Rule 4(a)(4) was dead, to reiterate.³³ There is no doubt whatever about that. The register of its burial was signed by the Appellate Rules Committee, the Standing Committee, the United States Judicial Conference, and the Supreme Court.³⁴ The Chief Justice signed it,³⁵ and his name was good for anything he chose to put his hand to. And Congress having taken no action during the prescribed statutory period,³⁶ the old version of Rule 4(a)(4) was as dead as a doornail.

But some two decades after its decease, the old rule’s spirit materialized in the Fourth Circuit and caused the dismissal of two premature

ding motion absent such a “limited remand”). And it is certainly preferable to the Fourth Circuit’s practice of dismissing the appeal and requiring the filing of a new notice of appeal. See *infra* Part II (discussing cases demonstrating the Fourth Circuit’s practice).

31. As noted at the start of section I.B, Appellate Rule 4(a)(4)(B)(i) provides that a notice of appeal filed during the pendency of a postjudgment motion of a type listed in Rule 4(a)(4)(A) “becomes effective . . . when the order disposing of the last such remaining motion is entered.” Fed. R. App. P. 4(a)(4)(B)(i). If the appeal has been dismissed rather than held in abeyance, then the notice of appeal cannot later “become effective.” *Id.*

32. See *infra* Part II (discussing *United States v. Bailey*, 628 F. App’x 212 (4th Cir. 2016) (*per curiam*), and *Cooper v. Astrue*, 480 F. App’x 724 (4th Cir. 2012) (*per curiam*)).

33. With thanks to Charles Dickens:

Marley was dead, to begin with. There is no doubt whatever about that. The register of his burial was signed by the clergyman, the clerk, the undertaker, and the chief mourner. Scrooge signed it. And Scrooge’s name was good upon ‘Change, for anything he chose to put his hand to. Old Marley was as dead as a door-nail.

Charles Dickens, *A Christmas Carol* 1 (New York, Hodder & Stoughton 1913) (1843).

34. See generally Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. Pa. L. Rev. 1099, 1104 (2002) (outlining the process for approving an amendment to a rule under the Rules Enabling Act).

35. See H. Journal, 103d Cong., 1st Sess. 338–39 (1993) (noting referral of “[a] letter from the Chief Justice of the United States, transmitting amendments to the Federal Rules of Appellate Procedure as adopted by the Court, pursuant to 28 U.S.C. 2072 (H. Doc. No. 103-72); to the Committee on the Judiciary and ordered to be printed”).

36. See 28 U.S.C. § 2074(a) (2012) (“The Supreme Court shall transmit to the Congress not later than May 1 . . . a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.”).

appeals—*Cooper v. Astrue*³⁷ and *United States v. Bailey*.³⁸ Section II.A notes that the apparition caused serious trouble in *Cooper* because the pro se appellant's second notice of appeal was held untimely, and thus she lost her right to an appeal. In *Bailey*, the apparition did not cause the loss of appeal rights, but as section II.B explains, the case is of interest because it reveals more clearly the operation of this phantom rule.

A. *Cooper v. Astrue*

In the first of the two cases, the would-be appellant was self-represented on appeal,³⁹ and the dismissal of her initial appeal led to the loss of her appeal right.⁴⁰ Francyne Cooper sought review in federal district court of the denial of federal disability benefits.⁴¹ After the district court adopted the magistrate judge's recommendation and granted summary judgment to the Commissioner of Social Security, Cooper promptly sought reconsideration of that judgment; it appears that from this point forward she was no longer represented by the lawyer who had appeared on her behalf in the district court.⁴² While that request for reconsideration was still pending, Cooper filed a notice of appeal.⁴³ The government moved to dismiss her appeal as untimely, presumably because she filed the notice of appeal more than sixty days after the entry of judgment.⁴⁴ The court of appeals rejected that challenge, treating Cooper's reconsideration request as a Civil Rule 60(b) motion that, under Appellate Rule 4(a)(4)(A)(vi), suspended the time to appeal from

37. 480 F. App'x 724.

38. 628 F. App'x 212 (4th Cir. 2016) (per curiam).

39. See *Cooper*, 480 F. App'x at 724 (listing Cooper as "Appellant Pro Se" in the section enumerating the attorneys in the case).

40. See *infra* notes 47–50 and accompanying text.

41. See *Cooper v. Astrue*, No. 4:10-cv-110, 2011 WL 6749018, at *1 (E.D. Va. Dec. 22, 2011), appeal dismissed in part and remanded in part, 480 F. App'x 724.

42. See *Cooper*, 480 F. App'x at 724 (noting Cooper had filed a motion pro se and interpreting that motion as one "requesting the district court to reconsider its ruling"). Because of the privacy protections that apply to actions seeking review of Social Security determinations, the parties' filings in *Cooper* are unavailable for remote electronic viewing. See Fed. R. Civ. P. 5.2(c) (limiting remote electronic access to party filings in Social Security actions); see also Fed. R. App. P. 25(a)(5) ("An appeal in a case whose privacy protection was governed by . . . Federal Rule of Civil Procedure 5.2 . . . is governed by the same rule on appeal."). Thus, this Piece relies on the information that can be gleaned from the dockets and court opinions in the case.

43. See *Cooper*, 480 F. App'x at 724 (ruling Cooper's May 14th notice of appeal premature in light of the unresolved reconsideration motion filed on January 4th).

