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Raise It (again?) or Waive It—Preserving Claims for Appellate Review When They Are Dismissed with Leave to Amend

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**RAISE IT (AGAIN?) OR WAIVE IT—PRESERVING CLAIMS
FOR APPELLATE REVIEW WHEN THEY ARE DISMISSED
WITH LEAVE TO AMEND**

Mike Chak Hin Tsoi[†]

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I. INTRODUCTION

In the universe of civil procedure, two principles are well established. First, “an amended complaint supercedes [sic] an original complaint and renders the original complaint without legal effect.”¹ Second, “an error not raised and preserved at the trial court level will not be considered on appeal.”² These two maxims collide in the context of preserving claims for appellate review when they are dismissed with leave to amend.

To illustrate the issue, imagine that a plaintiff files a four-count complaint in a federal district court. On a 12(b)(6) motion,³ the judge dismisses the plaintiff’s two best claims with leave to amend.⁴

1. *Karnes v. Poplar Bluff Transfer Co. (In re Atlas Van Lines, Inc.)*, 209 F.3d 1064, 1067 (8th Cir. 2000); *see also* 6 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1476, at 90 (3d ed. 2010) (“Once an amended pleading is interposed, the original pleading no longer performs any function in the case and any subsequent motion made by an opposing party should be directed at the amended pleading.” (footnote omitted)).

2. Ryan Walters, *Raise It or Waive It? Addressing the Federal and State Split in Authority on Whether a Conviction Under an Unconstitutional Statute Is a Jurisdictional Defect*, 62 BAYLOR L. REV. 909, 916–17 (2010); *see also* *Yakus v. United States*, 321 U.S. 414, 444 (1944) (“No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.”).

3. *See* FED. R. CIV. P. 12(b)(6) (allowing a party to assert the defense that the complaint “fail[ed] to state a claim upon which relief can be granted”).

4. *See* FED. R. CIV. P. 15(a)(2) (“The court should freely give leave [to amend] when justice so requires.”); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (“[U]nder Rule 12(b)(6), ‘a district court should grant leave to amend even if no request to amend the pleading was made’” (quoting *Doe v. United*

At this point, the plaintiff's options for the dismissed claims are limited without a final judgment⁵—neither an interlocutory appeal under 28 U.S.C. § 1292(b)⁶ nor an appeal from a judgment certified as final under Rule 54(b)⁷ is available.⁸ Perhaps if the plaintiff strongly believes in the merits of the original dismissed claims, the plaintiff will disclaim the opportunity to amend and insist on an expedited appellate review.⁹ However, if the plaintiff decides to amend the complaint,¹⁰ the issue of this article is presented: must the plaintiff replead the dismissed claims in order to preserve the dismissal error for appellate review?

This issue is complicated when viewed in light of the two maxims of complaint supersession and issue preservation. On one hand, the amended complaint superseded the original complaint, and, thus, dismissed claims not repleaded in the amended complaint remain with the legally ineffective original complaint.

States, 58 F.3d 494, 497 (9th Cir. 1995)).

5. See 28 U.S.C. § 1291 (2006) (“The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . .”); *Catlin v. United States*, 324 U.S. 229, 233 (1945) (“A ‘final decision’ generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” (citing *St. Louis, I.M. & S. Ry. Co. v. S. Express Co. (Express Companies’ Cases)*, 108 U.S. 24, 28 (1883))); *Moya v. Schollenbarger*, 465 F.3d 444, 451 (10th Cir. 2006) (“[W]hen the dismissal order expressly *grants* the plaintiff leave to amend, that conclusively shows that the district court intended only to dismiss the complaint; the dismissal is thus not a final decision.”); 15A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 3914.1, at 494–95 (2d ed. 1992) (“An order that both dismisses and grants leave to amend . . . is not final until some further event makes it final.” (footnote omitted)).

6. 28 U.S.C. § 1292(b) (2006) (requiring that an interlocutory appeal be granted where there is “a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation”).

7. Federal Rule of Civil Procedure 54(b) provides that “when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.”

8. Certification under 28 U.S.C. § 1292(b) or Federal Rule of Civil Procedure 54(b) requires trial court consent, which would naturally be difficult to obtain when the court has expressly provided leave to amend on its own initiative.

9. 15A WRIGHT ET AL., *supra* note 5, § 3914.1, at 496 (“Finality thus may be achieved following dismissal with leave to amend by formally disclaiming the opportunity to amend, and some opinions seem to require a disclaimer. . . . [Moreover, c]ourts often have been willing to treat an appeal as an election to stand on the original complaint, making the judgment final.”).

10. 15A WRIGHT ET AL., *supra* note 5, § 3914.1, at 507 (“The choice to pursue an amended complaint before appeal often may avoid the need for any appeal, or reduce the prospect of multiple appeals.”).

On the other hand, the dismissal was an issue argued by both parties and ruled on by the trial court, and thus, the error was preserved for appellate review even without the plaintiff repleading the issue in the amended complaint.

When confronted with this situation,¹¹ eight of the federal courts of appeals have taken various approaches to determine whether a plaintiff has waived the dismissed claims for appellate review.¹² The Seventh Circuit has adopted a blanket approach that does not require any repleading to preserve dismissed claims for appellate review.¹³ The Second, Third, Fifth, Tenth, and Eleventh Circuits have taken a flexible approach that requires repleading to preserve claims dismissed for technical deficiencies, but not for claims dismissed for legal deficiencies.¹⁴ At the opposite end of the spectrum, the Ninth Circuit has adopted a blanket approach that requires repleading to preserve all claims regardless of the type of deficiency.¹⁵ And although the Eighth Circuit was the first court to articulate the flexible approach,¹⁶ recent case law suggests that this court now favors the Ninth Circuit blanket approach.¹⁷

In light of the federal courts of appeals' disagreement on this topic and the lack of a U.S. Supreme Court ruling, this article analyzes the issue and recommends an approach that best fulfills the purpose of the Federal Rules of Civil Procedure.¹⁸ The discussion begins in Part II with a background on the maxims of original complaint supersession and issue preservation. Part III

11. This article only addresses the specific situation of when a plaintiff's claims are dismissed with leave to amend. Various courts have ruled that repleading is not required in other circumstances. *See, e.g.,* *Young v. City of Mount Ranier*, 238 F.3d 567, 572–73 (4th Cir. 2001) (claims dismissed *without* leave to amend); *USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council*, 31 F.3d 800, 812 (9th Cir. 1994) (claims disposed of by way of summary judgment).

