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Purposivist Reasoning in Federal Civil Procedure

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PURPOSIVIST REASONING IN FEDERAL CIVIL PROCEDURE

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ABSTRACT

This invited Article both reviews the Tenth Circuit’s stance on the circuit split addressing repleading counterclaims in amended answers and observes broader interpretive-approach trends in Federal Rules of Civil Procedure cases. In *Sinclair Wyoming Refining Co. v. A & B Builders, Ltd.*, the Tenth Circuit holds that, absent prejudice to the opposing party, the failure to replead a counterclaim in an amended answer does not constitute abandonment; thus, taking the so-called permissive side of a circuit split on this question. In so doing, the Tenth Circuit adopts a purposivist approach to interpretation of the Federal Rules of Civil Procedure. In reviewing all of the Tenth and other circuits’ significant, published, 2021, Federal Rules of Civil Procedure cases, we conclude that the circuits deploy textualist reasoning less often for Rules issues than they do for other questions. In particular, we find that both the Tenth Circuit, at 1.9%, and the other circuits, at 1.8%, deployed textualist reasoning seldomly for Rules issues. Yet, in this same dataset of cases, the courts used textualist reasoning for non-Rules issues often: the Tenth Circuit, at 23.1%, and the other circuits, at 21.3%. We also found the Tenth Circuit, at 1.9%, trailed the other circuits, at 5.3%, in the use of purposivist reasoning in Rules analyses.

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INTRODUCTION

In 2021, the Tenth Circuit, in *Sinclair Wyoming Refining Co. v. A & B Builders, Ltd.*,¹ took a stance in a burgeoning circuit split on whether the failure to replead counterclaims in an amended answer constitutes waiver. The Tenth Circuit, adopting a purposivist rather than textualist interpretation of the Federal Rules of Civil Procedure (Rules), held that the failure to replead counterclaims in an amended answer does not constitute abandonment absent prejudice to the opposing party.² While treatises have noted this underlying split, ours is the first law review piece to tackle this question.³ Beyond a discussion of this split, we focus on the Tenth Circuit’s purposivist interpretive approach to the Rules more broadly. We find that, in addition to taking this purposivist stance in *Sinclair*, in 2021 the Tenth Circuit generally eschewed textualist reasoning when addressing Rules issues. Further, we find that in Rules cases, the Tenth Circuit tended to mirror its sister circuits in deploying purposivist reasoning over textualist reasoning. We conclude that these broader interpretive commitments, both in the Tenth Circuit and elsewhere, are important trends, especially when the Supreme Court itself fails to chart a consistent interpretive approach in Rules cases.⁴

Certainly, the Tenth Circuit’s entry into this circuit split on the need to replead counterclaims in amended answers, on its own, is of note. But of broader interest, in our view, is the Tenth Circuit’s adoption of a purposivist interpretive approach to the Rules. Indeed, in prior work, Professors Mulligan and Staszewski argue that even judges who are otherwise strict textualists should be purposivists⁵ when it comes to interpreting the

1. 989 F.3d 747 (10th Cir. 2021).

2. *Id.* at 777–78.

3. See, e.g., 1 STEPHEN S. GENSLER & LUMEN N. MULLIGAN, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 428, 431 (2022) [hereinafter RULES AND COMMENTARY] (“[T]he courts are split on whether counterclaims must be restated in an answer to an amended complaint.”).

4. See, e.g., Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 136–42 (2015) (addressing the Court’s various interpretive approaches to Rules cases); Lumen N. Mulligan & Glen Staszewski, *The Supreme Court’s Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1243 n.325 (2012) [hereinafter *Supreme Court Regulation*].

5. We generally adopt Stack’s definitions of textualism and purposivism. See Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 881–82 (2015) (“The debate over how courts do and should interpret statutes has narrowed to two primary interpretive approaches: textualism and purposivism. . . . Textualists take understanding the meaning of enacted text as the sole object of interpretation. In contrast, purposivists treat the text as the best evidence of statutory purposes and a source of constraint, but understand interpretation as a process of implementing statutory purposes, not merely adhering to statutory text.”).

Rules.⁶ This follows in this view because the Rules, enacted in an intra-judicial-branch process, lack the separation of powers considerations that surround statutory interpretation⁷ and include the official notes and policy statements as part of their formally enacted documentation.⁸ The *Sinclair* opinion, then, becomes a strong jumping-off point to test whether judges actually do engage in purposivist reasoning more often in Rules cases. We find that they do.

We proceed as follows. In Part I, we address the circuit split regarding the need to replead counterclaims in amended answers. First, we lay out the background legal and factual scenarios that drive the split. Second, we address the so-called strict approach, which concludes that the failure to replead counterclaims results in abandonment of the counterclaims. Third, we turn to the counter-position, the permissive approach, which reasons that the failure to replead a counterclaim in an amended answer does not constitute waiver absent a showing of prejudice. We end this Part with a review of the *Sinclair* opinion that adopts the permissive approach.

In Part II, we examine the Supreme Court's three differing approaches to Rules interpretation. We illustrate that the Court at times takes a textualist approach to the Rules. At other times, the Court takes a free-wheeling, inherent authority tact to Rules construction. And in yet a third mode, the Court at times adopts a purposivist theory of Rules interpretation. In so doing, we conclude that the strict approach to the need to replead counterclaims is an example of the textualist approach to Rules interpretation. By contrast, the permissive approach, which the Tenth Circuit adopted in *Sinclair*, is an instance of the purposivist approach of Rules interpretation. Given our general commitment to purposivist reasoning in Rules cases, we conclude that the Tenth Circuit falls on the right side of the underlying split.

In Part III, we look to textualist and purposivist reasoning in Rules cases more generally for the 2021 calendar year. In this process, we reviewed all fifty-two significant, published Rules cases in the Tenth Circuit in 2021. We conducted a similar review of all the other circuits' 881 significant, published Rules cases. Our findings tend to support the notion that judges are more inclined to purposivist reasoning in Rules cases. To wit, we found that both the Tenth Circuit, at 1.9%, and the other circuits, at 1.8%, deployed textualist reasoning seldomly for Rules issues in this dataset.⁹ Yet, in this same dataset of cases, the courts used textualist reasoning for non-Rules issues often: the Tenth Circuit, at 23.1%, and the

6. See Lumen N. Mulligan & Glen Staszewski, *Civil Rules Interpretive Theory*, 101 MINN. L. REV. 2167, 2211–15, 2227–28 (2017) [hereinafter *Rules Interpretive Theory*] (arguing that the Rules require a purposive interpretive approach); see also Lumen N. Mulligan & Glen Staszewski, *Institutional Competence and Civil Rules Interpretation*, 101 CORNELL L. REV. ONLINE 64, 70–73, 80–81, 87–88 (2016) (same); *Supreme Court Regulation*, *supra* note 4, at 1243 n.325 (same).

7. *Rules Interpretive Theory*, *supra* note 6, at 2183–86.

8. *Id.* at 2196–98.

9. See *infra* Table 1.

other circuits, at 21.3%.¹⁰ We also found the Tenth Circuit, at 1.9%, trailing the other circuits, at 5.3%, in the use of purposivist tools of interpretation for significant Rules cases.¹¹ We conclude that studies of judges' actual interpretive methods in Rules cases, both in the Tenth and other circuits, are valuable and call for broader, similar studies in the future.

I. REPLEADING COUNTERCLAIMS CIRCUIT SPLIT

In this Part, we address the split regarding repleading counterclaims. We begin by providing a legal and factual introduction to this circuit split. Next, we review the two competing camps on this issue: the strict view and the permissive view. Finally, we address the Tenth Circuit's adoption of the permissive approach in *Sinclair*.

A. Legal and Factual Framework to the Counterclaim Split

The Tenth Circuit's *Sinclair* opinion addresses amending pleadings and the relationship between amended and pre-amended pleadings.¹² The pleadings set the parameters of a civil lawsuit.¹³ In particular, the complaint and the answer establish the claims and counterclaims for relief sought, as well as the denials and affirmative defenses to these claims.¹⁴ The Rules, however, do not assume that the pleadings will be static. Rather, Rule 15(a) envisions that the parties will regularly amend the pleadings before trial.¹⁵ Indeed, this assumption is so baked into the system that motions to amend pleadings, unusually, place the burden on the non-movant to demonstrate why leave to amend should not be granted,¹⁶ and the court must grant leave unless there is a good reason to deny it.¹⁷ As part of this process, the courts apply the fundamental rule that amended pleadings supersede prior pleadings.¹⁸ As a result, if counsel omits a claim or defense

10. *Id.*

11. *Id.*

12. See 989 F.3d 747, 774 (10th Cir. 2021).

13. See RULES AND COMMENTARY, *supra* note 3, at 168–70.

14. See FED. R. CIV. P. 8(a)–(c); see also RULES AND COMMENTARY, *supra* note 3, at 167.

15. See FED. R. CIV. P. 15(a)(2) (“The court should freely give leave [to amend pleadings] when justice so requires.”).

16. See, e.g., *Mayeaux v. La. Health Serv. & Indem. Co.*, 376 F.3d 420, 425 (5th Cir. 2004); *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003); *Petworth Holdings, LLC v. Bowser*, 333 F.R.D. 297, 299 (D.D.C. 2019) (“Under Rule 15(a), ‘the non-movant generally carries the burden in persuading the court to deny leave to amend.’”) (quoting *Nwachukwu v. Karl*, 111 F.R.D. 208, 211 (D.D.C. 2004)).

17. See *Williams v. Lew*, 819 F.3d 466, 471 (D.C. Cir. 2016); see also *Stem v. Gomez*, 813 F.3d 205, 215–16 (5th Cir. 2016); *Simmons v. United Mortg. & Loan Inv.*, 634 F.3d 754, 769 (4th Cir. 2011); *Bylin v. Billings*, 568 F.3d 1224, 1229 (10th Cir. 2009); *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006).

18. See *Pac. Bell Tel. v. Linkline Commc'ns*, 555 U.S. 438, 456 n.4 (2009) (“Normally, an amended complaint supersedes the original complaint.”); see also *Bosarge v. Miss. Bureau Narcotics*, 796 F.3d 435, 440 (5th Cir. 2015), *overruled on other grounds by Wilcher v. Lincoln Cnty. Bd. of Supervisors & City of Brookhaven, Mississippi*, 243 So.3d 177, 185 (Miss. 2018); *Hayward v. Cleveland Clinic Found.*, 759 F.3d 601, 617 (6th Cir. 2014); *W. Run Student Hous. Assocs. v. Huntington Nat. Bank*, 712 F.3d 165, 171 (3d Cir. 2013); *Desai v. Deutsche Bank Sec.*, 573 F.3d 931, 936 n.5, 941 (9th Cir. 2009); *Connectu LLC v. Zuckerberg*, 522 F.3d 82, 91 (1st Cir. 2008); *Pintando v. Miami-Dade Hous. Agency*, 501 F.3d 1241, 1243 (11th Cir. 2007); *Young v. City of Mount Ranier*, 238 F.3d 567, 572 (4th Cir. 2001).

from a prior pleading in the amended pleading, as a general rule, the missing claim or defense is no longer a part of the case.¹⁹ Of course, the courts find exceptions, but generally they are not relevant to this discussion.²⁰

Because amended pleadings supersede prior pleadings, an opposing party's service of an amended pleading can raise a desire, or a requirement, to amend one's own pleadings. Generally speaking, this urge is less pressing for plaintiffs facing an amended answer that lacks a counterclaim. Just as with the original answer, an amended answer requires no response because the Rules do not contemplate mandatory reply pleadings absent the presence of a counterclaim.²¹ (Of course, plaintiffs may seek leave to serve a reply to an amended answer.)²² Thus, the failure of a plaintiff to respond to an amended answer that lacks a new counterclaim raises few issues of concern.

Defendants facing an amended complaint, however, have the right to respond. The Supreme Court holds that, under Rule 15 and as a function of constitutional due process, courts must give defendants a chance to respond to amended complaints.²³ Thus, defendants need not seek leave of court to file an amended answer to an amended complaint. But this right to respond is not coterminous with a necessity—that is to say, a duty—that defendants respond to amended complaints.

Indeed, the Court has not addressed whether defendants have a duty

19. See *Mowrer v. U.S. Dep't Trans.*, 14 F.4th 723, 733 (D.C. Cir. 2021); *Linicomn v. Hill*, 902 F.3d 529, 534 n.4 (5th Cir. 2018); *Green v. Domestic Rels. Section Ct. Common Pleas Compliance Unit Montgomery Cnty.*, 649 F. App'x 178, 181 (3d Cir. 2016); *Mohammadi v. Islamic Republic Iran*, 782 F.3d 9, 17–18 (D.C. Cir. 2015) (noting plaintiffs' omitted jurisdictional allegations); *Anderson v. Donahoe*, 699 F.3d 989, 997 (7th Cir. 2012); *Cadkin v. Loose*, 569 F.3d 1142, 1149 (9th Cir. 2009); *B & H Med., LLC v. ABP Admin.*, 526 F.3d 257, 267 n.8 (6th Cir. 2008); *Ramallo Bros. Printing, Inc. v. El Dia, Inc.*, 490 F.3d 86, 88 n.2 (1st Cir. 2007); *Young*, 238 F.3d at 573.

20. For example, plaintiffs filing amended complaints need not replead claims that have already been dismissed with prejudice in order to preserve them for appeal. See *Hayward*, 759 F.3d at 617–18; *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (overruling prior practice of requiring repleading for appeal preservation); *United States ex rel. Aktinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 516 (3d Cir. 2007); *Young*, 238 F.3d at 572; *Crysen/Montenay Energy Co. v. Shell Oil & Scallop Petroleum Co. (In re Crysen)*, 226 F.3d 160, 162 (2d Cir. 2000); *Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1191 n.5 (11th Cir. 1999); *Davis v. TXO Prod. Corp.*, 929 F.2d 1515, 1518 (10th Cir. 1991). But, as these opinions clarify, claims dismissed without prejudice (or with leave to amend or leave to replead) must be repleaded in any amended pleading to keep them alive in the case and preserve them for appeal.