44. *Id.* ("The Commissioner has filed a motion to dismiss the appeal, contending that Cooper's . . . notice of appeal was untimely filed."). Because this was a civil case to which a federal government entity was a party, the rule and statute set a sixty-day appeal time limit. See 28 U.S.C. § 2107(b) (2012); Fed. R. App. P. 4(a)(1)(B).

the underlying judgment.⁴⁵ But the court then proceeded to dismiss the appeal:

Because the district court has not yet ruled on the [reconsideration motion], Cooper's . . . notice of appeal—while not untimely—is premature.

We therefore deny the Commissioner's motion to dismiss this appeal as untimely and instead dismiss it as premature. We remand the case to the district court so that it may rule on Cooper's pro se [motion], properly construed as a Rule 60 motion to reconsider. Of course, should the district court rule adversely on Cooper's pro se Submission, she may at that time file a timely notice of appeal from the district court's judgment . . . , the order denying her Submission, or both.⁴⁶

The district court did rule against Cooper on her motion for reconsideration.⁴⁷ And Cooper filed a second notice of appeal—but she did so seventy-one days after the entry of the order denying reconsideration.⁴⁸ The court of appeals granted the government's motion to dismiss the appeal as untimely.⁴⁹ The court reasoned that Cooper had sixty days from the entry of the order denying reconsideration in which to file her notice of appeal and concluded that her failure to do so within that time limit deprived the court of jurisdiction to hear the appeal.⁵⁰

B. United States v. Bailey

In the second case, the would-be appellant had appellate counsel and managed to file a second notice of appeal within the time frame set by the court of appeals.⁵¹ Frank Bailey was convicted in federal district

45. See *Cooper*, 480 F. App'x at 724; see also Fed. R. App. P. 4(a)(4)(A)(vi) (including, among the motions that toll the time to appeal the underlying judgment, a motion "for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered"). Cooper had filed her reconsideration request within twenty-eight days after entry of the judgment. See *Cooper v. Astrue*, No. 4:10-cv-00110 (E.D. Va. Dec. 22, 2011) (judgment dated December 21, 2011, and file-stamped December 22, 2011); see also *Cooper*, 480 F. App'x at 724 (noting Cooper filed her reconsideration motion on January 4, 2012).

46. *Cooper*, 480 F. App'x at 724 (citation omitted) (citing 28 U.S.C. § 1291 (2006)).

47. See *Cooper v. Astrue*, No. 4:10-cv-110 (E.D. Va. Oct. 2, 2012) (order denying motion for reconsideration).

48. See *Cooper v. Astrue*, No. 12-2534 (4th Cir. Feb. 8, 2013) (order dismissing appeal) ("The order that Cooper seeks to appeal was entered on October 3, 2012. . . . Cooper did not file a notice of appeal until December 13, 2012 . . .").

49. See *id.*

50. See *id.*

51. See *Bailey v. United States*, Nos. RDB-12-3557, RDB-07-0559, 2016 WL 739036, at *3 (D. Md. Feb. 25, 2016) (order denying Bailey's reconsideration motion); Notice of Appeal at 1, *Bailey*, No. RDB-07-0559 (D. Md. Apr. 22, 2016) [hereinafter Notice of Appeal] (noticing an appeal from, inter alia, the district court's January 2013 judgment dismissing Bailey's § 2255 motion); see also *United States v. Bailey*, 628 F. App'x 212, 213 (4th Cir. 2016) (per curiam) (dismissing Bailey's prior appeal from the January 2013

court of drug and firearms violations, and the Fourth Circuit affirmed the judgment of conviction on direct appeal.⁵² A few years later, Bailey moved (without counsel) for relief under 28 U.S.C. § 2255.⁵³ The district court denied the motion as untimely (after Bailey, proceeding pro se, had failed to respond to the district court's directive that he explain within twenty-eight days why the motion was timely).⁵⁴ Within twelve days thereafter, Bailey filed a letter both explaining his earlier failure to respond⁵⁵ and arguing for equitable tolling of the limitations period for seeking § 2255 relief.⁵⁶ The district court took no action in response, despite periodic letters from Bailey inquiring about the status of his motion.⁵⁷ After roughly nine months, Bailey filed a document seeking review by the court of appeals.⁵⁸ The court of appeals interpreted the document as a notice of appeal⁵⁹ and appointed appellate counsel for Bailey.⁶⁰ However, it ultimately dismissed the appeal on the grounds that Bailey's letter to the district court counted as a timely reconsideration

judgment and stating that if Bailey wished to appeal that judgment he would need to file a new "timely notice of appeal" after the district court's disposition of his reconsideration motion).

52. See *United States v. Bailey*, 329 F. App'x 439, 440, 442 (4th Cir. 2009).

53. See *Bailey*, Nos. RDB-12-3557, RDB-07-0559 (D. Md. Jan. 17, 2013) (order dismissing § 2255 motion as untimely).

54. See *id.*

55. He asserted that the court's prior directive was delivered to him by prison officials more than a month after its issuance. See Letter from Frank Bailey to Richard D. Bennett, Judge, U.S. Dist. of Md. 2, *Bailey*, Nos. RDB-12-3557, RDB-07-0559, 2016 WL 739036 (Jan. 22, 2013) [hereinafter January Letter from Frank Bailey to Judge Richard D. Bennett]. Applying the "prisoner mailbox rule" would mean that Bailey filed the letter even sooner, when he delivered it to prison officials for mailing. Cf. 16A Wright et al., *supra* note 4, § 3950.12, at 529–30 & n.20 (4th ed. 2008 & Supp. 2016) (discussing the application of the prisoner-mailbox rule to filings in the district court other than the notice of appeal).