12. Other circuit courts are either silent or reluctant to rule on the issue. *E.g., Young*, 238 F.3d at 573 n.4 (“We do not consider whether claims dismissed *with* leave to amend must be re-alleged in an amended complaint in order to preserve the right to appeal the dismissal, as that issue is not before us.”).

13. *See infra* Part III.A.

14. *See infra* Part III.B.

15. *See infra* Part III.C.

16. *See infra* Part III.B.1.

17. *See infra* Part III.C.2.

18. Although this article only examines federal case law, there is indication that state courts are split on the issue as well. *See* *Gavin v. AT&T Corp.*, No. 01 C 2721, 2003 WL 22849128, at *4 (N.D. Ill. Dec. 1, 2003) (discussing how repleading is required under Illinois state law, but is not required under Seventh Circuit federal law).

summarizes the key cases that promulgated the different approaches and explains the policy considerations underlying each approach. Part IV argues that the Seventh Circuit's blanket approach best supports the federal rules' policy considerations. Then finally, Part V concludes the article by offering recommendations for preserving dismissed claims specifically in the Eighth Circuit in light of this circuit's conflicting case law.

II. BACKGROUND ON ORIGINAL COMPLAINT SUPERSESSION AND ISSUE PRESERVATION

A. *Effects of an Amended Complaint*

Rule 15 of the Federal Rules of Civil Procedure controls amendments to complaints.¹⁹ And it reinforces a basic policy of the federal rules: “pleadings are not an end in themselves but are only a means to assist in the presentation of a case to enable it to be decided on the merits.”²⁰ Accordingly, a court may, on its own initiative, require parties to amend a complaint to avoid dismissal, and 15(a)(2) dictates that courts should “freely give” leave to amend “when justice so requires.”²¹

Once the plaintiff amends the complaint under Rule 15, the amended complaint “supersedes the pleading it modifies and remains in effect throughout the action unless it subsequently is modified.”²² Accordingly, the original complaint “cannot be utilized to cure defects in the amended pleading, unless the relevant portion is specifically incorporated in the new pleading.”²³ But exceptions to the general rule of supersession do exist. For example, the original complaint continues to be relevant for the relation back doctrine under Rule 15(c).²⁴ Another example is when courts examine the issue of removal jurisdiction based on the original complaint.²⁵

The policy underlying the supersession rule is simple: “to ensure that the pleadings give notice of all the issues that are in

19. FED. R. CIV. P. 15.

20. 6 WRIGHT ET AL., *supra* note 1, § 1473, at 601–02.

21. *Id.* § 1473, at 602 (quoting FED. R. CIV. P. 15(a)(2)).

22. *Id.* § 1476, at 636.

23. *Id.* § 1476, at 640 (footnote omitted).

24. *Id.*

25. *E.g.*, O’Halloran v. Univ. of Wash., 856 F.2d 1375, 1379 (9th Cir. 1988) (“Jurisdiction is based on the complaint as originally filed and not as amended.”).

controversy so [that] they can be handled and comprehended expeditiously.”²⁶

B. Preserving and Waiving Issues for Appellate Review

Waiver is commonly understood as the “voluntary and intentional relinquishment of a known right.”²⁷ Thus, a failure to raise an issue voluntarily at the trial court results in a waiver of that issue for appellate review.²⁸ Indeed, even a constitutional right may be forfeited by a failure to timely raise an issue.²⁹

The rationales for the raise-or-waive rule include: encouraging finality, promoting judicial economy, preventing unfair surprise, preserving a system of allowing litigants to frame and present the issues, and discouraging abuse of the appellate system.³⁰

III. FEDERAL APPROACHES FOR DETERMINING THE PRESERVATION OF DISMISSED CLAIMS

Eight of the federal courts of appeals have produced three different approaches in determining whether a plaintiff is required to replead claims that were dismissed with leave to amend in order to preserve them for appellate review. At the most plaintiff-friendly end of the spectrum, the “no repleading” approach requires no repleading at all for dismissed claims to be reviewable.³¹ But at the most defendant-friendly end of the spectrum, the “replead all” approach requires everything to be repleaded in order to preserve the claims for appeal.³² Intermediately, some courts have adopted a flexible, “deficiency” approach which examines the nature of the defect in the original complaint in order to determine the preservation issue.³³

26. 6 WRIGHT ET AL., *supra* note 1, § 1476, at 641.

27. Haddock v. Nationwide Fin. Servs., 514 F. Supp. 2d 267, 272 (D. Conn. 2007).

28. Walters, *supra* note 2, at 916–17.

29. Yakus v. United States, 321 U.S 414, 444 (1944).

30. Walters, *supra* note 2, at 916–17.

31. *See infra* Part III.A.

32. *See infra* Part III.C.

33. *See infra* Part III.B.

A. *The “No Repleading” Approach*

1. *The Seventh Circuit Origin*

In *Bastian v. Petren Resources Corp.*, the Seventh Circuit established the “no repleading” approach.³⁴ The plaintiffs in *Bastian* invested \$600,000 in oil and gas limited partnerships promoted by the defendants.³⁵ The plaintiffs brought a complaint alleging violations of Rule 10b-5 of the Securities Exchange Act³⁶ and the RICO statute,³⁷ asserting that they would not have invested in these partnerships but for the defendants’ misrepresentations and misleading omissions.³⁸

On a 12(b)(6) motion, the district court dismissed the complaint with leave to amend³⁹ because of pleading deficiencies including the failure to allege “loss causation”⁴⁰ for the Rule 10b-5 charge.⁴¹ The plaintiffs then amended the complaint, but they did not replead the Rule 10b-5 claim because they did not think that loss causation was an element that was necessary and provable at the time.⁴² The court ultimately dismissed the amended complaint as well,⁴³ but with prejudice this time.⁴⁴

On appeal, the defendants argued that the plaintiffs had

34. 892 F.2d 680, 682–83 (7th Cir. 1990).

35. *Id.* at 682.

36. *See generally* 17 C.F.R. § 240.10b-5 (2011) (prohibiting any act or omission resulting in fraud or deceit in connection with the purchase or sale of any security).

37. *See generally* Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–68 (2006) (providing for extended criminal penalties and a civil cause of action for acts performed as part of an ongoing criminal organization).

38. *Bastian*, 892 F.2d at 682.