21. See FED. R. CIV. P. 7(a). A reply is a pleading responding to a defendant's answer. See *id.* at 7(a)(7); see also *Reply*, BLACK'S LAW DICTIONARY (Bryan A. Garner ed., 9th ed. 2009) (defining a "reply" as "the plaintiff's response . . . , by court order, to the defendant's . . . answer."). Unless addressing a counterclaim, replies are not mandatory, and indeed, require court order. See FED. R. CIV. P. 7(a)(7) (listing the seven possible pleadings and noting a reply is a pleading only "if the court orders one"); FED. R. CIV. P. 7 advisory committee's note to 1946 amendment (clarifying that replies to answers, as opposed to counterclaims, are not mandatory); FED. R. CIV. P. 12(a)(1)(C) (noting that the deadline to file a reply applies only "after being served with an order to reply . . ."). A party that completely fails to respond to a counterclaim, or a crossclaim, risks Rule 55 default judgment. See *Campbell Harrison & Dagley, L.L.P. v. PBL Multi-Strategy Fund, L.P.*, 744 F. App'x 192, 203 n.55 (5th Cir. 2018); *AMI Stamping, LLC v. ACE Am. Ins. Co.*, 709 F. App'x 354, 359 (6th Cir. 2017).

22. See FED. R. CIV. P. 7(a)(7).

23. See *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466–67 (2000); see also *Lucente v. Int'l Bus. Machs. Corp.*, 310 F.3d 243, 260 (2d Cir. 2002); *Wagner v. Choice Home Lending*, 266 F.R.D. 354, 357 (D. Ariz. 2009).

to respond to an amended complaint. The current text of Rule 15(a) does not provide a clear directive on this score either. Rule 15(a)(3) states that “[u]nless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.”²⁴ The current language, it seems, addresses only the timing of any required response, not a requirement to serve a responsive pleading.²⁵ On the other hand, prior to the 2007 Rules amendments, Rule 15(a) read: “A party *shall plead* in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.”²⁶ That older language, in the eyes of some, expressed an obligation to respond to an amended pleading, at least as to the parts actually amended.²⁷ When one further notes that the Advisory Committee Notes on the 2007 amendments to Rule 15 state that the changes were “intended to be stylistic only,” arguably, the current Rule 15 requires defendants to serve amended answers.²⁸

It should not be surprising, then, that the circuit courts split on whether defendants have an obligation to file an amended answer to every amended complaint filed. Some courts find such a duty and strictly enforce it.²⁹ Other courts, however, hold that a defendant does not have a duty to respond to an amended complaint (or does not enforce that duty) when the amendments do not materially alter the substance of the complaint.³⁰ But even this latter group finds a duty to answer to the extent the amended complaint contains new allegations because the failure to file an amended answer in such an instance would result in the new allegations being admitted by operation of Rule 8(b)(6).³¹

Assuming that a defendant must serve an amended answer to an amended complaint, or that the defendant does so voluntarily, there is a second-order question of how much information must be included in this amended answer. Once again, we find that Rule 15 does not specify any particular form for amended answers. The best practice, of course, is to file a completely new answer, even if the amended complaint contains just a few changes to the prior complaint and correspondingly few changes to

24. FED. R. CIV. P. 15(a)(3).

25. See, e.g., *KST Data, Inc. v. DXC Tech. Co.*, 980 F.3d 709, 715 (9th Cir. 2020) (“[B]y its plain terms, Rule 15(a)(3) does not render a prior response to a prior pleading moot and require the filing of a new answer.”).

26. FED. R. CIV. P. 15(a) (1993) (amended 2007) (emphasis added).

27. See, e.g., *Burton v. Ghosh*, 961 F.3d 960, 968 n.4 (7th Cir. 2020).

28. See FED. R. CIV. P. 15 advisory committee’s note to 2007 amendment.

29. See, e.g., *Burton*, 961 F.3d at 968 (“[A] new answer is *required* when a complaint is amended.”) (emphasis in original); *Ashley v. Jaipersaud*, 544 F. App’x 827, 829 (11th Cir. 2013) (holding that a failure to answer an amended complaint resulted in admission of the allegations raised by the opposing party).

30. See, e.g., *KST Data*, 980 F.3d at 715; *Edelman v. Belco Title & Escrow, LLC*, 754 F.3d 389, 394–95 (7th Cir. 2014).

31. FED. R. CIV. P. 8(b)(6) (“An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied.”).

the answer.³² Indeed, many federal districts require this by local rule, and individual judges may require it pursuant to their case-management powers.³³ In some districts, however, it remains possible to file an addendum to the existing pleadings or to incorporate portions of the earlier pleadings by reference.³⁴

This state of affairs sets the stage for the circuit split that the Tenth Circuit tackled in *Sinclair*. The basic fact pattern forming the split is: In response to the original or a prior amended complaint, the defendant answered and included counterclaims in that answer. At a later time, the plaintiff served an amended complaint that did not address the counterclaims. In response, the defendant either did not file an amended answer or served an amended answer that omitted the counterclaims previously brought. This fact pattern raises the question of whether the defendant waived originally pleaded counterclaims in the amended answer.

Importantly, *Sinclair* did not address whether an initially omitted counterclaim may be included in a later-in-time amended answer. Rather, the issue in *Sinclair* was whether counterclaims, timely raised in the prior answer, must be repleaded.³⁵ The law as to initially omitted counterclaims is clearer than the law on the need to replead counterclaims. Defendants with mature compulsory counterclaims at the time of the original answer who failed to assert them must file an amended answer, via Rule 15(a), that asserts the counterclaim or face exclusion of the issue from the instant suit and, in the case of compulsory counterclaims, permanent waiver in any future suit.³⁶ Permissive counterclaims face the same regime for post-original-answer inclusion, except that permanent waiver in future suits is not at issue.³⁷ Prior to 2009, Rule 13(f) addressed the assertion of omitted counterclaims.³⁸ The courts, however, generally construed Rule 13(f) as coextensive with the Rule 15(a) standards for amendments to the pleadings.³⁹ Thus, Rule 13(f) was abrogated, leaving amendment of answers to

32. See RULES AND COMMENTARY, *supra* note 3, at 429 (“While Rule 10(c) expressly allows parties to incorporate past pleadings, this method then requires both the parties and the court to flip back and forth between multiple documents. That may have been a justifiable result in the days of typewritten pleadings, but it makes little sense today given the ease of revising documents using modern word processing technology.”).

33. See *Rieco v. Bronsburg*, 674 F. App’x 110, 113 (3d Cir. 2017) (“[A] district court may require a plaintiff to prepare a single, amended pleading when it would facilitate managing the case . . .”).

34. See FED. R. CIV. P. 10(c) (allowing parties to incorporate past pleadings by reference); *Rasidescu v. Midland Credit Mgmt.*, 435 F. Supp. 2d 1090, 1101 (S.D. Cal. 2006) (noting the possibility of incorporation by reference).

35. *Sinclair Wyo. Refin. Co. v. A & B Builders*, 989 F.3d 747, 776–78 (10th Cir. 2021).

36. See FED. R. CIV. P. 13(a); *Baker v. Cold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974) (“A counterclaim which is compulsory but is not brought is thereafter barred . . .”).

37. See, e.g., FED. R. CIV. P. 13(b); *Islamic Republic Iran v. Boeing Co.*, 771 F.2d 1279, 1286–87 (9th Cir. 1985).

38. FED. R. CIV. P. 13(f) (2008) (abrogated 2009).

39. See, e.g., *Newport News Holdings Corp. v. Virtual City Vision*, 650 F.3d 423, 439 (4th Cir. 2011); *Langbord v. U.S. Dept. Treasury*, 749 F. Supp. 2d 268, 272 (E.D. Pa. 2010), *affid on reh’g*, 832 F.3d 170, 202–03 (3d Cir. 2016); *Rimkus Consulting Grp., Inc. v. Cammarata*, 257 F.R.D. 127, 134 (S.D. Tex. 2009).

include omitted counterclaims to Rule 15(a).⁴⁰ Under Rule 15(a)'s structure, a party has three possible pathways for amending its answer to assert an omitted counterclaim: (1) it may be able to do so "as a matter of course"; (2) it can seek the opposing party's consent; or (3) it can seek leave of court.⁴¹ Returning, then, to the question of a requirement to replead counterclaims in the face of an amended complaint or face abandonment, the courts fall into two broad camps: the strict approach and the permissive approach.

B. *Strict Approach*

We first review the strict approach to the requirement to replead counterclaims in amended answers. The strict approach deems all counterclaims waived unless explicitly included in each subsequent answer, basing this reading upon a textualist interpretation of the Rules.⁴² Two circuits and several district courts adopt this approach.

The lead circuit ruling for the strict view is the Federal Circuit's *General Mills, Inc. v. Kraft Foods Global, Inc.* opinion.⁴³ This suit, brought by General Mills, centered upon a patent infringement claim regarding rolled fruit snacks.⁴⁴ Kraft answered, denying the infringement and related claims.⁴⁵ Kraft also brought a counterclaim, alleging that General Mills breached a prior settlement agreement by bringing this infringement suit.⁴⁶ General Mills then amended its complaint to include a breach of contract

40. See FED. R. CIV. P. 13 advisory committee's note on 2009 amendments.

41. FED. R. CIV. P. 15(a). Note, however, that if the Rule 16 scheduling order deadline for amending the pleadings has passed, then the process has two steps. First, the party must show good cause to modify the scheduling order under Rule 16(b)(4). Second, the party must obtain leave to amend its answer under Rule 15(a)(2). See, e.g., *Ground Zero Museum Workshop v. Wilson*, 813 F. Supp. 2d 678, 706–07 (D. Md. 2011). Further, the Rules treat a supplemented, as opposed to amended, complaint differently. See RULES AND COMMENTARY, *supra* note 3, at 482 ("A supplemental pleading is not an amended pleading. Whereas an amended pleading relates to matters that occurred before the original complaint was filed, a supplemental pleading sets forth transactions, occurrences, or events that took place after the original complaint was filed."). With supplemental complaints, the courts do not require re-pleading counterclaims because, unlike an amended complaint, a supplemented complaint does not replace the original pleading. See, e.g., *Z View Enters. v. Giant Eagle, Inc.*, 834 F. App'x 709, 712 (3d Cir. 2020).

42. See *Uniroyal Chem. Co. v. Syngenta Crop Prot., Inc.*, No. 3:02CV02253, 2005 WL 677806, at *2 (D. Conn. Mar. 23, 2005) (holding that where "the amended complaint does not change the scope of the action, a defendant should obtain leave of court before adding a new counterclaim that would change the scope of the case."); see also *Wechsler v. Hunt Health Sys. Ltd.*, 186 F. Supp. 2d 402, 410 (S.D.N.Y. 2002).

43. 487 F.3d 1368 (Fed. Cir. 2007), *aff'd and clarified on reh'g*, 495 F.3d 1378 (Fed. Cir. 2007).

44. *Gen. Mills*, 487 F.3d at 1370–71. The item at issue in this suit was "Fruit by the Foot." See *id.* at 1371; *Fruit by the Foot*, WIKIPEDIA, https://en.wikipedia.org/wiki/Fruit_by_the_Foot (last visited Dec. 19, 2022). Perhaps more famously, General Mills also marketed similar snacks as "Fruit Roll-Ups" and sold them under the Betty Crocker label. See *Fruit Roll-Ups*, WIKIPEDIA, https://en.wikipedia.org/wiki/Fruit_Roll-Ups (last visited Dec. 19, 2022).

45. *Gen. Mills*, 487 F.3d at 1372.

46. *Id.*

claim of its own.⁴⁷ “Kraft never answered the amended complaint or reasserted its counterclaim.”⁴⁸ Rather, it filed a Rule 12(b)(6) motion to dismiss the amended complaint on both the infringement and breach of contract claims.⁴⁹ The district court dismissed the infringement claim on the merits and then declined to retain supplemental jurisdiction over the non-diverse breach of contract claim, per 28 U.S.C. § 1367(c).⁵⁰ As to Kraft’s counterclaim, the district court reasoned that “because Kraft did not reassert its counterclaim in response to the amended complaint, no counterclaim was pending when the district court entered judgment and that the judgment was therefore final and complete.”⁵¹

The Federal Circuit affirmed.⁵² The circuit court noted that “[t]he amended complaint, unlike the original complaint, attached the Settlement Agreement as an exhibit.”⁵³ This Settlement Agreement was key because the breach of contract counterclaim was also based on it.⁵⁴ Importantly to the circuit, Kraft moved to dismiss, but it did not, in the circuit’s view, timely file an amended answer to the amended complaint, and as such, it did not reassert its counterclaim.⁵⁵ Consequently, the court held that the counterclaim was abandoned when the defendant did not respond to the amended complaint in a timely manner.⁵⁶ Although the Federal Circuit was likely incorrect in finding that an amended answer was due,⁵⁷ our focus is instead on the court’s holding that, assuming an amended answer

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 1372–73.

51. *Id.* at 1373.

52. *Id.* at 1377.

53. *Id.* at 1372.

54. *Id.*

55. *Id.*

56. *Id.* at 1376–77.