56. See Letter from Frank Bailey to Judge Richard D. Bennett, *supra* note 55, at 1.

57. Bailey first followed up with a letter in March 2013. See Letter from Frank Bailey to Richard D. Bennett, Judge, U.S. Dist. of Md., *Bailey*, Nos. RDB-12-3557, RDB-07-0559, 2016 WL 739036 (Mar. 22, 2013). When he received no response, Bailey sent another letter, which the court received in May. See Letter from Frank Bailey to Richard D. Bennett, Judge, U.S. Dist. of Md., *Bailey*, No. RDB-12-3557, RDB-07-0559, 2016 WL 739036 (May 16, 2013). Bailey then sent another letter, which the court received in September. See Letter from Frank Bailey to Richard D. Bennett, Judge, U.S. Dist. of Md., *Bailey*, Nos. RDB-12-3557, RDB-07-0559, 2016 WL 739036 (Sep. 9, 2013).

58. Letter from Frank Bailey to Patricia S. Connor, Clerk, U.S. Court of Appeals for the Fourth Circuit at 1, *Bailey*, Nos. RDB-12-3557, RDB-07-0559, 2016 WL 739036 (Oct. 29, 2013). Bailey filed the notice of appeal in the court of appeals, which transmitted it to the district court pursuant to Appellate Rule 4(d). See Letter from Patricia S. Connor, Clerk, U.S. Court of Appeals for the Fourth Circuit to Felicia Cannon, Clerk, U.S. Dist. Court of Md. 1, *Bailey*, No. RDB-12-3557, No. RDB-07-0559, 2016 WL 739036 (Nov. 12, 2013).

59. See *United States v. Bailey*, 628 F. App'x 212, 212 (4th Cir. 2016) (per curiam).

60. See Letter from Robert W. Jaspen, Senior Staff Counsel, U.S. Court of Appeals for the Fourth Circuit, to John J. Korzen, Professor, Wake Forest Univ. Sch. of Law 1, *Bailey*, 628 F. App'x 212 (No. 13-7863) (Feb. 28, 2014) (on file with the *Columbia Law Review*).

motion of a kind described in Appellate Rule 4(a)(4) and that the reconsideration motion nullified his notice of appeal:

Because the district court has not yet ruled on the pending January 22 motion, Bailey's October 29, 2013, letter to the Clerk of this Court, which was construed as a notice of appeal, is premature and has no effect. See *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 61 . . . (1982).

We therefore dismiss the appeal as premature and remand the case to the district court so that it may rule upon the January 22 motion. See, e.g., *United States v. Rowe*, 872 F.2d 420 (4th Cir. 1989) (unpublished table decision). Should the district court rule adversely on the January 22 motion, Bailey may at that time file a timely notice of appeal from the court's dismissal of the § 2255 motion, the denial of the January 22 motion, or both. See *Cooper v. Astrue*, 480 Fed. Appx. 724, 724 (4th Cir. 2012).⁶¹

Here it is worth pausing to ask the basis for the *Bailey* court's dismissal of the appeal. The *Cooper* court had simply cited 28 U.S.C. § 1291—the statute that authorizes appeals as of right from “final decisions” of the federal district courts.⁶² The incompletely articulated rationale in *Cooper*, presumably, was that the pending reconsideration motion rendered the judgment not yet “final” for purposes of appeal.⁶³ In *Bailey*, the court cited its prior nonprecedential opinion⁶⁴ in *Cooper* as precedent.⁶⁵ But the *Bailey* court's further citations to *Griggs* and *Rowe* are more revealing: Both of those cases applied the pre-1993 version of Appellate Rule 4(a)(4).⁶⁶ In other words, the court dismissed Bailey's appeal in reliance on a phantom rule—and in so doing, it ignored the current version of the rule, which forbids such a dismissal.

In a number of ways, the court of appeals exercised commendable care in preserving an opportunity for Bailey to obtain consideration of his challenge to his conviction. The court interpreted Bailey's letter to the court of appeals as a notice of appeal, appointed appellate counsel,

61. *Bailey*, 628 F. App'x at 212–13 (footnote omitted).

62. See *supra* note 46 (noting the citation to § 1291); see also 28 U.S.C. § 1291 (2012) (providing in relevant part that “[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States”).

63. See, e.g., *Tripathi v. Henman*, 857 F.2d 1366, 1367 n.1 (9th Cir. 1988) (per curiam) (“[A] pending Rule 59 motion deprives a case of finality for appellate jurisdiction purposes . . .”).

64. As the *Cooper* opinion stated, “[u]npublished opinions are not binding precedent in this circuit.” *Cooper v. Astrue*, 480 F. App'x 724, 724 (4th Cir. 2012) (per curiam).