39. *Id.* Neither the district court nor circuit court opinions specifically stated that the complaint was dismissed with leave to amend, only that it was dismissed with prejudice; however, this is obvious because the circuit court analyzed the issue in the context of a dismissal with leave to amend. *See id.* (“[T]hat dismissal was . . . of a complaint with leave to amend . . .” (citing *Harris v. Milwaukee Cnty. Circuit Court*, 886 F.2d 982, 984 (7th Cir. 1989); 28 U.S.C. § 1291)); *Bastian v. Petren Res. Corp.*, 681 F. Supp. 530, 538 (N.D. Ill. 1988) (“Count II[, the RICO claim,] is dismissed with prejudice.”).

40. *Bastian*, 892 F.2d at 682. “[L]oss causation” is a showing that “if the facts had been as represented by the defendants[, then] the value of the limited partnerships would not have declined.” *Id.*

41. *Id.* The RICO charge had a minor technical deficiency that was curable. *Id.*

42. *Id.* at 682–83.

43. The RICO charge was also dismissed on the ground that a RICO case requires “loss causation.” *Id.* at 682.

44. *Id.*

waived their right to challenge the dismissal of the Rule 10b-5 claim because they did not replead that claim in the amended complaint.⁴⁵ Writing for the majority, Judge Posner rejected the defendants' argument based on the principle that "[w]hen a final decision is appealed, the appeal brings up *all* previous rulings of the district judge adverse to the appellant."⁴⁶ The crux of Judge Posner's argument against waiver is that "[o]therwise there would be no way to obtain appellate review of those rulings"⁴⁷ Indeed, Judge Posner emphasized: "It is not waiver—it is prudence and economy—for parties not to reassert a position that the trial judge has rejected."⁴⁸

The *Bastian* court also equated this situation to when a district judge grants partial summary judgment to a defendant.⁴⁹ In that scenario, the plaintiff would definitely be able to challenge the granting of the partial summary judgment.⁵⁰ In sum, Judge Posner saw no reason to differentiate the procedural process of a dismissal with leave to amend and that of a granting of partial summary judgment.⁵¹

2. *Summarizing the "No Repleading" Approach*

In making all rulings available for appellate review regardless of whether the dismissed claims were repleaded, the "no repleading" approach is primarily concerned with the underlying policy of issue preservation—that raised issues should be available for appellate review. This approach views the plaintiff's original assertion of the issue and the plaintiff's opposition to the defendant's motion to dismiss as satisfying the raise-or-waive rule. In addition, this approach recognizes that when a trial judge requests an amendment by providing a leave to amend along with the dismissal, the plaintiff can safely assume that judge does not want the plaintiff to reassert a rejected position.

45. *Id.*

46. *Id.* (citing *Asset Allocation & Mgmt. Co. v. W. Emp'rs Ins. Co.*, 892 F.2d 566, 569 (7th Cir. 1989) (upholding jurisdiction over an appeal of an injunction) (emphasis added)).

47. *Id.* at 682–83.

48. *Id.* at 683.

49. *Id.*

50. *Id.*

51. *Id.*

B. *The “Deficiency” Approach*

While the Seventh Circuit adopts a blanket “no repleading” approach that renders all rulings reviewable on appeal, six other circuit courts follow a flexible approach that is still plaintiff-friendly, but renders some rulings unreviewable depending on the deficiency of the original complaint. The rulings of the Third, Eighth, and Tenth circuit courts were especially important in advancing the theory of this approach.

1. *The Eighth Circuit Origin*

Over a century ago, the Eighth Circuit adopted the “deficiency” approach in *Williamson v. Liverpool & London & Globe Insurance Co.*⁵² The plaintiff in *Williamson* sued an insurance company under its fire insurance policies to recover damages.⁵³ Relying on a Missouri statute,⁵⁴ the plaintiff also claimed attorney’s fees and additional damages for vexatious delay in payment.⁵⁵

At the trial court level, the judge dismissed the complaint with leave to amend within three days.⁵⁶ The complaint was dismissed on the ground that the Missouri statute was in contravention of the Equal Protection Clause of the Fourteenth Amendment.⁵⁷ The plaintiff then submitted an amended complaint that entirely omitted the claims for additional damages and attorney’s fees.⁵⁸

On appeal,⁵⁹ the Eighth Circuit held that the plaintiff had not

52. *Williamson v. Liverpool & London & Globe Ins. Co.*, 141 F. 54, 56–57 (8th Cir. 1905).

53. *Id.* at 55.

54. *Williamson v. Liverpool, L. & G. Ins. Co.*, 105 F. 31, 32 (W.D. Mo. 1900) (“The statute in question is found in section 8012, Rev. St. Mo. 1899, as follows: ‘In any action against any insurance company to recover the amount of any loss under a policy of fire, life, marine or other insurance, if it appear from the evidence that such company has vexatiously refused to pay such loss, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not exceeding ten per cent. on the amount of the loss, and a reasonable attorney’s fee; and the court shall enter judgment for the aggregate sum found in the verdict.’”).

55. *Williamson*, 141 F. at 55.

56. *Id.*

57. *Id.* (“[T]he Missouri statute . . . being directed against insurance companies alone, it deprived them of the equal protection of the laws.”).

58. *Id.* After the amended complaint, the U.S. Supreme Court ruled on the issue in several separate cases. *Id.* at 55–56. The *Williamson* plaintiff asked for, but was denied, leave to amend her complaint a second time. *Id.* at 55.

59. The Eighth Circuit first held that “the trial court erred in its first ruling, and that, . . . the plaintiff possessed a valid cause of action for damages and attorney’s fees in addition to the amount of the [fire insurance] policies.” *Id.* at

waived her right to challenge the dismissal of claims for additional damages and attorney's fees.⁶⁰ The court held that there was no waiver when the dismissal "struck a vital blow to a substantial part of [the] plaintiff's cause of action."⁶¹ The court provided, however, that waiver would exist if the dismissal was for "indefiniteness, incompleteness, . . . insufficiency of statement . . . [or] technical defects."⁶²

In establishing this rule, the court focused its ruling on avoiding a "denial of [the plaintiff's] substantial right."⁶³ To that end, the court drew a line between claims that were dismissed for technical deficiencies and those dismissed for legal deficiencies, and only claims of the former are waived if not repleaded in the amended complaint.