57. A pre-answer motion, filed in response to an original pleading, tolls when a responsive pleading is due. See FED. R. CIV. P. 12(a)(4). The Federal Circuit did not apply Rule 12(a)(4) in *General Mills*, however, because Kraft’s pre-answer motion was filed in the face of an amended complaint. See *Gen. Mills*, 487 F.3d at 1376. Rule 12(a)(4)’s tolling provision alters the time periods set forth in Rule 12(a)(1) to (3) but the time to respond to an amended pleading is set forth not in Rule 12(a) but in Rule 15(a)(3). See FED. R. CIV. P. 12(a)(4); see also FED. R. CIV. P. 15(a)(3). Thus, the Federal Circuit held that Rule 12(a)(4) tolling does not apply when parties respond to amended pleadings with pre-answer motions. Rather, it held that the Rule 15(a)(3) deadline, which was then ten days, applied regardless of whether a pre-answer motion had been filed. See *Gen. Mills*, 487 F.3d at 1376. Arguably, the circuit’s interpretation of the tolling rule was incorrect at the time it issued its opinion. See, e.g., *Direct Enters., Inc. v. Sensient Colors LLC*, No. 1:15-cv-01333-JMS-TAB, 2017 WL 2985623, at *3 n.2 (S.D. Ind. July 13, 2017) (determining that the same policy reasons for tolling apply whether a pre-answer motion is directed against the original complaint or an amended complaint); *Jones v. Chase Home Fin.*, No. 1:12-CV-542-CAP, 2012 WL 13012354, at *4 (N.D. Ga. June 18, 2012) (rejecting the reasoning of *General Mills* and refusing to apply Rules 12 and 15 in a “rigid” fashion that “would circumvent the purpose of Rule 12(a)(4)”; *Mgmt. Registry, Inc. v. A.W. Co., Inc.*, No. 0:17-cv-5009-JRT-KMM, 2020 WL 468846, at *2 (D. Minn. Jan. 29, 2020) (applying the reasoning of *Direct Enterprises*); *Tenser v. Ryan*, No. CV 19-05496 VBF, 2020 WL 4760192, at *5 (C.D. Cal. May 26, 2020), *report and recommendation adopted*, 2020 WL 5946078 (C.D. Cal. Oct. 7, 2020), *aff’d*, *Tenser v. Silverman*, 2021 WL 4958986 (9th Cir. Oct. 26, 2021) (similar). Indeed, numerous other courts simply assume the Rule 12(a)(4) tolling rule applies to pre-answer motions to amended complaints, likely on purposivist grounds. See, e.g., *Mullane v. Barclays Bank Del. Inc.*, No. 1:18-CV-20596-

was due, the failure to replead counterclaims abandoned them.⁵⁸

The Third Circuit similarly adopted the strict approach in an unpublished opinion that offered scant rationale for its holding. The Third Circuit held that because the defendant “decided to omit from its amended answer its patent counterclaims The amended pleadings ‘supersede[] the original [pleadings] and render [them] of no legal effect.’”⁵⁹ The circuit’s focus here was on the notion that amended pleadings “supersede” any subsequent pleadings.⁶⁰

Several district courts have adopted the strict approach as well. One of the most cited of these cases is the U.S. District Court for the Eastern District of Missouri’s *Johnson v. Berry* opinion.⁶¹ In this case, Johnnie Johnson, rock and roll star Chuck Berry’s pianist,⁶² alleged a copyright interest, and other related claims, in thirty-three of Berry’s hit songs.⁶³ Berry answered and brought a trademark counterclaim as to the use of the phrase, “The Father of Rock and Roll.”⁶⁴ Johnson later amended his complaint, but Berry failed to serve an amended answer.⁶⁵ The court concluded that this failure to replead abandoned the trademark counterclaim.⁶⁶ In its analysis, the court first took note of the last sentence of Rule 15(a)(3)—as then drafted—which “requires a party to plead in response to an amended pleading. No option is given merely to stand on preexisting pleadings made in response to an earlier complaint.”⁶⁷ The court went on to reason that the texts of Rule 13(a) and (b) make clear that “a counterclaim is part of the responsive pleading[, and by] . . . failing to plead in response to the first amended complaint, and therein to replead his counterclaim, Berry abandoned his counterclaim, which effectively dropped [it] from the case.”⁶⁸

Several other district courts have adopted this strict approach as well, often citing *Johnson*. For instance, the U.S. District Court for the District

MORENO/LOUIS, 2018 WL 1835933, at *1 (S.D. Fla. Apr. 9, 2018), *objections overruled*, 2018 WL 1835934 (S.D. Fla. Apr. 17, 2018); *Iraheta v. Equifax Info. Serv., LLC*, No. 5:17-cv-1363, 2018 WL 3381419, at *2 (W.D. La. July 10, 2018); *Robles v. Amarr Garage Doors*, No. 11-2707-JAR-DJW, 2012 WL 4867289, at *2-3 (D. Kan. Oct. 15, 2012), *aff’d*, 509 F. App’x 741 (10th Cir. 2013); *DeVary v. Countrywide Home Loans, Inc.*, 701 F. Supp. 2d 1096, 1111 (D. Minn. 2010); *McKenzie v. AAA Auto Fam. Ins. Co.*, No. 10-2160-KHV, 2010 WL 3718861, at *6 (D. Kan. Sept. 13, 2010). In any event, it now appears that the tolling result in *General Mills* was altered by the 2007 amendments to Rule 15(a)(3). See *supra* text accompanying notes 26-28.

58. See *Gen. Mills*, 487 F.3d at 1376-77.

59. *Par Pharm., Inc. v. QuVa Pharma, Inc.*, 764 F. App’x 273, 277 n.3 (3d Cir. 2019) (alteration in original).

60. See *id.*; see also cases cited *supra* note 18 (discussing issue of superseding prior pleadings).

61. 228 F. Supp. 2d 1071 (E.D. Mo. 2002).

62. For an introduction to Chuck Berry, who is an inaugural member of the Rock and Roll Hall of Fame, see *Chuck Berry*, ROCK & ROLL HALL FAME, <https://www.rockhall.com/inductees/chuck-berry> (last visited Dec. 19, 2022).

63. *Johnson*, 228 F. Supp. 2d at 1072-73.

64. *Id.* at 1079.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

of Minnesota, in *Bremer Bank v. John Hancock Life Insurance Co.*,⁶⁹ applied *Johnson* when the defendant failed to replead its indemnification counterclaims in its amended answer when two years had passed since the filing of the amended complaint.⁷⁰ Similarly, in *Essex Insurance Co. v. Sheppard & Sons Construction, Inc.*,⁷¹ the U.S. District Court for the Western District of Oklahoma held, in a declaratory judgment action regarding an insurance contract, that the defendant's failure to replead breach-of-insurance contract counterclaims in the amended answer constituted abandonment because the amended answer supersedes the original answer.⁷² Several other district courts have issued similar opinions.⁷³

The hallmark of those opinions taking a strict approach is a brand of textualism. Thus, the courts in this camp tend to ignore an analysis of whether the inclusion of the counterclaim would cause prejudice to the plaintiff⁷⁴ in a manner akin to a Rule 15(a) leave-to-amend analysis under *Foman v. Davis*.⁷⁵ Rather, these courts focus upon Rule 13(a)(1)'s textual imperative that: "[a] pleading must state as a counterclaim";⁷⁶ the textual instruction from Rule 7(a) that only complaints, answers, and replies are pleadings;⁷⁷ and the notion implicit from Rule 15(a)'s text that amended pleadings supersede and void prior ones.⁷⁸ Because textualist principles do not construe a superseded pleading as a Rule 7 pleading, defendants cannot rely upon such past pleading of a counterclaim, even in situations where there is no prejudice to the plaintiff in so relying.

C. Permissive Approach

On the other side of the circuit split, we find the so-called permissive approach. Courts on this side of the divide tend to eschew the strict approach's brand of textualism. Courts adopting the permissive approach instead look to purposive interpretive methods to ground an analysis upon

69. No. CIV. 06-1534 ADM/JSM, 2009 WL 702009 (D. Minn. Mar. 13, 2009).

70. *Id.* at *12 (citing *Johnson*, 228 F. Supp. 2d at 1079), *aff'd sub nom.*, *Bremer Bank v. John Hancock Life Ins.*, 601 F.3d 824 (8th Cir. 2010).

71. No. CIV-12-1022-D, 2015 WL 11752917 (W.D. Okla. July 9, 2015).

72. *Id.* at *10.

73. See, e.g., *Pa. Nat'l Mut. Cas. Ins. Co. v. Snider*, 996 F. Supp. 2d 1173, 1180 n.8 (M.D. Ala. 2014) ("Because the . . . [d]efendants failed to answer Penn National's amended complaint, and therefore, never reasserted their counterclaims, the Court finds that the . . . [d]efendants' duty to defend counterclaims w[as] abandoned."); *Settlement Cap. v. Pagan*, 649 F. Supp. 2d 545, 562 (N.D. Tex. 2009) ("While [the defendants] asserted counterclaims for slander of title in their original answer, these counterclaims were not reasserted in their amended answer and thus have been abandoned."); *Designing Health, Inc. v. Erasmus*, No. CV-98-4758 LGB (CWx), 2001 WL 36239751, at *3 (C.D. Cal. Apr. 23, 2001) (holding that the counterclaims that were not repleaded in response to an amended complaint are abandoned); cf. *Doe v. Williston Northampton Sch.*, 766 F. Supp. 2d 310, 313-14 (D. Mass. 2011) (granting motion to dismiss counterclaims for failure to prosecute pursuant to Rule 41(b) where the counterclaims were not reasserted in response to amended complaints).

74. *Bremer Bank* is an exception as it looks to the passage of two years, lack of discovery, and proximity to the date of adjudication. See *Bremer Bank*, 2009 WL 702009, at *12.

75. 371 U.S. 178, 182 (1962) (holding that leave to amend must be granted absent prejudice, undue delay, bad faith, futility, or repeated failure to cure).

76. FED. R. CIV. P. 13(a)(1).

77. See FED. R. CIV. P. 7(a).

78. See cases cited *supra* note 18 (discussing issue of superseding prior pleadings).

*Foman*⁷⁹ prejudice factors. The courts in the permissive camp tend to highlight that the overarching purpose of the Rules, as embodied in Rule 1, is to provide the “just, speedy, and inexpensive determination of every action and proceeding”⁸⁰ and that overlooking a non-prejudicial omission better comports with such a purpose.⁸¹ We turn to an overview of these opinions next.

The lead circuit opinion for the permissive approach is *Davis v. White*.⁸² In this case, the Eighth Circuit took a permissive approach to a defendant’s need to replead counterclaims, underscoring the discretion granted to courts on the matter. Here, the Ferguson, Missouri police arrested Henry Davis for drunk driving, and he eventually pleaded guilty to careless driving charges.⁸³ During his detention after the arrest, a fight ensued between Davis and police officers at the jail.⁸⁴ Davis alleged that, due to excessive force, he suffered a concussion and scalp lacerations.⁸⁵ One of the defendants, Officer White, alleged that he suffered a broken nose that required immediate surgery.⁸⁶ Davis brought a 42 U.S.C. § 1983 claim against the officers and the city for use of excessive force as well as related state law torts.⁸⁷ White counterclaimed for assault and battery.⁸⁸ In response, Davis “filed interrogatories addressing the counterclaim.”⁸⁹ The civil case bogged, waiting for the conclusion of the criminal case, at which time Davis served an amended complaint.⁹⁰ White’s amended answer did not replead the counterclaim.⁹¹ Nevertheless, White responded to Davis’s interrogatories concerning the counterclaim, and Davis moved to compel supplemental responses.⁹² The district court then granted Davis’s motion to compel in part, and White served the supplemental responses.⁹³ Moreover, at deposition, defense counsel specifically asked Davis “if he understood that he was ‘named as a defendant in a counterclaim,’” and Davis

79. 371 U.S. at 182 (holding that leave to amend must be granted absent prejudice, undue delay, bad faith, futility, or repeated failure to cure).

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

81. See *Davis v. White*, 794 F.3d 1008, 1015–16 (8th Cir. 2015) (emphasizing the significance of flexibility when interpreting the Rules); see also *KST Data, Inc. v. DXC Tech. Co.*, 980 F.3d 709, 716 (9th Cir. 2020) (noting the superfluity of reasserting affirmative defenses in response to an amended complaint); *Ground Zero Museum Workshop v. Wilson*, 813 F. Supp. 2d 678, 705–06 (D. Md. 2011) (taking a holistic and practical approach on analyzing the need to the reassert counterclaims); *Hughes v. Abell*, 867 F. Supp. 2d 76, 91 (D.D.C. 2012) (same); *Schutt ex rel. A.S. v. Garland Indep. Sch. Dist.*, No. 3:17-CV-1708-B, 2019 WL 3006768, at *3 (N.D. Tex. July 9, 2019) (same); *Mathews v. Ohio Pub. Emps. Ret. Sys.*, No. 2:12-cv-1033, 2014 WL 4748472, at *4–6 (S.D. Ohio Sept. 23, 2014) (same).

82. 794 F.3d 1008 (8th Cir. 2015).

83. *Id.* at 1011.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 1011–12.

88. *Id.* at 1011.

89. *Id.* at 1015.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

answered, “Yes.”⁹⁴

As trial drew near, Davis moved the district court to bar trial of the counterclaim because White abandoned it by failing to replead it.⁹⁵ The district court denied this motion.⁹⁶ The Eighth Circuit affirmed.⁹⁷

In so holding, the Eighth Circuit determined that Rules 15(a)(2) and (3) give district courts the discretion to grant or deny motions that deem counterclaims abandoned.⁹⁸ Additionally, the circuit addressed the textual need to place a counterclaim in a pleading by looking to the unamended answer. “Though Rule 13(a)(1) requires that a compulsory counterclaim be stated in a pleading, that term was used to clarify that counterclaims could be asserted in pleadings other than the answer.”⁹⁹ The circuit did not wrestle with the notion that an amended pleading supersedes and voids a prior one and thus the corollary that the counterclaim in the prior pleading is not itself void.¹⁰⁰ Ultimately, however, the circuit looked to the Rules’ purpose, which is to provide “just, speedy, and inexpensive” outcomes.¹⁰¹ The Eighth Circuit consequently elected to champion a flexible rule that better aligns with “the interests of justice,” because sufficient notice was provided to the plaintiff and no prejudice, as the *Foman* opinion deploys the term, was demonstrated.¹⁰²

Several district courts have examined the issue and elected a permissive approach as well.¹⁰³ The U.S. District Court for the District of Mary-

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 1016.

98. *Id.* at 1015; *see also* FED. R. CIV. P. 15(a)(2)–(3) (“The court should freely give leave when justice so requires. . . . Unless the court orders otherwise, any required response to an amended pleading must be made . . .”).

99. *Davis*, 794 F.3d at 1015 (internal quotation marks omitted).

100. *See* cases cited *supra* note 18 (discussing issue of superseding prior pleadings).