65. See *supra* note 61 and accompanying text (quoting *Bailey*, 628 F. App'x at 212–13).

66. See *United States v. Rowe*, No. 88-7349, 1989 WL 27531, at *1 (4th Cir. Mar. 21, 1989) (per curiam) (unpublished table decision) (“Rowe's appeal is premature and his notice of appeal has no effect. The appeal is not properly before this Court until . . . a timely notice of appeal is filed within the 60-day period after the order is entered disposing of the Rule 59(e) motion.” (citations omitted)); see also *supra* notes 18–20 and accompanying text (discussing *Griggs*).

and urged the district court to also appoint counsel for Bailey.⁶⁷ And, indeed, after the district court denied Bailey's reconsideration motion, Bailey's appointed appellate counsel filed a notice of appeal within the sixty-day time limit as measured from the entry of the order denying reconsideration.⁶⁸

So this chapter of Bailey's procedural story had a good ending.⁶⁹ But it is not hard to imagine the story ending quite differently, especially for pro se litigants. Admittedly, it is unclear whether the Fourth Circuit would enforce the full measure of forfeiture that existed under the pre-1993 Appellate Rule 4(a)(4); in both *Cooper* and *Bailey* the would-be appellant was placed on notice of the court's requirement of a new notice of appeal at a time when there was still an opportunity to file the new notice.⁷⁰ Perhaps in a case in which that deadline had already expired by the time that the court of appeals reviewed the question of its appellate jurisdiction, the court of appeals would allow the previously filed notice of appeal to relate forward. But even if the court of appeals permitted relation forward in such instances, the remaining potential for dismissal of appeals due to the pendency in the district court of a tolling motion (as in *Cooper* and *Bailey*) is problematic.

Requiring a litigant to file a new notice of appeal after disposition of the pending tolling motions (rather than simply holding the existing notice of appeal in abeyance until that disposition) creates opportunities for the loss of appeal rights in instances when no such opportunities should exist. Cooper's case provides an example: Proceeding pro se, she

67. See supra notes 59–60 and accompanying text (discussing the interpretation of the letter as a notice of appeal and appointment of appellate counsel); see also *Bailey*, 628 F. App'x at 213 n.2 ("We suggest that the district court consider appointing counsel for Bailey, to assist his handling of the January 22 motion proceedings and to place this matter in a proper procedural posture.").

68. See Notice of Appeal, supra note 51, at 1; *Bailey v. United States*, Nos. RDB-12-3557, RDB-07-0559, 2016 WL 739036, at *3 (D. Md. Feb. 25, 2016) (order denying Bailey's reconsideration motion).

69. In the end, Bailey's appeal failed for other reasons. See *United States v. Bailey*, No. 16-6593, 2016 WL 6298694 (4th Cir. Oct. 27, 2016) (per curiam) (unpublished decision) (dismissing Bailey's appeal because he failed to qualify for a certificate of appealability under the standard set by 28 U.S.C. § 2253(b)(2) (2012)).

70. In *Cooper*, the Fourth Circuit's August 9, 2012 order dismissing Cooper's first notice of appeal made clear the court's view that Cooper must file a new notice of appeal after the disposition of her pending reconsideration motion, see *Cooper v. Astrue*, 480 F. App'x 724, 724 (4th Cir. 2012) (per curiam), and the district court did not dispose of that reconsideration motion until October 2012, see *Cooper v. Astrue*, No. 4:10-cv-00110 (E.D. Va. Oct. 2, 2012) (order denying motion for reconsideration). Likewise, in *Bailey*, the Fourth Circuit's February 16, 2016, opinion dismissing Bailey's first notice of appeal (and explaining the court's view that a new notice of appeal would be necessary after the district court's disposition of the reconsideration motion), see *United States v. Bailey*, 628 F. App'x at 213, predated the district court's February 25, 2016, disposition of Bailey's reconsideration motion. See *Bailey*, Nos. RDB-12-3557, RDB-07-0559, 2016 WL 739036, at *1 (order denying Bailey's reconsideration motion).

misunderstood the court's filing deadline for the notice of appeal.⁷¹ Apparently, she thought that the sixty-day period ran from her receipt of notice of the order denying reconsideration⁷²—but the general rule for appeal deadlines is that they run from the date of entry of the order or judgment, not from the date the litigant receives notice of the order or judgment.⁷³

It is time, then, for the Fourth Circuit to banish the phantom of the old Appellate Rule 4(a)(4); that is one of the points of this brief Piece. But in singling out the Fourth Circuit, this Piece does not mean to suggest that the Fourth Circuit is the only court haunted by obsolete versions of the rules.⁷⁴ Nor does this Piece mean to argue that all procedural phantoms are malignant. The next Part contrasts the old Appellate Rule 4(a)(4) with the phantoms of old Civil Rule 84 and the now-abrogated Civil Forms.

III. ASSESSING PHANTOM RULES

As Marley's ghost illustrates, even one who is dead as a doornail may have an important message to convey.⁷⁵ One should not overlook, therefore, the possibility that some procedural hauntings can be beneficial. What makes a procedural phantom good or bad? Here this Piece briefly contrasts the type of bad phantom discussed above—namely, a defunct rule that contravenes current law to the detriment of procedural justice—with a type of phantom that is not necessarily bad—namely, an abrogated rule that (depending on the circumstances) may continue to provide a useful guide to the content of current law. The old

71. See *Cooper v. Astrue*, No. 12-2534 (4th Cir. Feb. 8, 2013) (order dismissing appeal) (“While Cooper’s notice of appeal and submissions in this Court appear to reflect an assumption that the pertinent appeal period began to run from the moment she received notice of the order’s entry, she is mistaken.”); see also *Cooper*, 480 F. App’x at 724 (noting that Cooper was “pro se”).

72. See *supra* note 71.

73. See, e.g., Fed. R. App. P. 4(a)(1)(B) (providing in cases involving specified types of federal government litigants that “[t]he notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from”); see also Fed. R. App. P. 4(a)(4)(B)(ii) (providing that challenging an order disposing of a tolling motion, or a judgment’s alteration upon such a motion, requires filing a new or amended notice of appeal “within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion”). Of course, neither of these deadlines should have applied to Cooper because her prior notice of appeal should have sufficed to bring the judgment up for review. See Fed. R. App. P. 4(a)(6) (providing, under specified circumstances, for the reopening of the appeal time when the would-be appellant failed to receive notice of the judgment).