2. *Following Tenth Circuit Dictum*

Over fifty years after *Williamson*, the Tenth Circuit, in *Blazer v. Black*, approved of the "deficiency" approach in dictum.⁶⁴ In turn, the *Blazer* dictum⁶⁵ became the basis of the majority holding in the Tenth Circuit decision of *Davis v. TXO Production Corp.*⁶⁶

a. *Blazer v. Black—Tenth Circuit Dictum*

In *Blazer*, the plaintiff, a former stockholder of a dissolved corporation, sued in the District Court of Kansas for compensatory and punitive damages against the corporation's former president.⁶⁷ The plaintiff alleged that the defendant, through a series of schemes and transactions, fraudulently converted the plaintiff's stock before dissolution.⁶⁸

57.

60. *Id.*

61. *Id.*

62. *Id.* The court offered that "[i]t is well settled in federal practice" that this is the ruling; however, the court cited no authorities for this proposition. *Id.*

63. *Id.*

64. 196 F.2d 139, 143–44 (10th Cir. 1952).

65. See Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 953 (2005) ("A *holding* consists of those propositions along the chosen decisional path or paths of reasoning that are actually decided, are based upon the facts of the case, and lead to the judgment. A proposition in a case that is not [a] holding is *dicta*.") (emphasis added).

66. 929 F.2d 1515, 1517–18 (10th Cir. 1991).

67. *Blazer*, 196 F.2d at 141.

68. *Id.* Allegedly, the defendant "devised a fraudulent scheme to acquire control of the . . . [plaintiff's stock], . . . with the use of corporate funds; enter into

On the defendant's motion, the district court dismissed from the complaint all allegations related to matters and events subsequent to the plaintiff's departure of its stocks and receipt of payment for those stocks.⁶⁹ With leave to amend, the plaintiff filed an amended complaint that included all the same claims for fraudulent conduct except for the previously dismissed allegations.⁷⁰ Ultimately, the case went up for appeal after the court sustained a motion for a directed verdict in favor of the defendant.⁷¹

On appeal, the plaintiff sought to challenge the dismissal of certain allegations, but the defendant argued at bar that the plaintiff had waived its right to challenge the dismissal by amending the complaint and omitting the dismissed claim.⁷² Although the Tenth Circuit admitted that it "need not decide whether the trial court erroneously sustained the motion to strike or whether appellant waived his right to question such ruling by pleading over,"⁷³ the court voiced support for the *Williamson* "deficiency" approach by reiterating that

while the pleader who amends or pleads over, waives his objections to the ruling of the court on indefiniteness, incompleteness or insufficiency, or mere technical defects in pleadings, he does not waive his exception to the ruling which strikes "a vital blow to a substantial part" of his cause of action.⁷⁴

an extensive drilling program, with borrowed funds, for the purpose of enhancing the value of the stock, and then sell the outstanding stock of the Company to the National Cooperative Refinery Association." *Id.*

69. *Id.* at 142–43 ("The court observed that while such allegations might be entirely proper in an action for rescission or in a proceedings to impress a trust upon funds in the hands of an unfaithful fiduciary, they had no place in a suit for money damages for fraud and deceit . . .").

70. *Id.* at 143.

71. *Id.* at 141.

72. *Id.* at 143.

73. *Id.* at 144. The Tenth Circuit concluded that it was unnecessary to decide the waiver issue because it was "certain that the second amended complaint . . . sufficiently stated a claim based upon a fraudulent scheme under color of a fiducial relationship." *Id.*

74. *Id.* at 143–44 (quoting *Williamson v. Liverpool & London & Globe Ins. Co.*, 141 F. 54, 57 (8th Cir. 1905)). The court noted other state (e.g., Kansas, Texas, Ohio) and federal (e.g., Ninth Circuit) jurisdictions that did not follow *Williamson* and stated that *Williamson* "has long been the rule of Federal practice. . . ." *Id.* at 143.

b. *Davis v. TXO Production Corp.*—*Tenth Circuit Holding*

The *Williamson* “vital blow” language resurfaced again in the Tenth Circuit in the case of *Davis v. TXO Production Corp.*⁷⁵ In *Davis*, the plaintiff alleged tortious interference with a business relation,⁷⁶ champerty and maintenance,⁷⁷ and breach of the implied covenant of good faith and fair dealing.⁷⁸ Upon a 12(b)(6) dismissal, the plaintiff amended the complaint but did not replead the breach of an implied covenant of good faith claim.⁷⁹

On appeal, the Tenth Circuit rejected the defendant’s argument that the plaintiff had waived the breach of an implied covenant of good faith claim based on a failure to replead that claim.⁸⁰ The court cited the *Blazer* dictum as presenting “a reasonable standard to determine when a party should be allowed to assert the trial court’s original alleged error on appeal.”⁸¹

The court further reasoned that a rule that requires plaintiffs to replead dismissed claims “merely sets a trap for unsuspecting plaintiffs” because the party may be “reticent to raise a claim . . . that had been previously dismissed for . . . fear [of the] imposition of a Rule 11 sanction.”⁸²

75. 929 F.2d 1515, 1517–18 (10th Cir. 1991).

76. *Davis*, 929 F.2d at 1516. See generally RESTATEMENT (SECOND) OF TORTS § 766 (1979) (“One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.”).

77. *Davis*, 929 F.2d at 1516. See generally 7 RICHARD A. LORD, WILLISTON ON CONTRACTS § 15:1 (4th ed. 1990) (“Maintenance consists in maintaining, supporting or promoting the litigation of another, with most courts requiring that the maintaining party act as an officious intermeddler and be without any interest in the litigation. Champerty is a bargain to divide the proceeds of litigation between the owner of the litigated claim and the party supporting or enforcing the litigation.”).

78. *Davis*, 929 F.2d at 1516. See generally RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981) (defining “good faith” in the case of a merchant as “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade” (citing U.C.C. §2-103(1)(j))).

79. *Davis*, 929 F.2d at 1516–17.

80. *Id.* at 1518. The defendant had cited, as support, other previous Tenth Circuit decisions in *Leggett v. Montgomery Ward & Co.*, 178 F.2d 436 (10th Cir. 1949) and *Aetna Life Ins. Co. v. Phillips*, 69 F.2d 901 (10th Cir. 1934). *Id.* at 1517.

81. *Id.* The Tenth Circuit in effect overruled itself by ruling along the *Blazer* dictum and thus circulated the opinion to the en banc court pursuant to local rules. *Id.* at 1518 n.3.