101. *Davis*, 794 F.3d at 1015 (quoting FED. R. CIV. P. 1).

102. *Id.* at 1015–16; *see also* *KST Data, Inc. v. DXC Tech. Co.*, 980 F.3d 709, 711 (9th Cir. 2020) (holding, for similar reasons, that absent a showing of prejudice defendant need not replead affirmative defenses in subsequent amended answers).

103. *See, e.g.*, *Freedom Med., Inc. v. Gillespie*, No. CIV.A. 06-3195, 2013 WL 3819366, at *4, *12 (E.D. Pa. July 24, 2013); *Performance Sales & Mktg. v. Lowe’s Cos.*, No. 5:07-cv-00140-RLV-DSC, 2013 WL 4494687, at *9 n.2 (W.D.N.C. Aug. 20, 2013) (“Although Lowe’s has yet to file an Answer in response to Plaintiffs’ Amended Complaint, it has already set forth its counterclaim within its Answer to the original Complaint.”); *AVKO Educ. Rsch. Found. v. Morrow*, No. 11-13381, 2013 WL 1395824, at *10 (E.D. Mich. Apr. 5, 2013) (holding that court should not dismiss counterclaim merely because it was not refiled); *Cairo Marine Serv. v. Homeland Ins. Co.*, No. 4:09CV1492 CDP, 2010 WL 4614693, at *3–4 (E.D. Mo. Nov. 4, 2010); *Steele v. Turner Broad. Sys.*, 607 F. Supp. 2d 258, 262 (D. Mass. 2009); *Bradley v. Smith*, 235 F.R.D. 125, 127 (D.D.C. 2006) (holding plaintiff’s pleadings should be construed broadly and “presumes that plaintiff did not abandon claims raised in the original complaint.”); *U.S. Bank Nat’l v. Safeguard Ins. Co.*, 422 F. Supp. 2d 698, 701 n.1 (N.D. Tex. 2006); *Dunkin’ Donuts v. Romanias*, No. 00-1886, 2002 WL 32955492, at *1–2 (W.D. Pa. May 29, 2002); *cf. Hitachi Med. Sys. Am., Inc. v. Horizon Med. Gp.*, No. 5:07CV02035, 2008 WL 5723531, at *5–6 (N.D. Ohio Aug. 29, 2008) (denying plaintiff’s motion to strike counterclaim because it was untimely repleaded in response to amended complaint). *See also* *UDAP Indus. v. Bushwacker Backpack & Supply Co.*, No. CV 16-27-BU-JCL, 2017 WL 1653260, at *3 (D. Mont. May 2,

land thoroughly discussed the permissive approach in its *Ground Zero Museum Workshop v. Wilson*¹⁰⁴ opinion and cites many of the leading cases.¹⁰⁵ There, the Plaintiffs, after an agreement to modify the Plaintiff museum's website fell apart, sued the website designer, William Wilson, for copyright violations, conversion, defamation, tortious interference in a business relationship, and intentional infliction of emotional distress.¹⁰⁶ Wilson answered and counterclaimed for fraud, breach of implied contract, quantum meruit, unjust enrichment, breach of contract, trademark infringement, and misuse of trade secrets.¹⁰⁷ At summary judgment, the museum argued that Wilson's "counterclaims were waived or abandoned when not reasserted in his answer to the first and second amended complaints."¹⁰⁸

The district court rejected the museum's argument. The court emphasized that "the few courts" that have considered the issue "have not reached a consensus."¹⁰⁹ Opting to take the permissive approach,¹¹⁰ the court reasoned that:

Rule 13, which governs counterclaims, requires only that a counterclaim be set forth in a pleading—it does not mandate that it be contained in an answer. . . . Further, an answer responds to the allegations in a complaint, a counterclaim is something independent. *Revisions to a complaint do not require revisions to a counterclaim.*¹¹¹

Thus, like the Eighth Circuit, the district court treated the prior answer's inclusion of the counterclaims as satisfying Rule 13's requirement to include counterclaims in a pleading even though that runs contrary to the text of Rule 7(a), which does not include "prior answers" in its textual definition of pleadings.

The court then discussed Wilson's intent as part of a prejudice analysis. In this regard, the court reviewed the numerous times during the litigation when Wilson continued to pursue his counterclaim.¹¹² All of this culminated with the court concluding that Wilson had not waived his counterclaim but instead had manifested a strong intent to continue to pursue

2017) (allowing counterclaims without leave of court "only when the amended complaint changes the theory or scope of the case, and then, the breadth of the changes in the amended response must reflect the breadth of the changes in the amended complaint.") (quoting *Bern Unlimited v. Burton Corp.*, 25 F. Supp. 3d 170, 177 (D. Mass. 2014)); *Patel v. Pandya*, No. 14-8127, 2016 U.S. Dist. LEXIS 71710, at *6 (D.N.J. June 2, 2016); *Poly-Med, Inc. v. Novus Sci. Pte. Ltd.*, No. 8:15-cv-01964-JMC, 2017 WL 2874715, at *6 (D.S.C. July 6, 2017).

104. 813 F. Supp. 2d 678 (D. Md. 2011).

105. *Id.* at 705–06.

106. *Id.* at 688.

107. *Id.*

108. *Id.* at 705.

109. *Id.*

110. *Id.* at 705–06.

111. *Id.* at 706 (emphasis added) (quoting *Dunkin' Donuts v. Romanias*, No. Civ.A. 00-1886, 2002 WL 32955492, at *2 (W.D. Pa. May 29, 2002)).

112. *Id.*

it.¹¹³ Given that the purpose of the Rules is to promote on-the-merits adjudication,¹¹⁴ such an intent analysis (coupled with lack of prejudice to the plaintiff) makes sense from the permissive camp's vantage point.¹¹⁵

D. The Tenth Circuit Adopts the Permissive Approach

This sets the stage, then, for the Tenth Circuit's entry into this debate. In *Sinclair*, the plaintiff, Sinclair Wyoming Refining Co., argued that the defendants, various contractors, waived their indemnity counterclaims by failing to replead them in their subsequent answers to Sinclair Wyoming's two amended complaints.¹¹⁶ As part of its analysis, the court in *Sinclair* addressed the split on the matter.¹¹⁷ It characterized the strict approach as based on the rule that an amended answer "supersedes previous answers, render[ing] them of no legal effect."¹¹⁸ The Tenth Circuit characterized the permissive approach as "permitting a defendant to pursue its counterclaim unless the plaintiff shows that the failure to replead it caused prejudice."¹¹⁹ Ultimately, the Tenth Circuit held that the contractors were permitted to assert their indemnity counterclaims despite their failure to replead them, adopting the permissive approach.¹²⁰

After introducing the circuit split, the Tenth Circuit turned to the text of Rules 13 and 7, which form the foundation of the strict approach, observing that:

113. *Id.*

114. *See, e.g.,* *Foman v. Davis*, 371 U.S. 178, 181–82 ("It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of mere technicalities. . . . [Indeed, the objective of the Rules is to] facilitate a proper decision on the merits.") (internal quotation marks omitted); *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 240 (1958) (Frankfurter, J., dissenting) ("Simplicity and speed, when consonant with effective protection of the interests of the parties, are touchstones for the interpretation of all the Rules, especially those strategically placed to advance the litigation to its final conclusion."); *Kuehl v. FDIC*, 8 F.3d 905, 908 (1st Cir. 1993) ("Our federal rules promote the disposition of claims on the merits rather than on the basis of technicalities, . . . and courts should be reluctant to impose a dismissal with prejudice for a rules violation that is neither persistent nor vexatious, particularly without some review of the merits.") (citation omitted); *Stevo v. Frasor*, 662 F.3d 880, 887 (7th Cir. 2011) ("Local rules, like the Federal Rules of Civil Procedure that they supplement, should be construed to provide for the 'just, speedy, and inexpensive determination of every action' on its merits.") (citation omitted); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1222 (9th Cir. 2006) (holding that the Rules promote "the public policy favoring the disposition of cases on their merits . . ."); *Am. Sec. Bank, N.A. v. John Y. Harrison Realty, Inc.*, 670 F.2d 317, 323 (D.C. Cir. 1982) ("The philosophy of the Federal Rules of Civil Procedure is to promote decisions on the merits whenever that is possible without prejudicing the parties unduly.").

115. Several other cases look to prejudice or equities in adopting the permissive approach. *See, e.g.,* *Schutt ex rel. A.S. v. Garland Indep. Sch. Dist.*, No. 3:17-CV-1708-B, 2019 WL 3006768, at *2–3 (N.D. Tex. July 9, 2019); *Fenzel v. Grp. 2 Software, LLC*, No. DKC 13-0379, 2016 WL 865363, at *3 n.3 (D. Md. Mar. 7, 2016); *Mathews v. Ohio Pub. Emps. Ret. Sys.*, No. 2:12-cv-1033, 2014 WL 4748472, at *4–5 (S.D. Ohio Sept. 23, 2014); *Hughes v. Abell*, 867 F. Supp. 2d 76, 91 (D.D.C. 2012); *Hitachi Med. Sys. Am., Inc. v. Horizon Med.*, No. 5:07CV02035, 2008 WL 5723531, at *4 (N.D. Ohio Aug. 29, 2008).

116. *Sinclair Wyo. Ref. Co. v. A & B Builders*, 989 F.3d 747, 774 (10th Cir. 2021).

117. *Id.* at 775.

118. *Id.* at 776 (internal quotation marks omitted) (quoting *Par Pharm. v. QuVa Pharma*, 764 F. App'x 273, 277 n.3 (3d Cir. 2019)).

119. *Id.*

120. *Id.* at 778.

It would be reasonable to conclude from these two rules that a counterclaim is not a distinct pleading, but rather must be included as part of another pleading, such as an answer. And it is certainly true that “[o]nce an amended pleading is interposed, the original pleading no longer performs any function in the case. . . . Accordingly, it is reasonable for [the plaintiff] to assert that when [the defendant] replaced its answer with an answer that did not contain counterclaims, the pleading that was before the Court (the new answer) did not contain counterclaims.”¹²¹

Nevertheless, the Tenth Circuit, relying on the U.S. District Court for the District of Columbia’s opinion in *Hughes v. Abell*,¹²² determined that this conclusion would incorrectly put “form over substance,” and that counterclaims are “distinct from defenses, admissions, and denials.”¹²³ From a purposivist perspective, this rings true because a counterclaim is more akin to a complaint than a denial or a defense.¹²⁴ In fact, “[i]t is not especially intuitive that a counterclaim is part of the pleading to which it is attached, nor is it obvious that counterclaims must be re-pled when an answer with counterclaims attached is superseded.”¹²⁵ Thus, the Tenth Circuit rejected the unyielding textualism of the strict approach in favor of an interpretive stance that focuses on the purposes of the provisions involved.

The Tenth Circuit next examined the Eighth Circuit’s *Davis* opinion. The Tenth Circuit followed the Eighth’s lead in again rejecting the textualism of the strict approach. Like the Eighth Circuit, the Tenth held that the Rules grant district courts discretion in determining whether a counterclaim is abandoned because Rules 15(a)(2) and (3) contain discretionary language.¹²⁶ Moreover, again following the Eighth Circuit, the Tenth held that Rule 13(a)(1)’s requirement that counterclaims be included in “a pleading” does not mean the counterclaim must be found in the most recently amended answer to the exclusion of prior answers, despite Rule 7(a)’s textual commitment otherwise.¹²⁷ Ultimately, like the Eighth Circuit, the Tenth Circuit focused on the purpose of the Rules,¹²⁸ and it held that the strict approach was at odds with the Rules’ purpose of securing on-the-merits adjudications, mislaying the focus instead on the pleading

121. *Sinclair Wyo.*, 989 F.3d at 776 (alteration in original) (internal citation omitted) (quoting *Hughes v. Abell*, 867 F. Supp. 2d 76, 91 (D.D.C. 2012)).

122. 867 F. Supp. 2d 76 (D.D.C. 2012).

123. *Sinclair Wyo.*, 989 F.3d at 776 (quoting *Hughes*, 867 F. Supp. 2d at 91).

124. *See id.*; *see also* RULES AND COMMENTARY, *supra* note 3, at 384–85, 391–92 (discussing the basics of Rule 13).

125. *Sinclair Wyo.*, 989 F.3d at 776 (quoting *Hughes*, 867 F. Supp. 2d at 91).

126. *Id.* at 776–77 (citing FED. R. CIV. P. 15(a)(3), stating that “[u]nless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later”); *see also* FED. R. CIV. P. 15(a)(2) (stating that a district court “should freely give leave [to amend] when justice so requires.”).

127. *Sinclair Wyo.*, 989 F.3d at 776–78.

128. *Id.* at 777 (citing FED. R. CIV. P. 1).

skills of counsel.¹²⁹ The Tenth Circuit thus found “*Hughes* and *Davis* persuasive because the Federal Rules do not speak clearly about whether counterclaims must be repleaded in subsequent answers, counterclaims are distinct from other parts of an answer, and an inflexible rule would not serve the interests of justice.”¹³⁰

The Tenth Circuit further held that an approach that focuses upon intent and prejudice to the plaintiff marks the best path for determining when a defendant has abandoned a counterclaim.¹³¹ Thus, the circuit held that “[a] key consideration is whether the plaintiff had notice that the defendant intended to continue pursuing the counterclaim.”¹³² In so doing, the Tenth Circuit emphasized Rule 15(a) doctrine, which “focuses principally on prejudice.”¹³³

Having set this standard, the circuit found that the facts demonstrate a lack of prejudice against Sinclair Wyoming. First, the contractors omitted all three counter and crossclaims “from their answers to the first and second amended complaints, instead of selectively omitting one or two of them.”¹³⁴ Moreover, in all three answers, the contractors referred to themselves as “counterclaimants.”¹³⁵ Further, in discovery responses postdating the contractors’ answer to the second amended complaint, they stated that one of their affirmative defenses was offset, which entitled them to indemnity from Sinclair Wyoming.¹³⁶ Lastly, “after [the defendants’] answer to the first amended complaint but before their answer to the [second amended complaint], the [defendants] moved to dismiss their crossclaim without prejudice but did not move to dismiss their counterclaims.”¹³⁷ These facts led the Tenth Circuit to conclude that sufficient notice was provided to Sinclair Wyoming and that it was clear to all parties that the contractors intended to continue their indemnity counterclaims.¹³⁸

II. INTERPRETIVE APPROACHES TO THE RULES

In this Part, we turn to the Supreme Court’s interpretive approaches to the Rules generally and where the strict and permissive camps on repleading counterclaims fall within these broader interpretive views. The

129. *Id.* at 777–78 (holding that when the “plaintiff is given sufficient notice that defendant is continuing to pursue a compulsory counterclaim, and plaintiff would not be unfairly prejudiced if the counterclaim proceeds, an inflexible rule that counterclaims are always abandoned if not repleaded would not serve the interests of justice.”) (quoting *Davis v. White*, 794 F.3d 1008, 1015–16); *see also* *Green Country Food Mkt. v. Bottling Grp.*, 371 F.3d 1275, 1280 (10th Cir. 2004) (holding that the Rules are “‘intended to promote the objective of deciding cases on their merits rather than in terms of the relative pleading skills of counsel[.]’”) (alteration in original); cases cited *supra* note 114 (supporting that purpose of Rules is to promote on-the-merits adjudication over pleading technicalities).