74. Indeed, in fairness to the Fourth Circuit, one must note that there are at least two previous cases in which that circuit properly invoked the current version of Appellate Rule 4(a)(4). See *United States v. Green*, 200 F. App’x 214, 214 (4th Cir. 2006) (per curiam); *O’Grady v. Zurich Holding Co. of Am.*, 123 F. App’x 557, 558 (4th Cir. 2005) (per curiam).

75. See *supra* note 33 and accompanying text (referencing Charles Dickens’s *A Christmas Carol*).

Appellate Rule 4(a)(4) is an example of the first kind, and old Civil Rule 84 and its accompanying Appendix of Forms exemplify the second.⁷⁶

The first two Parts of this Piece point out that the Fourth Circuit has of late been haunted by an obsolete version of Appellate Rule 4(a)(4)—a version that produces results directly opposite to the directive in current Appellate Rule 4(a)(4). Because those results run counter to both the text of the current Rule 4(a)(4) and the intent of the 1993 amendments that produced the current rule, and because those results can erroneously lead to the loss of appeal rights, this is a phantom that should be banished.

Given the recency of the 2015 amendments to the Civil Rules, it seems useful to consider the potential future role of the now-abrogated Civil Rule 84 and the likewise-abrogated Appendix of Forms to the Civil Rules. Old Rule 84 and the old Forms, despite their 2015 abrogation, will likely continue to be discussed in connection with Civil Rule 8(a)(2)'s pleading standard. Claimants are likely to argue that the old Forms continue to exemplify the requirements of a pleading standard that the 2015 amendments were expressly designed not to alter.

From the beginning (that is, from the 1938 promulgation of the original set of Civil Rules), Rule 84 made clear that the Appendix of Forms was designed to exemplify “the simplicity and brevity of statement which the rules contemplate.”⁷⁷ In 1946, Rule 84 was amended to state that the documents set out in the Appendix of Forms “are sufficient under the rules.”⁷⁸ The 1946 Committee Note explained that the goal of this amendment was “to emphasize that the forms contained in the Appendix of Forms are sufficient to withstand attack under the rules under which they are drawn, and that the practitioner using them may rely on them to that extent.”⁷⁹

76. As another example, the rulemakers restyled the various sets of national rules but did not intend substantive changes (except when they specifically noted otherwise). See Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 *Notre Dame L. Rev.* 1761, 1761 (2004) (noting the goal of restyling is “to translate present text into clear language that does not change the meaning”). When a question arises as to the meaning of a restyled rule, it seems entirely appropriate to inform the analysis by reference to the pre-restyling version of the rule.

77. 14 Moore, *supra* note 13, § 84App.02 (quoting the original Rule 84, which stated that “[t]he forms contained in the Appendix of Forms are intended to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate”); see also A. Benjamin Spencer, *The Forms Had a Function: Rule 84 and the Appendix of Forms as Guardians of the Liberal Ethos in Civil Procedure*, 15 *Nev. L.J.* 1113, 1120 (2015) (recounting Advisory Committee reporter Charles Clark’s explanation of the Civil Rules’ pleading standard).

78. The 1946 amendments also deleted from Rule 84 the phrase “subject to the provisions of these rules.” See 14 Moore, *supra* note 13, § 84App.05 (quoting the 1946 amendment to Civil Rule 84); see also Spencer, *supra* note 77, at 1117, 1123 (noting the language added in 1946, about sufficiency under the rules, was very similar to language considered but ultimately not adopted in the development of the original Civil Rule 84).

79. Fed. R. Civ. P. 84 advisory committee’s note on 1946 Amendment.

As its drafters intended, Rule 84 became a significant source of guidance concerning the requirements of Civil Rule 8(a)(2).⁸⁰ Ever since its 1938 promulgation, Civil Rule 8(a)(2) has directed that a pleading setting out a claim for relief include “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁸¹ Original Form 9 (which was renumbered as Form 11 in 2007⁸²) illustrated that brevity and plainness in the context of a negligence case. As to the elements of duty and breach, the form stated simply: “[D]efendant negligently drove a motor vehicle against plaintiff”⁸³

In 2007, when the Supreme Court in *Bell Atlantic Corp. v. Twombly* announced a new and more stringent interpretation of Rule 8(a)(2)’s pleading requirements,⁸⁴ the Court took care to explain how the anti-trust-conspiracy complaint in that case differed from then-Form 9. The form, the *Twombly* Court noted, “alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time,” and the defendant in a case involving that type of “simple fact pattern . . . would know what to answer” on the basis of that brief complaint.⁸⁵ By contrast, the lack of specifics concerning the alleged antitrust conspiracy in *Twombly* would give the defendant “little idea where to begin” to defend itself in that more complex type of case.⁸⁶

Though debate continues concerning the nature and effect of the *Twombly/Iqbal* pleading standard,⁸⁷ one possible rendering of that stan-

80. See Spencer, *supra* note 77, at 1120 (“From the beginning . . . , we see the forms fulfilling the function envisioned by the drafters, as they were invoked by courts and litigants on many occasions to confirm that the new rules did not require particularized pleading in the ordinary case.”).