82. *Id.* at 1518, 1518 n.2.

3. *Applying the “Deficiency” Approach to an Amended Complaint that Omits a Defendant—Third Circuit*

Sixteen years after the Tenth Circuit accepted the “deficiency” approach in *Davis*, the Third Circuit applied the “deficiency” approach to analyze an amended complaint that omitted a defendant rather than merely a cause of action.

In *United States ex rel. Atkinson v. Pennsylvania Shipbuilding Co.*,⁸³ the plaintiff brought a qui tam action⁸⁴ under the False Claims Act (FCA),⁸⁵ alleging that the defendants defrauded the U.S. Navy in connection with a contract to build oil tankers.⁸⁶ Three defendants were named in the complaint in question⁸⁷: Sun Ship Inc. (Sun Ship), Pennsylvania Shipbuilding Co. (Penn Ship), and First Fidelity Bank, N.A. (Fidelity).⁸⁸ After a dismissal with leave to amend,⁸⁹ the plaintiff brought a final complaint that named only Penn Ship and Fidelity as defendants.⁹⁰

On appeal,⁹¹ Sun Ship contended that the plaintiff had waived his right to appeal the district court’s dismissal by failing to replead claims against Sun Ship in the final complaint.⁹² The Third Circuit then adopted the “deficiency” approach by articulating that repleading is not required when the dismissals were “with prejudice or based on some legal barrier other than want of specificity or

83. 473 F.3d 506, 515–18 (3d Cir. 2007).

84. See Gretchen L. Forney, Note, *Qui Tam Suits: Defining the Rights and Roles of the Government and the Relator Under the False Claims Act*, 82 MINN. L. REV. 1357, 1357 n.4 (1998) (“The phrase ‘qui tam’ is short for ‘qui tam pro domino rege quam pro se ipso in hac parte sequitur,’ which is a Latin phrase interpreted as ‘who brings the action for the king as well as for himself.’”).

85. See generally Federal False Claims Act, 31 U.S.C. §§ 3729–33 (1994); Forney, *supra* note 84, at 1357 (“[T]he False Claims Act . . . allows private citizens to bring suit against those who knowingly defraud the U.S. government.”).

86. *Atkinson*, 473 F.3d at 509.

87. The complaint in the case on appeal was the second amended complaint; the original complaint was brought by Atkinson and then co-relator Eugene Schorsch and was dismissed without prejudice. *Id.* at 512.

88. *Id.* at 509, 512.

89. The second amended complaint was dismissed under Federal Rules of Civil Procedure (12)(b)(6) and 9(b). *Id.* at 512.

90. *Id.* The court noted that it appeared to be a strategic choice by Atkinson’s counsel that Sun Ship was omitted in the final complaint. *Id.* at 516 n.14. Atkinson “strongly protested” the omission, but ultimately agreed to it, “believing that [counsel] would rename Sun Ship after discovery produced more evidence implicating [Sun Ship] in the alleged FCA violations.” *Id.*

91. The district court ultimately dismissed the action by way of summary judgment. *Id.* at 514.

92. *Id.* at 515.

particularity.”⁹³ The court reasoned that in such a case, the dismissals were “on the merits” and thus repleading “would have been futile.”⁹⁴

Applying this logic, the Third Circuit ruled that the plaintiff had indeed waived its right to challenge the Sun Ship dismissal.⁹⁵ The court reasoned that “it would not have been futile to replead the claims against Sun Ship because the dismissals were based on pleading deficiencies rather than substantive disagreements regarding the legal requirements of the causes of action.”⁹⁶ The court pointed out that the trial court had in fact “specifically invited” the plaintiff to provide a “better factual account of the alleged claim.”⁹⁷

The Third Circuit also reasoned that the “deficiency” approach “appl[ies] even more strongly” when a whole defendant is dismissed, because the defendant has “a legitimate expectation that [it is] no longer involved in the litigation.”⁹⁸ It was “unjust under these circumstances[,]” in the court’s mind, to allow the plaintiff to “drag Sun Ship back into this case” after four years.⁹⁹

4. Other Circuit Courts Accepting the “Deficiency” Approach— Second, Fifth, and Eleventh Circuits

In addition to the Third, Eighth, and Tenth Circuit Courts, other courts of appeals have also accepted the “deficiency” approach.

In *In re Crysen/Montenay Energy Co.*,¹⁰⁰ the Second Circuit accepted the “futility exception” reasoning of the “deficiency” approach and concluded that there was “no reason to require repleading of a claim or defense that explicitly has been denied.”¹⁰¹

In *Wilson v. First Houston Investment Corp.*,¹⁰² the Fifth Circuit,

93. *Id.* at 516.

94. *Id.*

95. *Id.* at 518.

96. *Id.* at 517.

97. *Id.*

98. *Id.* at 516.

99. *Id.* at 518.

100. *In re Crysen/Montenay Energy Co.*, 226 F.3d 160 (2d Cir. 2000).

101. *Id.* at 162. The plaintiff in *In re Crysen* brought a non-core adversary proceeding in federal bankruptcy court against an oil company for alleged breach of oil purchase contracts. *Id.* at 161. The plaintiff asserted on appeal that the defendant had waived the defense of arbitrability by failing to replead it in any of the amended answers. *Id.* at 162.

102. *Wilson v. First Hous. Inv. Corp.*, 566 F.2d 1235 (5th Cir. 1978), *vacated on*

citing dictum from *Blazer v. Black*, reasoned that a rule which results in a waiver for failure to replead is “too mechanical and seems to be a rigid application of the [amendment] concept.”¹⁰³ The court further reasoned that it was “not logical” to “completely deny[]” the plaintiff’s right to appeal when the plaintiff would have retained the right to challenge a ruling on a motion to strike a defense as legally insufficient.¹⁰⁴

Lastly, the Eleventh Circuit accepted the “deficiency” approach in *Dunn v. Air Line Pilots Ass’n*.¹⁰⁵ The court reasoned that the plaintiffs “presumably had nothing to add to their [original] claim; consequently, repleading would have been futile and would have resulted only in a second dismissal.”¹⁰⁶

5. Summarizing the “Deficiency” Approach

In contrast to the “no repleading” approach taken by the Seventh Circuit in *Bastian*,¹⁰⁷ the “deficiency” approach does not allow all dismissed claims to go up on appeal without repleading. Instead, only claims dismissed for legal deficiencies are reviewable on appeal without repleading, and challenges to dismissals for technical pleading deficiencies are waived if not repleaded. By

other grounds, 444 U.S. 959 (1979). The plaintiff in *Wilson* asserted an implied right of action for damages under both the Invested Advisors Act and Securities Exchange Act. *Id.* at 1237. Upon the district court’s dismissal with leave to amend, the plaintiff amended the complaint but excluded the claim based on the Investment Advisors Act. *Id.*

103. *Id.* at 1238 (quoting 6 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1476, at 393 (1971)).