130. *Sinclair Wyo.*, 989 F.3d at 777.

131. *Id.* at 777–78.

132. *Id.* at 777.

133. *Id.*

134. *Id.* at 778.

135. *Id.*

136. *Id.* (internal quotation marks omitted).

137. *Id.*

138. *Id.*

Supreme Court does not consistently engage in one approach to Rules interpretation.¹³⁹ There are at least three takes to Rules interpretation employed by the Court: textualism, inherent authority, and purposivism.¹⁴⁰ We review these approaches in turn and place the strict approach to repleading counterclaims in the textualist camp and the permissive approach to repleading counterclaims in the purposive one.

A. Textualism and the Strict Approach to Repleading Counterclaims

We begin with the Court's textualist moments in Rules interpretation. The Court, in Rules interpretation cases, often treats the Rules, for all practical purposes, like statutes.¹⁴¹ This tends to lead to textualist interpretive approaches, much like those employed by adherents to the strict approach to repleading counterclaims.¹⁴² For example, the Court often holds that “[w]e give the Federal Rules of Civil Procedure their plain meaning. . . .” As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous.¹⁴³ In such cases, the Court deploys semantic and syntactic rules of statutory construction, which tend to heavily emphasize textualist tools of interpretation.¹⁴⁴ Further, following this textualist approach, the Court tends to sidestep policy arguments, noting that such policy questions must be sent to the drafters of the Rules.¹⁴⁵

Take, for example, the Court's opinion in *Pavelic & LeFlore v. Marvel Entertainment Group*.¹⁴⁶ There, “the District Court imposed a Rule 11 sanction in the amount of \$100,000 against [the law firm of] Pavelic &

139. See *Rules Interpretive Theory*, *supra* note 6, at 2175–79 (discussing this problem).

140. See *id.* at 2175–78, 2199–215 (reviewing these approaches).

141. See, e.g., *Marx v. Gen. Revenue*, 568 U.S. 371, 376 (2013) (interpreting Rule 54(d)(1) and explaining that “[a]s in all statutory construction cases, we assume that the ordinary meaning of the statutory language accurately expresses the legislative purpose.”) (brackets and quotations omitted); see also *Bank Nova Scotia v. United States*, 487 U.S. 250, 255 (1988) (noting that the Federal Rules are as “binding as any statute”).

142. See cases cited *supra* note 73 and accompanying text (summarizing the strict approach).

143. *Bus. Guides, Inc. v. Chromatic Commc'ns Enters.*, 498 U.S. 533, 540–41 (1991); see also *Pavelic & LeFlore v. Marvel Ent. Corp.*, 493 U.S. 120, 123 (1989) (“We give the Federal Rules of Civil Procedure their plain meaning, . . . and generally with them as with a statute, ‘[w]hen we find the terms unambiguous, judicial inquiry is complete.’”) (alterations in original); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980) (using similar language); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 29 (1st Cir. 2009) (applying the Supreme Court's traditional interpretive approach).

144. See, e.g., *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 547–48 (2010) (employing textualist tools in a Rule 15 case); *Leatherman v. Tarrant Cnty. Narcotics Intell. & Coordination Unit*, 507 U.S. 163, 168 (1993) (applying *expressio unius est exclusio alterius* in a Rule 8 pleading case); see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 69–166 (2012) (identifying and describing numerous semantic and syntactic canons of statutory interpretation).

145. See, e.g., *Jones v. Bock*, 549 U.S. 199, 216 (2007) (holding in a Rules case that “[w]hatever temptations the statesmanship of policy-making might wisely suggest, the judge's job is to construe the statute—not to make it better. . . . The judge ‘must not read in by way of creation,’ but instead abide by the ‘duty of restraint, th[e] humility of function as merely the translator of another's command.’”) (alterations in original) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947)); see also *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (similar); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997) (similar).

146. 493 U.S. 120 (1989).

LeFlore on the ground that the [underlying copyright infringement] . . . claim had no basis in fact and had not been investigated sufficiently by counsel.¹⁴⁷ The question for the Court was whether Rule 11, as then drafted, allowed the district court to sanction only the attorney who signed the relevant pleading or the signing-attorney's entire firm.¹⁴⁸ The Court took a textualist methodology that focused on the plain meaning.¹⁴⁹ It held that the district court could not, consistent with the then-text of Rule 11, sanction entire firms.¹⁵⁰ The majority was not at all swayed by Justice Marshall's policy arguments, pointing to a contrary result.¹⁵¹

We find a similar approach in the plurality opinion in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*¹⁵² There, New York law allowed insureds to collect statutory interest from insurers for late benefits payments, but under state law, such interest could not be collected as part of a class action.¹⁵³ The plaintiffs filed an action in federal court, seeking to certify a class action to collect this statutory interest under Rule 23.¹⁵⁴ The issue, under the *Erie* doctrine,¹⁵⁵ was whether Rule 23 directly conflicted with the New York law, meaning that Rule 23 would govern under *Hanna*,¹⁵⁶ or whether Rule 23 should be interpreted to avoid conflict with New York law.¹⁵⁷ The plurality looked exclusively to the textual plain meaning of Rule 23's text, deploying textualist interpretive tools, to conclude that Rule 23 conflicted with New York law.¹⁵⁸ Further embracing this interpretive stance, the plurality specifically eschewed all purposive analysis in favor of this semantic approach.¹⁵⁹

We find this same textualist interpretive approach at work in the strict approach to repleading counterclaims. The courts employing the strict approach engage with Rules 7(a), 13(a) to (b), and 15(a)(3) strictly textually.

147. *Id.* at 122.

148. *Id.* at 121.

149. *Id.* at 123 (“We give the Federal Rules of Civil Procedure their plain meaning. . . . and generally with them as with a statute, [w]hen we find the terms . . . unambiguous, judicial inquiry is complete”) (alteration in original).

150. *Id.* at 125–27.

151. Justice Marshall took a purposive approach. *Id.* at 127 (Marshall, J., dissenting) (describing the lower court's heavy reliance on the policies underlying Rule 11); *see also id.* at 129 (arguing that “[t]he purposes of the Rule support this construction of Rule 11,” which would allow for firm-wide sanctions). From this differing view, Justice Marshall concluded that firm-wide sanction was consistent with Rule 11 because “[o]ne of the fundamental purposes of Rule 11 is to strengthen the hand of the trial judge in his efforts to police abusive litigation practices and to provide him sufficient flexibility to craft penalties appropriate to each case.” *Id.* at 127.

152. 559 U.S. 393 (2010).

153. *Id.* at 397.

154. *Id.*

155. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 92 (1938) (announcing that while federal procedural law applies to federal court proceedings, “[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the [substantive] law to be applied in any case is the law of the state.”).

156. *See Hanna v. Plumer*, 380 U.S. 460, 463–64 (1965).

157. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980).

158. *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 559 U.S. 393, 398–400 (2010).

159. *See id.* at 405 n.7 (rejecting the dissent's “suggest[ion] that we should read the Federal Rules ‘with sensitivity to important state interests’ and ‘to avoid conflict with important state regulatory policies.’”).

Thus, these courts find that because “prior answers” are not a listed pleading in Rule 7(a), the defendant failed to conform to Rule 13(a)–(b) or Rule 15(a)(3) and thus abandoned their previously raised counterclaims by failing to replead them.¹⁶⁰ In line with the Court’s textualist moments in Rules interpretation, the adherents of the strict approach ignore prejudice tests and broader policies favoring adjudication on the merits in reaching these conclusions.¹⁶¹ As such, one can fairly label the strict approach as a textualist take on Rules interpretation.

B. *Inherent Authority*

We turn next to the Court’s inherent-authority approach to Rules interpretation. The textualist mode of Rules interpretation does not always carry the day at the Supreme Court.¹⁶² Indeed, the Court often engages with Rules cases from a decidedly non-semantic perspective.¹⁶³ This inherent-authority approach to the Rules¹⁶⁴ has come to the fore in many high-profile cases such as *Scott v. Harris*,¹⁶⁵ *Wal-Mart Stores, Inc. v. Dukes*,¹⁶⁶ *Bell Atlantic Corp. v. Twombly*,¹⁶⁷ and *Ashcroft v. Iqbal*.¹⁶⁸ In this family of cases, we see the Court divorce itself from text almost entirely and look predominately to policy that the Justices set themselves.¹⁶⁹ That is to say, in this family of cases, the policy the Court sets is not one reflected in the Rules themselves or the Advisory Committee Notes, but rather one of the Justices’ own making.

When the Court acts in this inherent-authority mode—from the use of video evidence in summary judgment to certification of class actions—the Court’s interaction with the Rules can hardly be described as the straightforward exercise of textual interpretation.¹⁷⁰ Moreover, the Court has not provided any principled explanation for why deviation from its textualist approach to Rules cases should occur, nor has it acknowledged that it is adopting a fundamentally different interpretive methodology in these cases.¹⁷¹ This is not to say that such cases always lead to poor outcomes from a policy perspective; but rather, these cases result from the

160. See, e.g., cases cited *supra* note 73 and accompanying text.

161. See sources cited *supra* notes 74–77 and accompanying text.

162. See Porter, *supra* note 4, at 131–42 (identifying and describing two other distinct methodologies of Rules interpretation invoked by the Roberts Court).

163. See *Supreme Court Regulation*, *supra* note 4, at 1195–97; Porter, *supra* note 4, at 136–42.

164. See *Rules Interpretive Theory*, *supra* note 6, at 2199–211 (critiquing this approach).

165. 550 U.S. 372 (2007).

166. 564 U.S. 338 (2011).

167. 550 U.S. 554 (2007).

168. 556 U.S. 662 (2009).

169. See Porter, *supra* note 4, at 149–53 (recognizing and describing this phenomenon).

170. See *id.* at 136–37.

171. See David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 928 (2011) (claiming that the Court’s interpretive methodology in Rules cases varies “wildly and inexplicably”); Porter, *supra* note 4, at 142, 156 (describing “the Roberts Court’s interpretive bipolarity,” and recognizing “the Court’s lack of transparency and self-reflection about its” disparate approaches).

Justices' own view of what constitutes sound policy—not the text or legislative history of the Rules.

*Bell Atlantic v. Twombly*¹⁷² is a ready example. The Court had, prior to this 2007 opinion, affirmed the “no set of facts” standard for interpreting compliance with Rule 8(a)(2) under *Conley v. Gibson* for decades.¹⁷³ The Court rejected this accumulation of precedent in *Twombly*, an antitrust class-action suit against several telecommunications providers.¹⁷⁴ The issue for the Court was that the complaint asserted only that the defendants had colluded in violation of the antitrust laws without providing any specific factual allegations of that unlawful agreement.¹⁷⁵ While this bare allegation survived a Rule 12(b)(6) challenge under the *Conley* standard,¹⁷⁶ the *Twombly* Court overruled *Conley*.¹⁷⁷ Famously, the *Twombly* opinion now requires courts to disregard all recitals in a complaint that are mere legal conclusions and assess whether the well-pleaded factual allegations state a claim for relief that is “plausible.”¹⁷⁸ The opinion crafted a new and more demanding test for assessing the sufficiency of complaints.¹⁷⁹

Key for this discussion, however, is that the Court predicated this standard on its policy choice to avoid the high costs of discovery and other disadvantages of litigation, while encouraging the settlement of unmeritorious cases.¹⁸⁰ Indeed, commentators near universally recognized *Twombly* as a pronouncement regarding the policy underlying pleading requirements in federal court¹⁸¹—not as an interpretation of Rule 8(a)(2)'s text. Indeed, proponents of the opinion welcomed it not because of its textual exegesis but because it limited discovery costs.¹⁸² Similarly, opponents focus their ire on the policy implications of *Twombly* as opposed to

172. 550 U.S. 554 (2007).

173. 355 U.S. 41, 45–46 (1957). The Court had regularly upheld this standard for the fifty years between *Conley* and *Twombly*. See, e.g., *Erickson v. Pardus*, 551 U.S. 89, 93 (2007); *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 507 (2002); *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993); *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 164 (1984); *Hosp. Bldg. Co. v. Rex Hosp.*, 425 U.S. 738, 746 (1976); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506 (1959).

174. *Twombly*, 550 U.S. at 549–50.

175. *Id.* at 565 n.10.

176. *Id.* at 561.

177. *Id.* at 563 (retiring the key passage from *Conley*).

178. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”) (quoting *Twombly*, 550 U.S. at 547).

179. See RULES AND COMMENTARY, *supra* note 3, at 168–70.

180. See *Twombly*, 550 U.S. at 558–59; see also Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 826–27 (2010) (reviewing *Twombly*).