81. Fed. R. Civ. P. 8(a)(2).

82. The Civil Rules were restyled, and the accompanying Forms were restyled and renumbered, in 2007. See Supreme Court of the U.S., Submission to Congress of the Amendments to the Federal Rules of Civil Procedure (Apr. 30, 2007), <http://www.supremecourt.gov/orders/courtorders/frcv07p.pdf> [<http://perma.cc/2GJH-TWQ2>] (providing, *inter alia*, “[t]hat Forms 1 through 35 in the Appendix to the Federal Rules of Civil Procedure be, and they hereby are, amended to become restyled Forms 1 through 82” and appending as “Form 11” the “Complaint for Negligence”).

83. Staff of H. Comm. on the Judiciary, 110th Cong., Federal Rules of Civil Procedure with Forms 102 (Comm. Print 2007), <http://www.uscourts.gov/rules-policies/archives/superseded-rules/federal-rules-civil-procedure-2007> [<http://perma.cc/7MUB-MYSX>] (setting out Form 11); Staff of H. Comm. on the Judiciary, 109th Cong., Federal Rules of Civil Procedure with Forms 102 (Comm. Print 2006), <http://www.uscourts.gov/rules-policies/archives/superseded-rules/federal-rules-civil-procedure-2006> [<http://perma.cc/BEM3-KQ3X>] (setting out Form 9).

84. See 550 U.S. 544, 570 (2007) (requiring dismissal of the plaintiffs’ complaint because they did not plead “enough facts to state a claim to relief that is plausible on its face”).

85. *Id.* at 565 n.10.

86. *Id.*

87. In *Ashcroft v. Iqbal*, the Court made it clear that the *Twombly* pleading standard applies to all civil cases in federal court. See 556 U.S. 662, 684 (2009) (“Our decision in

dard is as follows. In assessing the sufficiency of a pleading that states a claim for relief, the court should disregard conclusory allegations,⁸⁸ assess whether the nonconclusory fact allegations (taken as true) themselves state a claim for relief, and—if it is necessary to draw inferences from those alleged facts in order to fill in one or more elements of the claim—consider whether those inferences are plausible in light of the judge’s “judicial experience and common sense.”⁸⁹

Prior to their abrogation, the official forms played a role in this analysis. Admittedly, their role was a contested one, and many commentators noted that the simplicity of the form pleadings stood in tension with the details demanded of the complaints in *Twombly* and *Iqbal*.⁹⁰ But neither of those decisions purported to question Rule 84’s instruction that the form pleadings sufficed under Rule 8(a)(2), and so the forms’ continued existence affirmed the fact that even after *Twombly* and *Iqbal*, some claims could be pleaded briefly and simply. Thus, whether one viewed a relevant form as helping to establish whether a given allegation was or was not conclusory, or whether one viewed the form in question as bearing more generally on the court’s application of experience and common sense, a real-life claim’s similarity to a claim set out in an official form could help ground an argument that the pleading sufficed under Rule 8(a)(2).

Has that role ceased with the abrogation of Rule 84 and the Appendix of Forms? Admittedly, the abrogation of Rule 84 means that no provision in the current Civil Rules requires a court to accept a pleading merely because it tracks the allegations in an official form. In that respect, the 2015 amendments appear to have transmuted the forms from binding to nonbinding authority. But litigants will undoubtedly continue to cite them as persuasive authority.⁹¹

Twombly expounded the pleading standard for ‘all civil actions,’ . . . and it applies to antitrust and discrimination suits alike.” (citation omitted) (quoting Fed. R. Civ. P. 1)).

88. See *id.* at 678 (“[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”); *Twombly*, 550 U.S. at 555 (“[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . .”).

89. *Iqbal*, 556 U.S. at 679 (“Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”). See generally Richard H. Field et al., *Civil Procedure: Materials for a Basic Course* 44 (concise 11th ed. 2014) (offering the framework stated in the text).

90. See, e.g., Spencer, *supra* note 77, at 1128 (noting “the tension between the forms and the plausibility pleading requirements of *Twombly* and *Iqbal*”).

91. Such an argument need not in the least suggest that the abrogation of Rule 84 and the Appendix of Forms was invalid. But cf. Brooke D. Coleman, *Abrogation Magic: The Rules Enabling Act Process, Civil Rule 84, and the Forms*, 15 Nev. L.J. 1093, 1106 (2015) (arguing “the proposed abrogation of Rule 84 and the forms is being done without reference to any of the rules to which the forms correspond” and that “[t]his failure to

Key here is the stated purpose of the abrogation.⁹² The Committee Note on Rule 84's abrogation had, all along, explained that the proposed abrogation stemmed from the fact that the forms' illustrative purpose had been met: "The purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled," and thus "Rule 84 and the Appendix of Forms are no longer necessary and have been abrogated."⁹³ Admittedly, the memorandum that accompanied the publication for comment of the proposed abrogation did mention, as well, perceptions of dissonance between the official forms and the post-*Twombly/Iqbal* pleading standards.⁹⁴ But after considering public comments on the proposal, the Civil Rules Committee forwarded the proposal along with a report that could be read to suggest that the topic of pleading standards should be delinked from the proposed abrogation of Civil Rule 84 and the forms.⁹⁵ And a subsequent addition to the Committee Note further specifies that "[t]he abrogation of Rule 84 does not alter existing pleading standards or otherwise change the require-

consider the rules and forms together is improper under the [Rules Enabling] Act"). A litigant need merely argue that the abrogated rule and forms can continue to speak to the question of pleading standards under Civil Rule 8(a)(2), just as that rule and those forms did when they were still officially part of the Civil Rules.