104. *Id.*

105. *Dunn v. Air Line Pilots Ass’n*, 193 F.3d 1185 (11th Cir. 1999). The plaintiffs in *Dunn* were pilots that sued the pilot’s union for libel. *Id.* at 1190. The airline had “encouraged pilots to cross picket lines by promising that any pilot who returned to work would receive promotions to higher-paying positions.” *Id.* at 1189. In response, the pilot’s union placed the plaintiffs on a “scabs” list, which is a “list of pilots who crossed union picket lines to fly for [the airline].” *Id.* at 1190. Moreover, the labor union produced and distributed 50,000 copies of the “scabs” list to anyone who wanted a copy. *Id.* The word “scab” in the labor context is “a pejorative term that frequently carries with it the threat of harm.” *Id.* at 1201 (Tjoflat, J., dissenting); see, e.g., Jose Lambiet & Craig Barnes, *UPS Strike Violence Hits Close To Home*, SUNSENTINEL.COM (Aug. 10, 1997), http://articles.sun-sentinel.com/1997-08-10/news/9708100009_1_ups-strike-picket-lines-rod-carter (discussing a UPS driver that crossed the picket line and was subsequently pulled from his delivery truck by six men, beaten, and stabbed five times with an ice pick).

106. *Dunn*, 193 F.3d at 1191 n.5.

107. See *supra* Part III.A.

insisting on this dividing line, this approach seeks to balance the policy of original complaint supersession against the policy of issue preservation.

This approach supports the policy of original complaint supersession by requiring the plaintiff to take an affirmative action to give notice of all the issues and parties still in controversy. This requirement of affirmative action makes sense when considering the difficulty in ascertaining the intent of the plaintiff's inaction. When dismissed claims are technically deficient, the plaintiff might: cure the technical defect; replead the claim; or do nothing further with the dismissed claim by omitting it from the amended complaint. The plaintiff's intent is clear when the defect is cured or repleaded; both actions signal how the plaintiff desires to advance the argument for the dismissed claim. But when the claim is omitted from the amended complaint, the plaintiff's intent is unclear. And because of this uncertainty, the "deficiency" approach places the burden on the plaintiff to replead in order to give notice of all the issues and all the parties that are still in controversy.

On the other hand, when the dismissed claims are legally deficient, the "deficiency" approach finds the reasoning for requiring an affirmative action less compelling, because in this scenario, the legal defect is not curable. Unlike a technical defect, the plaintiff cannot provide a better factual account to cure a legal defect. Accordingly, the defendant is not in danger of having to guess whether the plaintiff is simply abandoning the claim by choosing not to cure the defect. Indeed, when the plaintiff cannot cure the defect, the "deficiency" approach views the plaintiff's inaction as a sign that the plaintiff stands by the original complaint, because that is the only effective step that the plaintiff can take. And in this scenario, the plaintiff's original assertion of the issue and the plaintiff's opposition to the defendant's motion to dismiss satisfy the raise-or-waive rule.

In short, when the defect is technical in nature, the court expects an action from the plaintiff, thus the plaintiff's inaction signals waiver. But when the defect is legal in nature, the court does not expect an action from the plaintiff, thus the plaintiff's inaction does not signal waiver.

C. *The “Replead All” Approach*

In contrast to all the other approaches that do not require repleading to preserve at least some type of claims, the “replead all” approach takes the least plaintiff-friendly stance by requiring that all types of claims be repleaded in order to preserve them for appellate review. The Ninth Circuit first articulated this approach. And the Eighth Circuit, which was the catalyst for the “deficiency” approach,¹⁰⁸ appears to be leaning toward the “replead all” approach as well based on recent case law.

1. *The Ninth Circuit Origin*

The Ninth Circuit first articulated the “replead all” approach in *Studio Carpenters Local Union No. 946 v. Loew’s, Inc.*¹⁰⁹ In *Studio Carpenters*, the plaintiff brought a claim seeking a declaratory judgment.¹¹⁰ On motion, the trial court dismissed the claim with leave to amend.¹¹¹ The plaintiff then amended the complaint but sought damages instead of a declaratory judgment.¹¹² On appeal, the Ninth Circuit rejected the plaintiff’s assertion that the trial court erred in dismissing the original complaint.¹¹³ The court’s reasoning was short and simple: if the plaintiff thought the dismissal was an error, then the plaintiff “should have refused to plead further.”¹¹⁴

After *Studio Carpenters*, the court continued to uphold the “replead all” approach as the law in this circuit in cases such as *London v. Coopers & Lybrand* in 1981,¹¹⁵ *King v. Atiyeh* in 1987,¹¹⁶

108. See *supra* Part III.B.

109. *Studio Carpenters Local Union No. 946 v. Loew’s, Inc.*, 182 F.2d 168, 170 (9th Cir. 1950).

110. *Id.* at 169. The carpenters union was the plaintiff against The International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States (IATSE) as the defendant. *Id.* The union had entered into bargaining agreements with IATSE, which granted to members of the union an exclusive right to perform all required carpenter work. *Id.* The union alleged that IATSE conspired with other companies to lock out the union members, and that IATSE deprived union members of the privilege to work granted by the bargaining agreements. *Id.* See 26 C.J.S. DECLARATORY JUDGMENTS § 63 (2011) (“The rights and liabilities of the parties under a labor agreement or a collective bargaining agreement may be the subject of a declaratory judgment.”).

111. *Studio Carpenters*, 182 F.2d at 169.

112. *Id.*

113. *Id.* at 170.

114. *Id.*

115. *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981).