181. See *Twombly*, 550 U.S. at 579 (Stevens, J., dissenting) (noting the same).

182. See, e.g., Lynn C. Tyler, *Recent Supreme Court Decision Heightens Pleading Standards, Holds out Hope for Reducing Discovery Costs*, 78 PAT. TRADEMARK & COPYRIGHT J. 169 (2009); Mark Herrmann, James M. Beck, & Stephen B. Burbank, *Debate, Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. PENNUMBRA 141, 142, 146–47 (2009) (opening statement of Herrmann and Beck arguing that *Twombly* and *Iqbal* were properly decided, are correct interpretations of Rule 8, and set sound policy).

textual interpretive difficulties.¹⁸³ Much the same point has been made about the so-called summary judgment trilogy cases, where the Court enacted its own policy preferences that did not align with the Rule's text.¹⁸⁴ While this inherent-authority approach to Rules interpretation is often at play, it is not used by the courts as a part of the repleading counterclaims debate.

C. Purposivism and the Permissive Approach to Repleading Counterclaims

There is yet a third mode the Court takes when interpreting the Rules—a purposive approach.¹⁸⁵ Staszewski and Mulligan, in prior work, defend this overarching approach to Rules interpretation that looks to both the text and the *policy goals of the Rules drafters*—not those of the Justices themselves as adjudicators, which forms the hallmark of opinions such as *Twombly*.¹⁸⁶ In these cases, the Court deploys not just text, but the Advisory Committee Notes,¹⁸⁷ and the policies embedded within the Rules as a whole¹⁸⁸ to reach holdings.

The pre-*Twombly* case of *Swierkiewicz v. Sorema N.A.*,¹⁸⁹ is illustrative of this purposive approach. The issue here was whether, under Rule 8(a)(2), a complaint in an employment discrimination case must contain specific facts establishing a prima facie case of discrimination per the *McDonnell Douglas* doctrine.¹⁹⁰ Engaging in a purposive analysis of the text, the Court held that such a heightened pleading requirement was not

183. See, e.g., Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 858–62 (2010); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 448–50, 461–73 (2008) (detailing the many ways in which the *Twombly* rule deviates from past practice, the text, the intent, and the legislative history of Rule 8); see also *Supreme Court Regulation*, supra note 4, at 1197 & n.35–39 (describing these critiques and collecting sources). There were some interpretation-based critiques as well. See RICHARD A. POSNER, *HOW JUDGES THINK* 53–54 (2008) (contending that the Court in *Twombly* could not possibly have based its decision on “legalist” principles); see also Marcus, supra note 171, at 974 (“Every relevant indicator suggests that the Court misinterpreted Rule 8 in *Twombly* and *Iqbal*.”).

184. See Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 104–09 (2006) (arguing that the trilogy cases are an example of procedural reform through reinterpretation that do not comport with the text of Rule 56). This point about methodology should be kept separate from the policy merits. That is to say, one can agree with the policy outcome in the trilogy, as we do. See Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1343 (2005) (“[T]here exists no justification for imposing any burden on a movant for summary judgment that would not parallel the burden that party would have at trial prior to moving for judgment as a matter of law.”); see also EDWARD J. BRUNET, MARTIN H. REDISH, & MICHAEL A. REITER, *SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE* 85–86 (2d ed. 2000). Yet still note that this policy outcome is not couched within the text of Rule 56. See *Rules Interpretive Theory*, supra note 6, at 2202.

185. See *Rules Interpretive Theory*, supra note 6, at 2227 (providing a summation of such a purposive approach).

186. See *id.* at 2227–28 (defending this conclusion because of the intra-branch nature of Rules promulgation and the simultaneous passage of the official advisory committee notes).

187. *Id.* at 2212–13.

188. *Id.* at 2213–14.

189. 534 U.S. 506 (2002).

190. *Id.* at 508 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

required. After looking to the text of Rule 8(a)(2),¹⁹¹ the Court examined the purpose of the rule. In so doing, it held that the purpose of Rule 8(a)(2), as established by drafters, was to create a notice pleading regime.¹⁹² It then considered how “[o]ther provisions of the Federal Rules of Civil Procedure are inextricably linked to” the drafter created policy choice embedded within a notice pleading regime.¹⁹³ Indeed, the Court relied heavily on the purpose of the Rules that rejects “the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.”¹⁹⁴

*Gulf Oil Co. v. Bernard*¹⁹⁵ is also illustrative of this purposive approach. The opinion interprets Rule 23(d), which then stated that in “the conduct of [class] actions to which this rule applies, the court may make appropriate orders: . . . (3) imposing conditions on the representative parties or on intervenors . . . [and] (5) dealing with similar procedural matters.”¹⁹⁶ In an employment discrimination suit, the district court, pursuant to Rule 23(d)(3), entered an order prohibiting the parties and their counsel from communicating with potential class members without court approval.¹⁹⁷ The Court reversed.¹⁹⁸ The Court primarily looked to “the general policies embodied in Rule 23, which governs class actions in federal court.”¹⁹⁹ The Court then noted that because of the “potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.”²⁰⁰ Concluding, however, that this discretion must be bounded and subject to abuse of discretion review, the Court held that such “an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.”²⁰¹ The Court further held that “[o]nly such a determination can ensure that the [district] court is furthering, rather than hindering, the policies embodied in the Federal Rules of Civil Procedure, especially Rule 23.”²⁰²

We find this purposive approach at work in the opinions that make up the permissive approach to repleading counterclaims. For example, in the *Davis*, *Wilson*, and *Sinclair* opinions, the courts primarily relied on the

191. *Id.* at 512–13.

192. *Id.* at 512 (quoting the Rule’s text).

193. *Id.* at 513.

194. *Id.* at 514 (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

195. 452 U.S. 89 (1981).

196. *Id.* at 99 (alterations in original) (quoting FED. R. CIV. PRO. 23(d)).

197. *Id.* at 91, 93.

198. *Id.* at 103.

199. *Id.* at 99.

200. *Id.* at 100.

201. *Id.* at 101.

202. *Id.* at 101–02.

purpose of the Rules—promoting on-the-merits litigation—as the foundation for their adoption of the permissive approach.²⁰³ In so doing, these courts were not adopting their own policy preferences, but rather those embedded within the Rules themselves, often citing to Rule 1.²⁰⁴ Similarly, these courts looked to the concept of prejudice from *Foman*, which is itself a purposivist opinion,²⁰⁵ to further the purpose of on-the-merits litigation absent injury to the opposing party.²⁰⁶ Given that these methodological tools are hallmarks of the purposivist approach, one can fairly label the permissive approach as a purposivist take on Rules interpretation. From this interpretive theory overview, then, it follows that the Tenth Circuit took a purposivist interpretive approach to Rules interpretation in *Sinclair*.

We further conclude that the purposivist take, as evidenced in the *Sinclair* opinion, is the better approach to repleading counterclaims. While saving a full defense of the view for other work, we present a summary here. In sum, even for avowed textualists as to other items—e.g., statutes—the purposivist approach makes great sense in Rules cases. This follows because the Rules are promulgated in a different fashion than statutory enactments²⁰⁷—by intra-judicial branch promulgation—that lacks the separation-of-powers considerations that surround statutory interpretation and generally drive the normative foundations for a textualist approach.²⁰⁸ Furthermore, the Rules themselves include the official notes and policy statements as part of their formally enacted documentation, which tends to assuage concerns about the use of legislative history and purposes in the statutory realm.²⁰⁹ Thus, even if legislative history and purpose are not the primary tools of interpretation that a judge might use in a statutory case, they should be germane in a Rules case.²¹⁰ As Justice Frankfurter aptly put

203. See *Sinclair Wyo. Refin. Co. v. A & B Builders*, 989 F.3d 747, 776–77 (10th Cir. 2021) (citing Rule 1 to support the premise that the purpose of the Rules is to promote on-the-merits litigation); *Davis v. White*, 794 F.3d 1008, 1015 (8th Cir. 2015) (relying on the purposes of the Rules as contemplated by Rule 1); *Ground Zero Museum Workshop v. Wilson*, 813 F. Supp. 2d 678, 706 (D. Md. 2011) (similar).

204. See *Sinclair Wyo.*, 989 F.3d at 776–77; *Davis*, 794 F.3d at 1015; *Ground Zero Museum*, 813 F. Supp. 2d at 706.

205. *Rules Interpretive Theory*, *supra* note 6, at 2214–15 (discussing *Foman*).

206. See *Sinclair Wyo.*, 989 F.3d at 777–78 (focusing principally on whether the plaintiff is prejudiced if a counterclaim is allowed to proceed in the absence of a renewed pleading); *Davis*, 794 F.3d at 1015–16 (similar).

207. *Rules Interpretive Theory*, *supra* note 6, at 2186–93. (discussing the “court rulemaking process” in great detail).

208. *Id.* at 2183–86 (discussing the principles of statutory interpretation).

209. *Id.* at 2197–98.

210. See *Marcus*, *supra* note 171, at 957 (arguing that the Rules should be purposively interpreted); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103 (2002) (“[T]he Court should accord the Notes authoritative effect.”); *id.* at 1158 (“The fact that the Notes proceed through the approval process along with the text also helps to meet textualist objections to their use.”); cf. Jennifer Nou, *Regulatory Textualism*, 65 DUKE L.J. 81, 84–87 (2015) (claiming that a textualist approach to interpreting administrative regulations should include consideration of the regulatory preamble and other mandatorily created materials that were part of the public record when elected officials reviewed and approved the proposal). See also 28 U.S.C. § 2073(d) (2012). Specifically, this section requires that “[i]n making a recommendation under this section or under section 2072 or 2075 . . . , the body making that recommendation

it, “[p]lainly the Rules are not acts of Congress and cannot be treated as such.”²¹¹ Following this methodology, in addition to a Rule’s text, the “plain meaning” interpretation of the Rules, as the Court has held at times, “must be guided, in part, by an understanding of the . . . original version of Rule 11 that led to its revision.”²¹² For these reasons, then, we think the Tenth Circuit hits the right notes in its *Sinclair* opinion.

III. THE CIRCUITS ESCHEW TEXTUALIST REASONING IN THEIR 2021 SIGNIFICANT RULES DECISIONS

Noting that the *Sinclair* opinion takes a purposivist approach to Rules interpretation, we turn in this Part to determine whether this was a “one-off” interpretive choice for the Tenth Circuit in 2021, or whether this purposivist move represented a trend for 2021 Rules cases. We also explore how the 2021 Tenth Circuit’s interpretive approach to Rules cases compared to the other circuits. We conclude that both the Tenth and the other circuits, at least in 2021, generally eschewed textualist tools of interpretation in Rules cases, which in turn supports the normative argument that judges in Rules cases ought to employ purposivist reasoning.

To determine whether *Sinclair* was evidence of a trend or a one-off, we reviewed all the Tenth Circuit’s significant Rules cases in 2021. We did the same for the other circuits. Within these cases, we searched for indicia of textualist and purposivist reasoning on the Rules issue, using specific trigger terms such as “plain text” for textualist reasoning or use of the Advisory Committee Note for use of purposivist reasoning. Moreover, as noted above, we conclude that the courts should take a purposivist approach to Rules cases, even if the particular judge is otherwise a textualist for other interpretive endeavors. Thus, we also looked, within the set of significant Rules cases, for the use of textualist reasoning for the non-Rules issues to provide a basis of comparison between Rules and non-Rules issues. Our findings follow.

We begin with the 2021 significant, published Tenth Circuit Rules cases. We used Rules’ references in Westlaw headnotes in a published case as a proxy for significant Rules cases.²¹³ The Tenth Circuit decided

shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body’s action, including any minority or other separate views.” *Id.* The Rules differ greatly from most federal statutes in this regard. *See* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 570 (1985) (“Congress seldom provides explicit guidance, even in legislative history, on how it wishes courts to interpret statutory language.”); *see also* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 890 n.13 (2003) (“[P]ast history shows that it is most unlikely that Congress will enact rules of interpretation that will generally resolve the disputed issues of interpretive choice.”).

211. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting).

212. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 392 (1990).

213. We performed this search in the Westlaw database on June 8, 2022. We used the following search terms in the “Tenth Circuit” database: HE(F.R.C.P. “Fed. R. Civ. P.” “federal rule #of civil procedure”) & DA(after 12/31/2020) & DA(before 01/01/2022). Within these results, we filtered to return only circuit-level, published opinions.

fifty-two significant, published, Rules cases in 2021.²¹⁴ Of these fifty-two cases, only one took a textualist approach to interpreting the Rules²¹⁵: *In re Samsung Top-Load Washing Machine Marketing, Sales Practices & Products Liability Litigation*.²¹⁶ In *In re Samsung*, the Circuit held that “[b]ased on the Rule’s plain language, ‘a district court’s decision to certify a class must precede the appointment of class counsel.’”²¹⁷ *In re Samsung*, moreover, is the only opinion of the fifty-two cases to use the phrase “plain language” in connection with an analysis of the Rules. Notably, the Tenth Circuit never used the phrases “text,” “plain text,” “meaning,” “ordinary meaning,” “plain meaning,” “language,” or “ordinary language” in connection with an analysis of the Rules.²¹⁸ From this, we found that the Tenth Circuit employed textualist tools of interpretation for Rules analysis in 1.9% of its significant Rules cases in 2021.²¹⁹

These results are all the more striking given that within this very same fifty-two-opinion dataset, the same judges facing the same facts regularly deployed textualist analysis in interpreting other materials such as federal legislation, state legislation, regulation, and the like. For example, eight opinions use “plain language” as an interpretive tool for material other than the Rules.²²⁰ Similarly, eight opinions use “plain meaning” as an interpretive tool for material other than the Rules.²²¹ Further, seven opinions

214. See *infra* Appendix 1 (containing a list of all fifty-two cases). The search returned four additional opinions, which we excluded because they were later superseded or withdrawn. See *Edmonds-Radford v. Sw. Airlines Co.*, 13 F.4th 1107 (10th Cir. 2021), *withdrawn and superseded on reh’g*, 17 F.4th 975 (10th Cir. 2021); *Gerson v. Logan River Acad.*, 11 F.4th 1195 (10th Cir. 2021), *withdrawn and superseded on denial of reh’g en banc*, 20 F.4th 1263 (10th Cir. 2021); *Schell v. Okla. Sup. Ct.*, 2 F.4th 1312 (10th Cir. 2021), *withdrawn and superseded on reh’g*, 11 F.4th 1178 (10th Cir. 2021); *Truman v. Orem City*, 998 F.3d 1164 (10th Cir. 2021), *withdrawn and superseded on reh’g in part*, 1 F.4th 1227 (10th Cir. 2021).