92. For an account of the 2015 abrogation of Rule 84 and the Appendix of Forms, see *id.* at 1095–97.

93. Fed R. Civ. P. 84 advisory committee's note on 2015 abrogation of Rule 84.

94. See Memorandum from the Honorable David G. Campbell, Chair, Advisory Comm. on Civil Rules, on Report of the Advisory Committee on Civil Rules, to the Honorable Jeffrey S. Sutton, Chair, Comm. on Rules of Practice & Procedure (May 8, 2013, as supplemented June 2013) in Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 259, 276 (2013) (on file with the *Columbia Law Review*) (setting out the report of the Advisory Committee on Civil Rules and noting, *inter alia*, that "the pleading forms live in tension with recently developing approaches to general pleading standards"); see also Spencer, *supra* note 77, at 1136 (quoting this language).

95. The Civil Rules Committee's report to the Standing Committee stated in part:

Very few of the public comments addressed the abrogation of Rule 84. Among the objections, most asserted that the elimination of the forms would be viewed as an indirect endorsement of the *Twombly* and *Iqbal* pleading standards

After considering the public comments, the Committee continues to believe that the forms and Rule 84 should be eliminated. The forms are not used; revising them is a difficult and time-consuming process; other forms are readily available; and the Committee can better use its time addressing more relevant issues in the rules. The Committee continues to review the effects of *Twombly* and *Iqbal*. If it decides action is needed in this area, the more direct approach will be to amend the rules, not the forms.

Memorandum from Judge David G. Campbell, Chair, Advisory Comm. on Federal Rules of Civil Procedure, on Proposed Amendments to the Federal Rules of Civil Procedure, to Judge Jeffrey Sutton, Chair, Standing Comm. on Rules of Practice & Procedure B-20 (June 14, 2014) (on file with the *Columbia Law Review*).

ments of Civil Rule 8.”⁹⁶ Given the Committee Note’s explicit statement that Rule 8(a)(2)’s pleading requirement is unaltered by Rule 84’s abrogation, and given the weight that some pre-2015 case law had accorded to the forms, claimants are likely to urge that courts continue to rely upon the forms when assessing a pleading’s sufficiency.

Whether courts are inclined to heed the phantoms of the old forms may depend on the fit between the form in question and the needs of the case. Even before the abrogation of the forms, courts considered the forms as part of a larger analysis of the *Twombly/Iqbal* pleading standard. In *García-Catalán v. United States*, for example, the First Circuit first concluded that the plaintiff’s complaint plausibly alleged the defendant’s employees’ knowledge of a dangerous condition on the defendant’s premises.⁹⁷ It then cited as an additional reason for the complaint’s sufficiency the fact that it was “plainly modeled on Form 11.”⁹⁸ Will *García-Catalán*’s reliance on Form 11 continue to be good law now that the form has been abrogated? It is not hard to imagine courts in the First Circuit continuing to refer to the form as part of a broader pleading analysis.⁹⁹ And at least one court in another circuit has cited abrogated Form 11 as support for its ruling (in 2016) that a negligence complaint sufficed,

96. See Coleman, *supra* note 91, at 1097 (recounting the addition of this sentence to the Committee Note). The sentence in question was not a part of the Committee Note as initially forwarded by the Standing Committee to the Judicial Conference. See Comm. on Rules of Practice & Procedure, Report of the Judicial Conference Committee on Rules of Practice and Procedure B-69 (Sept. 2014), http://www.uscourts.gov/sites/default/files/fr_import/ST09-2014.pdf [<http://perma.cc/5XCP-CMJP>]; see also Civil Rules Advisory Comm., Minutes 2 (Apr. 9, 2015), http://www.uscourts.gov/sites/default/files/cv04-2015-min_0.pdf [<http://perma.cc/CCH6-867Q>] (“Judge Campbell reminded the Committee that the Supreme Court had asked whether a couple of changes might be made in the Committee Notes to the amendments The changes were approved by an e-mail vote of the Committee, and were approved by the Judicial Conference without discussion.”).

97. See 734 F.3d 100, 103 (1st Cir. 2013) (“Common sense suggests that the existence of a dangerous condition, not hidden from view, in a public area controlled by the defendant, supports a plausible inference that the defendant had actual or constructive knowledge of the condition.”).

98. *Id.* at 104 (noting “[t]he complaint disclosed the date, time, and place of the alleged tort, and it delineated both the nature of the dangerous condition at the commissary and the resulting injuries to the appellant”).

99. See, e.g., *Velazquez-Ortiz v. Negron-Fernandez*, 174 F.Supp.3d 653, 661 (D.P.R. 2016) (“[A] complaint modeled on Form 11 of the Appendix of the Federal Rules of Civil Procedure which contains sufficient facts to make the claim plausible is ordinarily enough to surpass the standard prescribed under *Twombly-Iqbal*.” (citing *García-Catalán*, 734 F.3d at 104)). Note, however, that this case was filed before the effective date of the 2015 amendments, see Complaint at 8, *Velazquez-Ortiz*, 174 F. Supp.3d 653 (No. 15-1164 (DRD)), which means that the district court had some discretion to decide whether it was “just and practicable” to apply the 2015 amendments (including the abrogation of the forms) in that case. See Proposed Amendments to the Fed. Rules of Civil Procedure, 305 F.R.D. 457, 460 (U.S. 2015) (providing the 2015 amendments to the Civil Rules, including the abrogation of Civil Rule 84 and the official forms, “shall take effect on December 1, 2015, and shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending”).