Marx v. Loral Corp. in 1996,¹¹⁷ and *Forsyth v. Humana, Inc.* in 1997.¹¹⁸

2. *The Eighth Circuit Forgets Williamson*

Almost one hundred years after the Eighth Circuit established the “deficiency” approach in *Williamson*,¹¹⁹ paving the way for five other circuit courts to follow, the Eighth Circuit briefly revisited the issue in *Tolen v. Ashcroft*.¹²⁰

In *Tolen*, the plaintiff brought numerous claims under Title VII¹²¹ and *Bivens*¹²² for racial discrimination and retaliation against various defendants.¹²³ Upon a dismissal with leave to amend, the plaintiff filed an amended complaint¹²⁴ alleging only the Title VII claims.¹²⁵ In a footnote and without mentioning *Williamson*, the Eighth Circuit held that the plaintiff had “waived his *Bivens* claims,” reasoning that the plaintiff had “voluntarily dismissed his *Bivens* claim[s]” by “not includ[ing] either of these claims in his [final complaint].”¹²⁶ By requiring repleading of legally deficient claims,¹²⁷ the Eighth Circuit moved away from the “deficiency” approach, which would have allowed the legally deficient claims to be preserved without repleading.¹²⁸ Instead, the Eighth Circuit

116. *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

117. *Marx v. Loral Corp.*, 87 F.3d 1049, 1055–56 (9th Cir. 1996).

118. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997).

119. *See supra* Part III.B.1.

120. *Tolen v. Ashcroft*, 377 F.3d 879, 882 n.2 (8th Cir. 2004).

121. *See generally* 42 U.S.C. §§ 2000e–2000e-17 (2006) (prohibiting discrimination by employers, including the federal government, on the basis of race, color, religion, sex, or national origin).

122. *See generally* *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (ruling that an implied cause of action existed for an individual whose Fourth Amendment freedom from unreasonable search and seizures had been violated by federal agents).

123. *Tolen*, 377 F.3d at 881. The plaintiff, Eric Tolen, was the Assistant United States Attorney. *Id.* The defendants included United States Attorney General John Ashcroft, FBI Special Agent Gary Fuhr, and Department of Justice attorney Joseph Gontram. *Id.*

124. The plaintiff’s final complaint was actually his Second Amended Complaint. *Id.* at 882.

125. *Id.*

126. *Id.* at 882 n.2.

127. The trial court had dismissed the *Bivens* claims because case law provided that the plaintiff must pursue available remedies under the Civil Service Reform Act of 1978 instead of pursuing monetary damages under *Bivens*. *Tolen v. Ashcroft*, No. 4:01CV00992 SNL/WKU, 2002 WL 172437, at *6 (E.D. Mo. Feb. 4, 2002).

128. *See* *Williamson v. Liverpool & London & Globe Ins. Co.*, 141 F. 54, 57 (8th Cir. 1905) (holding that legally deficient claims that strike a “vital blow” to the

cited the Ninth Circuit case¹²⁹ of *Forsyth v. Humana, Inc.* and concluded: “If a plaintiff fails to include dismissed claims in an amended complaint, the plaintiff is deemed to have waived *any* error in the ruling dismissing the prior complaint.”¹³⁰

3. Summarizing the “Replead All” Approach

The Ninth Circuit has consistently held to the least plaintiff-friendly approach that all claims must be repleaded in order to preserve them for appellate review, regardless of whether the claims were legally or technically deficient. The Eighth Circuit, while having established in a century-old case the “deficiency” approach that has been followed by five other circuit courts, appears to instead approve of the “replead all” approach based on a modern case.

D. Federal Approaches Conclusion

In determining whether a plaintiff is required to replead claims that were dismissed with leave to amend in order to preserve the claims for appellate review, eight of the federal circuit courts have articulated three different approaches: (1) the Seventh Circuit’s “no repleading” approach; (2) the Second, Third, Fifth, Eighth, Tenth, and Eleventh Circuits’ “deficiency” approach; and (3) the Ninth, and also perhaps, the Eighth Circuits’ “replead all” approach.

IV. DETERMINING THE BEST APPROACH

This part of the article first identifies the competing priorities of the civil rules. Then this part argues against the “deficiency” and

plaintiff’s action are preserved even if they were not repleaded in the amended complaint).

129. The court also cited two other cases from the Seventh and Eighth Circuits for the proposition that “an amended complaint supersedes an original complaint.” *Tolen v. Ashcroft*, 377 F.3d 879, 882 n.2 (8th Cir. 2004) (quoting *Karnes v. Poplar Bluff Transfer Co. (In re Atlas Van Lines, Inc.)*, 209 F.3d 1064, 1067 (8th Cir. 2000)). However, these cases do not deal with the dismissed claims preservation issue in the context of a 12(b)(6) dismissal with leave to amend. See *In re Atlas Van Lines, Inc.*, 209 F.3d at 1067 (determining subject matter jurisdiction); *Fuhrer v. Fuhrer*, 292 F.2d 140, 144 (7th Cir. 1961) (considering pleadings upon a summary judgment motion).

130. *Tolen*, 377 F.3d at 882 n.2 (emphasis added) (quoting *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997)).

“replead all” approaches and presents the reasons why the “no repleading” approach best supports the policies of the civil rules.

A. *Competing Priorities of the Federal Rules of Civil Procedure*

The competing priorities of the Federal Rules of Civil Procedure are handily articulated in Rule 1: “[T]o secure [a] just, speedy, and inexpensive determination.”¹³¹ “[T]his philosophical mandate. . . . reflects the spirit in which the rules were conceived and written”¹³² Indeed, “Rule 1 remains as the over-arching and most comprehensive principle of construction.”¹³³

A rule that meets this philosophical mandate does not ignore any one of the competing priorities, but instead seeks to balance all the competing priorities.¹³⁴ To that end, the competing priorities should be viewed on a “plane of equality.”¹³⁵ Several principles stand out to determine how a rule should balance competing priorities: (1) facilitate decisions on the merits, (2) simplify procedure, and (3) minimize technicalities.¹³⁶

The policy consideration for the maxim of original complaint supersession fits within the mandate of Rule 1. By advocating that the plaintiff should give notice of all the issues that are in controversy so that they can be handled and comprehended expeditiously, the maxim of original complaint supersession seeks to achieve the goal of achieving justice and judicial economy. The policy consideration for the maxim of issue preservation likewise fits within the mandate of Rule 1. By requiring the raising of an issue to preserve appellate review, the maxim of issue preservation seeks to promote justice and economy by preventing unfair surprise and encouraging finality.

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

132. 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1029, at 148 (3d ed. 2002).

133. *Id.* § 1029, at 152.