215. The terms we employed as indicia of textualist reasoning are: text, plain text, meaning, ordinary meaning, plain meaning, language, ordinary language, and plain language. We determined that an opinion used textualist reasoning if one of these terms was in the same paragraph as a Rules reference. Thus, the Westlaw “filter” terms within the search was: “plain text” /p (F.R.C.P. “Fed. R. Civ. P.” “federal rule #of civil procedure”). We repeated this filter for each term. The terms we employed as indicia of purposivist reasoning are: purpose, intent, and advisory committee. We used the same filter process as with the textualist language.

216. 997 F.3d 1077, 1087–88 (10th Cir. 2021).

217. *Id.* (quoting *Sheinberg v. Sorensen*, 606 F.3d 130, 132 (3d Cir. 2010)).

218. See authors’ commentary *supra* note 215 (describing process for obtaining results).

219. See *infra* Table 1.

220. See *Goodwill Indus. of Cent. Okla. v. Phila. Indem. Ins. Co.*, 21 F.4th 704, 712–14 (10th Cir. 2021) (deploying “plain language” interpretation of gubernatorial executive order); *Ohlsen v. United States*, 998 F.3d 1143, 1155–57 (10th Cir. 2021) (analyzing “plain language” of federal statute); *LKL Assocs., Inc. v. Union Pac. R.R. Co.*, 17 F.4th 1287, 1306 (10th Cir. 2021) (Briscoe, J., concurring) (same); *Nat’l Union Fire Ins. Co. of Pittsburgh v. Dish Network, LLC*, 17 F.4th 22, 30 (10th Cir. 2021) (relying on “plain language” of a contract); *BonBeck Parker, LLC v. Travelers Indem. Co. of Am.*, 14 F.4th 1169, 1174, 1176, 1179–81 (10th Cir. 2021) (same); *Marcantel v. Michael & Sonja Saltman Fam. Tr.*, 993 F.3d 1212, 1235 (10th Cir. 2021) (same); *N.R.D.C. v. McCarthy*, 993 F.3d 1243, 1251 (10th Cir. 2021) (utilizing “plain language” of regulation to reach decision).

221. See *Goodwill Indus. of Cent. Okla.*, 21 F.4th at 709 (analyzing “plain meaning” of a contract); *BonBeck Parker*, 14 F.4th at 1177–80 (same); *Marcantel*, 993 F.3d at 1235 (same); *Sinclair Wyo. Refin. Co. v. A & B Builders, Ltd.*, 989 F.3d 747, 766, 779 (10th Cir. 2021); *Nat’l Union Fire Ins.*, 17 F.4th at 30, 32 n.5 (deploying “plain meaning” interpretation of contract and statute); *Solar v. City of Farmington*, 2 F.4th 1285, 1289–90 (10th Cir. 2021) (relying on “plain meaning” of federal

use “ordinary meaning” as an interpretive tool for material other than the Rules.²²² And two opinions use “plain text” as an interpretive tool for material other than the Rules.²²³ To be sure, many of these opinions overlap in their use of textualist tools of interpretation; nevertheless, there are twelve unique opinions within this textualist tools of interpretation subset. From this, we found that the Tenth Circuit employed textualist tools of interpretation for non-Rules analysis in 23.1% of its significant Rules cases in 2021, while using textualist tools of interpretation for Rules issues in 1.9% of cases.²²⁴

We took a similar look at the other federal courts of appeals. Again, we used Rules’ references in the Westlaw headnote of a published opinion as a proxy for significant Rules opinion.²²⁵ The remaining twelve circuits issued 881 significant Rules opinions in 2021.²²⁶ Akin to the Tenth Circuit’s lack of textualist Rules holdings in 2021 (recall we found but one opinion out of the fifty-two), we found a dearth of textualist Rules opinions in the other circuits in 2021.²²⁷ Indeed, we identified only sixteen textualist Rules opinions in the other circuits in 2021²²⁸ when searching for the terms “text,” “plain text,” “meaning,” “ordinary meaning,” “plain

statute); *Standish v. Jackson Hole Mountain Resort Corp.*, 997 F.3d 1095, 1103–04, n.6 (10th Cir. 2021) (deploying “plain meaning” of state statute); *McCarthy*, 993 F.3d at 1251–52 (looking to “plain meaning” of regulation).

222. See *LKL Assocs.*, 17 F.4th at 1294 (relying on “ordinary meaning” of federal statute); *Solar*, 2 F.4th at 1290; *McCarthy*, 993 F.3d at 1251 (deploying “ordinary meaning” of regulation); *Goodwill Indus. of Cent. Okla.*, 21 F.4th at 710 n.3 (analyzing “ordinary meaning” of state statute); *Nat’l Union Fire Ins.*, 17 F.4th at 33 (deploying “ordinary meaning” of contract); *BonBeck Parker*, 14 F.4th at 1173, 1176–81 (same); *Marcantel*, 993 F.3d at 1223, 1226 (same).

223. See *McCarthy*, 993 F.3d at 1249 (relying on “plain text” of regulation); *Santa Fe All. for Pub. Health & Safety v. City of Santa Fe*, 993 F.3d 802, 821 (10th Cir. 2021) (Lucero, J., concurring) (deploying “plain text” of statute).

224. See *infra* Table 1.

225. We performed this search in the Westlaw database on June 8, 2022. We used the following search terms in the “Circuit Court” database: HE(F.R.C.P. “Fed. R. Civ. P.” “federal rule #of civil procedure”) & DA(after 12/31/2020) & DA(before 01/01/2022). Within these results, we filtered to return only non-Tenth Circuit, published opinions.

226. See *infra* Appendix 2 (containing a list of all 881 cases).

227. See authors’ commentary *supra* note 215 (describing process for obtaining results).

228. See *Santos-Arrieta v. Hosp. Del Maestro*, 14 F.4th 1, 9–10 (1st Cir. 2021) (deploying “plain text” interpretation); *Gravel v. Sensenich (In re Gravel)*, 6 F.4th 503, 518 (2d Cir. 2021) (Bianco, J., concurring in part and dissenting in part) (same); *Benjamin v. Sparks*, 986 F.3d 332, 342 (4th Cir. 2021) (utilizing “plain language” interpretation); *Pledger v. Lynch*, 5 F.4th 511, 530 (4th Cir. 2021) (Quattlebaum, J., concurring) (deploying both “plain language” and “plain meaning” interpretations); *L.A. Pub. Ins. Adjusters Inc. v. Nelson*, 17 F.4th 521, 525 (5th Cir. 2021) (relying on “ordinary meaning”); *Spectrum Ass’n Mgmt. of Tex. v. Lifetime HOA Mgmt. LLC*, 5 F.4th 560, 564–65 (5th Cir. 2021) (deploying “plain text” interpretation); *Cretacci v. Call*, 988 F.3d 860, 870–71 (6th Cir. 2021) (Readler, J., concurring) (same); *Marcure v. Lynn*, 992 F.3d 625, 633 (7th Cir. 2021) (relying on “plain meaning”); *Spirit Lake Tribe v. Jaeger*, 5 F.4th 849, 853 (8th Cir. 2021) (looking to “plain language” of Rule); *Merchant v. Corizon Health, Inc.*, 993 F.3d 733, 741 (9th Cir. 2021) (applying both “plain language” and “plain meaning” interpretations); *Olean Wholesale Grocery Coop., Inc., v. Bumble Bee Foods*, 993 F.3d 774, 794 (9th Cir. 2021) (Hurwitz, J., concurring in part and dissenting in part) (deploying “plain text” interpretation); *McKinney-Drobnis v. Oreshack*, 16 F.4th 594, 607 (9th Cir. 2021) (relying on “plain language”); *Briseño v. Henderson*, 998 F.3d 1014, 1024 (9th Cir. 2021) (same); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1283 (11th Cir. 2021) (deploying “plain text” and “plain meaning”); *Est. West v. Smith*, 9 F.4th 1361, 1367 (11th Cir. 2021) (relying on “plain language”); *Agudas Chasidei Chabad of United States v. Russian Fed’n*, 19 F.4th 472, 475–77 (D.C. Cir. 2021) (relying on “plain text” and “plain meaning” interpretations).

meaning,” “language,” “ordinary language,” or “plain language” within the same paragraph as a reference to the Rules. From this, we found that the other circuit’s employed textualist tools of interpretation for Rules analysis in 1.8% of their significant Rules cases in 2021.²²⁹

Similar to the Tenth Circuit, in these 881 significant Rules opinions issued in 2021 from the other circuits, the judges frequently used textualist tools of interpretation in addressing other materials such as federal legislation, state legislation, regulation, and the like. Our search revealed that 188 opinions used the terms “text,” “plain text,” “meaning,” “ordinary meaning,” “plain meaning,” “language,” or “ordinary language,” in their analysis of non-Rules materials.²³⁰ From this, we found that the other circuits employed textualist tools of interpretation for non-Rules issues in 21.3% of their significant Rules cases in 2021.²³¹

This result contrasts greatly with the thirty-four published, significant Rules opinions from circuits other than the Tenth that deploy the advisory committee’s note as a purposivist interpretive tool.²³² Further, we found an additional thirteen published, significant Rules opinions from circuits other than the Tenth that look to the “purpose” or “intent” of the Rules as an interpretive tool.²³³ From this, we found that the other circuits employed

229. See *infra* Table 1.

230. We obtained this result by filtering the search described in *supra* note 215 with the following: (“text,” “plain text,” “meaning,” “ordinary meaning,” “plain meaning,” “language,” “ordinary language,” or “plain meaning”). This returned 204 cases. We then removed the 16 opinions that deployed these terms only as part of their Rules analysis, leaving 188 opinions.

231. See *infra* Table 1.

232. See *supra* note 215 (describing process for obtaining results). The cases are: *Cohen v. Brown Univ.*, 16 F.4th 935, 943 (1st Cir. 2021); *Santos-Arrieta*, 14 F.4th at 9; *United States v. 2008 33’ Contender Model Tournament Vessel*, 990 F.3d 725, 727 (1st Cir. 2021); *Bais Yaakov Spring Valley v. ACT, Inc.*, 12 F.4th 81, 105 (1st Cir. 2021); *In re Vitamin C Antitrust Litig.*, 8 F.4th 136, 147 n.17 (2d Cir. 2021); *Liebowitz v. Bandshell Artist Mgmt.*, 6 F.4th 267, 291 (2d Cir. 2021); *Bensch v. Est. Umar*, 2 F.4th 70, 76 (2d Cir. 2021); *Fund Liquidation Holdings LLC v. Bank of Am. Corp.*, 991 F.3d 370, 389 n.10 (2d Cir. 2021); *Jin v. Shanghai Original*, 990 F.3d 251, 261–63 (2d Cir. 2021); *In re Citizens Bank*, 15 F.4th 607, 617–18 (3d Cir. 2021); *Russell v. Educ. Comm’n for Foreign Med. Graduates*, 15 F.4th 259, 267 (3d Cir. 2021); *Conboy v. U.S. Small Bus. Admin.*, 992 F.3d 153, 164 (3d Cir. 2021); *United States v. 269 Acres*, 995 F.3d 152, 170 n.11 (4th Cir. 2021); *Prantil v. Arkema, Inc.*, 986 F.3d 570, 582 n.65 (5th Cir. 2021); *Earl v. Boeing Co.*, 21 F.4th 895, 901 (5th Cir. 2021) (Elrod, J., concurring in part and dissenting in part); *Kensu v. Corizon, Inc.*, 5 F.4th 646, 649–50 (6th Cir. 2021); *S.J. ex rel. M.J. v. Akron City Sch. Dist. Bd. of Educ.*, 1 F.4th 436, 446 n.4 (6th Cir. 2021); *Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400, 423–24 (6th Cir. 2021); *Helena Agri-Enters., LLC v. Great Lakes Grain, LLC*, 988 F.3d 260, 273 (6th Cir. 2021); *Jones v. Ramos*, 12 F.4th 745, 749–50 (7th Cir. 2021); *Spirit Lake Tribe*, 5 F.4th at 853; *Azarax, Inc. v. Syverson*, 990 F.3d 648, 653 (8th Cir. 2021); *McKinney-Drobnis*, 16 F.4th at 609 n.4; *Moser v. Benefytt, Inc.*, 8 F.4th 872, 877 (9th Cir. 2021); *Circuitronix, LLC v. Kinwong Elec., Ltd.*, 993 F.3d 1299, 1304 (11th Cir. 2021); *Merchant*, 993 F.3d at 739–40; *AcryliCon USA, LLC v. Silikal GmbH*, 985 F.3d 1350, 1365 n.35 (11th Cir. 2021); *Fed. Trade Comm’n v. On Point Cap. Partners LLC*, 17 F.4th 1066, 1081 (11th Cir. 2021); *Cutuli v. Elie (In re Cutuli)*, 13 F.4th 1342, 1347–48 (11th Cir. 2021); *O’Neal Constructors, LLC v. DRT Am., LLC*, 991 F.3d 1376, 1379–80 (11th Cir. 2021); *Wilcox v. Geo. Univ.*, 987 F.3d 143, 151 (D.C. Cir. 2021); *Morrissey v. Mayorkas*, 17 F.4th 1150, 1166 (D.C. Cir. 2021) (Millet, J., dissenting); *Wi-LAN Inc. v. Sharp Elecs. Corp.*, 992 F.3d 1366, 1371–72, 1374 (Fed. Cir. 2021); *MLC Intell. Prop., LLC v. Micron Tech., Inc.*, 10 F.4th 1358, 1372 (Fed. Cir. 2021).