though the case's timing leaves ambiguous whether the court would have made the same use of the old form in a case filed after the 2015 amendments took effect.¹⁰⁰ Similarly, the old Form 12 should continue to illustrate a plaintiff's freedom to plead inconsistently and in the alternative when the plaintiff is unsure which of multiple defendants injured her.¹⁰¹

By contrast, the abrogation of Form 18 (concerning direct patent infringement)¹⁰² has been eagerly embraced by a number of district courts—a result that is unsurprising given the doubts that had been expressed about that form's appropriateness for modern patent litigation.¹⁰³ Prior to 2015, the Federal Circuit had held that “Rule 84,

100. See *Begay v. United States*, No. CIV 15-0358 JB/SCY, 2016 WL 3124630, at *34 n.47 (D.N.M. May 18, 2016) (“The Court draws comfort from the fact that the old forms attached to the back of the Federal Rules of Civil Procedure did not require much for negligence claims before the most recent amendment dropped the forms.”). This ruling did not specify whether the court was applying the version of the Civil Rules as amended in 2015 or the pre-December 1, 2015, version of those rules. Because the case was filed prior to December 1, 2015, see Complaint for Damages, *Begay*, No. CIV 15-0358 JB/SCY, 2016 WL 3124630, the 2015 amendments would have applied only to the extent “just and practicable.” Proposed Amendments to the Fed. Rules of Civil Procedure, 305 F.R.D. at 460 (quoting the Supreme Court’s April 2015 order concerning the effective date of the 2015 Civil Rules amendments).

101. The operative allegations of duty and breach in Form 12 read: “On *date*, at *place*, defendant *name* or defendant *name* or both of them willfully or recklessly or negligently drove, or caused to be driven, a motor vehicle against the plaintiff.” Staff of S. Comm. on the Judiciary, 110th Cong., Fed. Rules of Civil Procedure with Forms 109 (Comm. Print 2007) (setting out Form 12); see also Fed. R. Civ. P. 8(d)(2) (“A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.”); Fed. R. Civ. P. 8(d)(3) (“A party may state as many separate claims or defenses as it has, regardless of consistency.”).

102. As restyled and renumbered in 2007, Form 18’s allegations concerning liability read as follows:

2. On date, United States Letters Patent No. _____ were issued to the plaintiff for an invention in an electric motor. The plaintiff owned the patent throughout the period of the defendant’s infringing acts and still owns the patent.

3. The defendant has infringed and is still infringing the Letters Patent by making, selling, and using electric motors that embody the patented invention, and the defendant will continue to do so unless enjoined by this court.

4. The plaintiff has complied with the statutory requirement of placing a notice of the Letters Patent on all electric motors it manufactures and sells and has given the defendant written notice of the infringement.

Staff of S. Comm. on the Judiciary, 110th Cong., Fed. Rules of Civil Procedure with Forms 115 (Comm. Print 2007) (setting out Form 18).

103. See, e.g., Coleman, *supra* note 91, at 1101 (noting commentators’ arguments “that Form 18 is out of step with patent litigation practice”); Spencer, *supra* note 77, at 1134 (noting in decisions prior to abrogation of the forms, “[s]ome [courts] dismissed [Form 18] as not designed for more sophisticated design patents and as outdated,” while

combined with guidance from the [1946 Committee Note], makes clear that a proper use of [Form 18] effectively immunizes a claimant from attack regarding the sufficiency of” a “complaint for direct patent infringement.”¹⁰⁴ As of this writing, the Federal Circuit has not yet had occasion to issue a holding revisiting this ruling,¹⁰⁵ but there is a lopsided split of opinion among district courts, with most taking the view that the abrogation of Rule 84 and Form 18 lifted the “immuni[ty]” previously recognized by the Federal Circuit.¹⁰⁶

It is not the goal of this very brief Piece to resolve the question of the role that the old forms should play in future cases. Even the sparse outline sketched here demonstrates that the topic is complex. The point here is simply that the circumstances of the forms’ demise leave litigants ample room to argue that the forms may still sometimes illuminate the contours of federal pleading standards.

CONCLUSION

Not all phantom rules should be treated the same. Their reception should depend on their relation to the currently operative law. If a current rule was adopted specifically in order to undo the effects of its predecessor, then that predecessor rule should not be allowed to rematerialize. But if an old rule was abrogated for reasons that took no issue with the old rule’s relationship to surviving law, then the old rule’s phantom might still play a continuing role in the interpretation of that current law. Old Appellate Rule 4(a)(4) unquestionably should be sent packing. As of now, the phantoms to watch are those of the abrogated Civil Forms.

“[m]ore common has been the judicial cabining of Form 18 to its strict terms as an exemplar of pleading direct infringement claims only”).

104. *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1283 (Fed. Cir. 2013).

105. For suggestive dicta, see *Peralta v. Cal. Franchise Tax Bd.*, No. 2016-1820, 2016 WL 7174146, at *3 n.2 (Fed. Cir. Dec. 9, 2016) (unpublished opinion) (“The revised Federal Rules of Civil Procedure entered into effect on December 1, 2015. The revised Rules eliminate Rule 84, which had allowed for patent infringement claims to be plead at a lower standard in form pleadings than that espoused in *Twombly*.”).

106. See e.g., *Digital Corp. v. iBaby Labs, Inc.*, No. 15-cv-05790-JST, 2016 WL 4427209, at *2 (N.D. Cal. Aug. 22, 2016) (“The majority of courts have found that the *Twombly* pleading standard now applies to direct patent infringement claims and that complaints which merely comply with Form 18 are no longer immunized from attack on that basis.”).