233. See *supra* note 215 (describing process for obtaining results). The cases are: *Santos-Arrieta*, 14 F.4th at 8–9; *Electra v. 59 Murray Enters., Inc.*, 987 F.3d 233, 246 (2d Cir. 2021); *Lively v. WAFRA Inv. Advisory Grp., Inc.*, 6 F.4th 293, 302 n.2 (2d Cir. 2021); *In re Gravel*, 6 F.4th at 518

purposivist tools of interpretation for Rules analysis in 5.3% of their significant Rules cases in 2021.²³⁴ In the Tenth Circuit, the *Sinclair* opinion was the only significant Rules case in 2021 to use these same purposivist tools of interpretation in Rules issues.

	TENTH CIRCUIT		ALL OTHER CIRCUITS	
	CASE QUANTITY		CASE QUANTITY	
Significant Rules Opinions (SRO)	52		881	
SRO Deploying:	CASE QUANTITY	PERCENT	CASE QUANTITY	PERCENT
Textualist Analysis of Rules	1	1.9	16	1.8
Textualist Analysis of Non-Rules	12	23.1	188	21.3
Purposivist Analysis of Rules	1	1.9	47	5.3

TABLE 1. *Significant Federal Rules of Civil Procedure Cases (2021)*

Without presuming that a one-year sampling is truly representative, many of these findings struck us as notable. Both the Tenth Circuit, at 1.9%, and the other circuits, at 1.8%, seldomly deployed textualist reasoning for Rules issues.²³⁵ This conclusion appears reinforced when we compared the circuits' use of textualist reasoning for non-Rules issues within this same set of cases: the Tenth Circuit, at 23.1%, and the other circuits, at 21.3%.²³⁶ These results present evidence supporting the notion that even generally textualist judges eschew textualist reasoning when it comes to Rules issues.

We found the adoption of purposivist reasoning for Rules issues interesting as well. Here, at least in 2021, we find the Tenth Circuit, at 1.9%, trailing the other circuits, at 5.3%, in the use of purposivist tools of interpretation for significant Rules cases.²³⁷

Reviews, such as these, of the Tenth and other circuit courts' interpretative stance are important. As the Supreme Court continues to oscillate amongst at least three interpretive approaches,²³⁸ it matters greatly where the circuit courts land on these interpretive questions. From this one-year snapshot, it appears that the circuits are less textualist on Rules matters than they are in other areas of the law. We invite others to research this

(Bianco, J., concurring in part and dissenting in part); *Burgess v. Goldstein*, 997 F.3d 541, 562 (4th Cir. 2021); *B.R. v. F.C.S.B.*, 17 F.4th 485, 496 (4th Cir. 2021); *Sanchez Oil & Gas Corp. v. Crescent Drilling & Prod., Inc.*, 7 F.4th 301, 309 (5th Cir. 2021); *United Fire & Cas. Co. v. Prate Roofing & Installations, LLC*, 7 F.4th 573, 584 (7th Cir. 2021); *United States v. Hassebrock*, 21 F.4th 494, 497 (7th Cir. 2021); *Benavidez v. Cnty. of San Diego*, 993 F.3d 1134, 1145 (9th Cir. 2021); *Cooper v. Newsom*, 13 F.4th 857, 870 (9th Cir. 2021) (Forrest, J., concurring); *Barnapov v. Amual*, 986 F.3d 1321, 1324 (11th Cir. 2021); *MLC Intell. Prop.*, 10 F.4th at 1372.

234. See *infra* Table 1.

235. See *supra* Table 1.

236. See *supra* Table 1.

237. See *supra* Table 1.

238. See generally discussion *supra* Part II (discussing the Court's three approaches to Rules interpretation).

more fully to verify this conclusion over broader datasets.

CONCLUSION

In this Article, we reviewed the Tenth Circuit's *Sinclair* opinion, which held that the failure to replead a counterclaim in an amended answer does not constitute abandonment, absent prejudice to the opposing party. In so doing, the Tenth Circuit adopted a purposivist approach to interpretation of the Rules, which we found to be the most interesting aspect of the decision. In reviewing all the Tenth and other circuits' significant, published 2021 Rules cases, we conclude that the circuits deploy textualist reasoning less often for Rules issues than they do for other questions. This is an important trend, especially against the backdrop of the Supreme Court's oscillating interpretive approaches in Rules cases. We hope this Article will spur future broader reviews into the circuits' Rules interpretive stances.

APPENDIX 1: LIST OF SIGNIFICANT TENTH CIRCUIT FEDERAL RULES OF CIVIL PROCEDURE CASES (2021)

Case Name and Citation
1. <i>Hood v. American Auto Care, LLC</i> , 21 F.4th 1216 (10th Cir. 2021).
2. <i>Goodwill Industries of Central Oklahoma, Inc. v. Philadelphia Indemnity Insurance Co.</i> , 21 F.4th 704 (10th Cir. 2021).
3. <i>Hall v. Allstate Fire & Casualty Insurance</i> , 20 F.4th 1319 (10th Cir. 2021).
4. <i>Gerson v. Logan River Academy</i> , 20 F.4th 1263 (10th Cir. 2021).
5. <i>Reznik v. inContact, Inc.</i> , 18 F.4th 1257 (10th Cir. 2021).
6. <i>Brewer v. City of Albuquerque</i> , 18 F.4th 1205 (10th Cir. 2021).
7. <i>LKL Associates, Inc. v. Union Pacific Railroad Co.</i> , 17 F.4th 1287 (10th Cir. 2021).
8. <i>Edmonds-Radford v. Southwest Airlines Co.</i> , 17 F.4th 975 (10th Cir. 2021).
9. <i>Adams v. C3 Pipeline Construction Inc.</i> , 30 F.4th 943 (10th Cir. 2021).
10. <i>National Union Fire Insurance Co. of Pittsburgh v. Dish Network, LLC</i> , 17 F.4th 22 (10th Cir. 2021).
11. <i>Estate of Taylor v. Salt Lake City</i> , 16 F.4th 744 (10th Cir. 2021).
12. <i>Tompkins v. United States Department of Veterans Affairs</i> , 16 F.4th 733 (10th Cir. 2021).
13. <i>Crane v. Utah Department of Corrections</i> , 15 F.4th 1296 (10th Cir. 2021).
14. <i>Friends of Animals v. Bernhardt</i> , 15 F.4th 1254 (10th Cir. 2021).
15. <i>BonBeck Parker, LLC v. Travelers Indemnity Co. of America</i> , 14 F.4th 1169 (10th Cir. 2021).
16. <i>Rose ex rel. Rose v. Brown</i> , 14 F.4th 1129 (10th Cir. 2021).
17. <i>Brown v. Austin</i> , 13 F.4th 1079 (10th Cir. 2021).
18. <i>Tudor v. Southeast Oklahoma State University</i> , 13 F.4th 1019 (10th Cir. 2021).

19. *Hayes v. SkyWest Airlines, Inc.*, 12 F.4th 1186 (10th Cir. 2021).
20. *Brooks v. Colorado Department of Corrections*, 12 F.4th 1160 (10th Cir. 2021).
21. *Schell v. Oklahoma Supreme Court*, 11 F.4th 1178 (10th Cir. 2021).
22. *Hetronic International, Inc. v. Hetronic Germany GmbH*, 10 F.4th 1016 (10th Cir. 2021).
23. *Osterhout v. Board of County Commissioners of Leflore County*, 10 F.4th 978 (10th Cir. 2021).
24. *VDARE Foundation v. City of Colorado Springs*, 11 F.4th 1151 (10th Cir. 2021).
25. *Lupia v. Medicredit, Inc.*, 8 F.4th 1184 (10th Cir. 2021).
26. *Janny v. Gamez*, 8 F.4th 883 (10th Cir. 2021).
27. *North Mill Street, LLC v. City of Aspen*, 6 F.4th 1216 (10th Cir. 2021).
28. *Hamric v. Wilderness Expeditions, Inc.*, 6 F.4th 1108 (10th Cir. 2021).
29. *303 Creative LLC v. Elenis*, 6 F.4th 1160 (10th Cir. 2021), *cert. granted in part*, 142 S. Ct. 1106 (2022).
30. *Solar v. City of Farmington*, 2 F.4th 1285 (10th Cir. 2021).
31. *Truman v. Orem City*, 1 F.4th 1227 (10th Cir. 2021).
32. *Reorganized FLI, Inc. v. Williams Cos.*, 1 F.4th 1214 (10th Cir. 2021).
33. *Ramos v. Banner Health*, 1 F.4th 769 (10th Cir. 2021).
34. *Ohlsen v. United States*, 998 F.3d 1143 (10th Cir. 2021).
35. *Harris v. Remington Arms Co., LLC*, 997 F.3d 1107 (10th Cir. 2021).
36. *Standish v. Jackson Hole Mountain Resort Corp.*, 997 F.3d 1095 (10th Cir. 2021).
37. *Bridges v. Wilson*, 996 F.3d 1094 (10th Cir. 2021).
38. *In re Samsung Top-Load Washing Machine Marketing, Sales Practices & Products Liability Litigation*, 997 F.3d 1077 (10th Cir. 2021).
39. *Underwood v. Bank of America Corp.*, 996 F.3d 1038 (10th Cir. 2021).
40. *Natural Resources Defense Council v. McCarthy*, 993 F.3d 1243 (10th Cir. 2021).
41. *Marcantel v. Michael & Sonja Saltman Family Trust*, 993 F.3d 1212 (10th Cir. 2021).
42. *New Mexico Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Services*, 994 F.3d 1166 (10th Cir. 2021).
43. *Santa Fe Alliance for Public Health & Safety v. City of Santa Fe*, 993 F.3d 802 (10th Cir. 2021).
44. *Frank v. Crawley Petroleum Corp.*, 992 F.3d 987 (10th Cir. 2021).
45. *Hendrickson v. AFSCME Council 18*, 992 F.3d 950 (10th Cir. 2021).
46. *Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154 (10th Cir. 2021).
47. *Throupe v. University of Denver*, 988 F.3d 1243 (10th Cir. 2021).
48. *Sinclair Wyoming Refinery Co. v. A & B Builders, LTD*, 989 F.3d 747 (10th Cir. 2021).
49. *Smith v. Allbaugh*, 987 F.3d 905 (10th Cir. 2021).

50. *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272 (10th Cir. 2021).
51. *Mayotte v. U.S. Bank National Association*, 985 F.3d 1248 (10th Cir. 2021).
52. *Lance v. Morris*, 985 F.3d 787 (10th Cir. 2021).

APPENDIX 2: LIST OF SIGNIFICANT NON-TENTH CIRCUIT COURT
FEDERAL RULES OF CIVIL PROCEDURE CASES (2021)

Case Name and Citation

1. *United States v. Republic of Honduras*, 21 F.4th 1353 (11th Cir. 2021).
2. *Pineda v. Skinner Services, Inc.*, 22 F.4th 47 (1st Cir. 2021).
3. *Whittington v. Tyson Foods, Inc.*, 21 F.4th 997 (8th Cir. 2021).
4. *In re Piercy*, 21 F.4th 909 (6th Cir. 2021).
5. *Kalbers v. United States Department of Justice*, 22 F.4th 816 (9th Cir. 2021).
6. *Borley v. United States*, 22 F.4th 75 (2d Cir. 2021).
7. *Leszanczuk v. Carrington Mortgage Services, LLC*, 21 F.4th 933 (7th Cir. 2021).
8. *Brito v. Garland*, 22 F.4th 240 (1st Cir. 2021).
9. *Klaas v. Allstate Insurance Co.*, 21 F.4th 759 (11th Cir. 2021).
10. *In re Google Inc. Street View Electronic Communications Litigation*, 21 F.4th 1102 (9th Cir. 2021).
11. *United States v. Hassebrock*, 21 F.4th 494 (7th Cir. 2021).
12. *Doe #1 v. Red Roof Inns, Inc.*, 21 F.4th 714 (11th Cir. 2021).
13. *Earl v. Boeing Co.*, 21 F.4th 895 (5th Cir. 2021).
14. *Construction Industry & Laborers Joint Pension Trust v. Carbonite, Inc.*, 22 F.4th 1 (1st Cir. 2021).
15. *Dish Network Corp. v. Ace American Insurance Co.*, 21 F.4th 207 (2d Cir. 2021).
16. *RealPage, Inc. v. National Union Fire Insurance Co. of Pittsburgh, Pennsylvania.*, 21 F.4th 294 (5th Cir. 2021).
17. *Glennborough Homeowners Ass'n v. U.S. Postal Service*, 21 F.4th 410 (6th Cir. 2021).
18. *Financial Information Technologies, LLC v. iControl Systems, USA, LLC*, 21 F.4th 1267 (11th Cir. 2021).
19. *Halsey v. Townsend Corp. of Indiana*, 20 F.4th 1222 (8th Cir. 2021).
20. *Lax v. Mayorkas*, 20 F.4th 1178 (7th Cir. 2021).
21. *Air-Con, Inc. v. Daikin Applied Latin America, LLC*, 21 F.4th 168 (1st Cir. 2021).
22. *Miller v. Chicago Transit Authority*, 20 F.4th 1148 (7th Cir. 2021).
23. *DeOtte v. Nevada*, 20 F.4th 1055 (5th Cir. 2021).
24. *Disaster Solutions, LLC v. City of Santa Isabel*, 21 F.4th 1 (1st Cir. 2021).
25. *Esquivel v. United States*, 21 F.4th 565 (9th Cir. 2021).
26. *Care One Management, LLC v. United Healthcare Workers East*, 22 F.4th 128 (3d Cir. 2021).
27. *Ticer v. Imperium Insurance Co.*, 20 F.4th 1040 (5th Cir. 2021).
28. *Skyline Restoration, Inc. v. Church Mutual Insurance Co.*, 20 F.4th 825 (4th Cir. 2021).

29. *Terral River Service, Inc. v. SCF Marine, Inc.*, 20 F.4th 1015 (5th Cir. 2021).
30. *Timpa v. Dillard*, 20 F.4th 1020 (5th Cir. 2021).
31. *Moss v. United Airlines, Inc.*, 20 F.4th 375 (7th Cir. 2021).
32. *Romspen Mortgage Limited Partnership v. BGC Holdings LLC –Arlington Place One*, 20 F.4th 359 (7th Cir. 2021).
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