134. *See id.* § 1029, at 158 (“Rule 1 does not pronounce a single canon of construction but rather delineates the inherent tension throughout the rules. For example, ‘speed’ often saves ‘expense,’ but at the cost of ‘justice.’ On the other hand, dignifying a meritless claim with a lengthy trial also sacrifices justice. . . . The trade-offs between and among speed, expense, and justice are apparent”).

135. *See id.* § 1029, at 157–58 (“[I]t should be noted that Rule 1 places the objectives of ‘speedy’ and ‘inexpensive’ on a plane of equality with ‘just.’”).

136. *See id.* § 1029, at 150–51.

B. The “Replead All” Approach Does Not Promote Just, Speedy, and Inexpensive Determinations

The “replead all” approach requires repleading to preserve appellate review for all claims dismissed with leave to amend. This hard line approach results in determinations that are neither just, speedy, nor inexpensive.

First, the “replead all” approach is the least just—and most prejudicial—of all the approaches because it restricts the most claims available for an appellate review on the merits.¹³⁷ Justice is also not served because this approach “sets a trap” for unsuspecting plaintiffs that may be reluctant to replead for fear of sanctions.¹³⁸

Second, requiring repleading is generally not speedy or inexpensive. This is especially true for legally deficient claims because repleading would result in nothing but a second dismissal.¹³⁹ Although the process of repleading may not consume too much time and too many resources, the zero return on that investment produces an inefficient result.

Finally, while plenty of authorities have been critical of the

137. See *Suowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966) (“These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits.”); *De Franco v. United States*, 18 F.R.D. 156, 159 (S.D. CA. 1955) (“The general purpose of the Federal Rules of Civil Procedure is to see that actions are tried on the merits, and to dispense with technical procedural problems. To fall back on a technicality and refuse to permit a case to come to issue on the merits is to sap the very heart out of the rules and to obviate the very purpose for which they are intended.”); 6 WRIGHT ET AL., *supra* note 1, § 1476 (“[W]aiver should not be imposed without considering the possible prejudicial impact on the amending party.”).

138. See *USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council*, 31 F.3d 800, 811–12 (9th Cir. 1994) (reviewing the district court’s award of Rule 11 sanctions against appellant for its “persistent reincorporation of stricken parts of the complaint in the amended complaints”); *Davis v. TXO Prod. Corp.*, 929 F.2d 1515, 1518 n.2 (10th Cir. 1991) (“A party unfamiliar with this rule may be reticent to raise a claim in an amended complaint that had been previously dismissed for failure to state a claim for which relief could be granted. The party may, perhaps realistically, fear imposition of Rule 11 sanction.”).

139. See *Bastian v. Petren Res. Corp.*, 892 F.2d 680, 683 (7th Cir. 1990) (“It is not waiver—it is prudence and economy—for parties not to reassert a position that the trial judge has rejected. Had the plaintiffs repleaded their Rule 10b-5 charge without alleging loss causation, the judge would have dismissed the charge, not only with prejudice but with annoyance.”).

Ninth Circuit's "replead all" approach,¹⁴⁰ it is worth noting that the Ninth Circuit itself has been apprehensive in upholding a minority view that has never been analyzed much by the court,¹⁴¹ and the principle of stare decisis¹⁴² stands as the lone barrier to an overruling.¹⁴³

C. The "Deficiency" Approach Promotes Justice But Does Not Promote Speedy and Inexpensive Determinations

In contrast to the "replead all" blanket approach, the "deficiency" approach does appropriately serve justice by allowing dismissed claims to be adjudicated on the merits when the claims are dismissed for legal deficiencies. However, this approach does not best serve the administration of speedy and inexpensive determinations.

First, the potential exists that much time and a lot of monetary resources will be spent on resolving the uncertainty of whether a claim is technically or legally deficient. This uncertainty can be illustrated by the fact pattern in *Bastian*.¹⁴⁴

In *Bastian*, the plaintiffs' 10b-5 claim was dismissed for failure

140. See *United States ex. rel. Atkinson v. PA. Shipbuilding Co.*, 473 F.3d 506, 516 n.16 (3d Cir. 2007) (describing the Ninth Circuit approach as "formalistic"); *Davis*, 929 F.2d at 1517 (also describing the Ninth Circuit approach as "formalistic"); *Wilson v. First Hous. Inv. Corp.*, 566 F.2d 1235, 1237-38 (5th Cir. 1978) ("A rule that a party waives his objections to the court's dismissal he elects to amend is too mechanical and seems to be a rigid application of the concept that a Rule 15(a) amendment completely replaces the pleading it amends." (quoting 6 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1476, at 393 (1971)), *vacated on other grounds*, 444 U.S. 959 (1979); *In re Crysens/Montenay Energy Co.*, 240 B.R. 166, 173 (S.D.N.Y. 1999) (describing the Ninth Circuit approach as an "aberrational rule"); *United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 695 F. Supp. 1426, 1433 (E.D.N.Y. 1988) (describing the Ninth Circuit approach as "questionable").

141. See *Marx v. Loral Corp.*, 87 F.3d 1049, 1055-56 (9th Cir. 1996) (enforcing the Circuit approach but acknowledging the criticism that the approach is unduly formalistic, rigid, and mechanical); *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981) ("We are well aware that other circuits do not look with favor upon this rule . . .").

142. See 21 C.J.S. *Courts* § 194 (2011) ("The theory is that when a legal principle is accepted and established, rights may accrue under it, security and certainty require that the principle be subsequently recognized and followed, and having relied on precedent to define rights, those rights should not be affected by judicial fiat." (footnote omitted)).

143. See *London*, 644 F.2d at 814 (9th Cir. 1981) (enforcing the approach because "[i]t has long been the rule in this circuit" and the court is "not at liberty to re-examine its validity").

144. *Bastian*, 892 F.2d at 682-83.

to sufficiently allege loss causation.¹⁴⁵ But one of the reasons why the plaintiffs did not allege loss causation is because they did not believe that this element was necessary.¹⁴⁶ Thus, even though the court characterized the dismissal as a technical pleading deficiency, the crux of the issue was in effect a disagreement regarding the necessity of a legal element of a claim. Indeed, this situation presents the difficulty of applying the “deficiency” approach: was the claim dismissed based on a technical deficiency that requires repleading in order to preserve appellate review, or was it actually dismissed based on a legal deficiency that would trigger preservation without repleading?

This difficult distinction was made even more unclear by the Third Circuit in *Atkinson*. In *Atkinson*, the Third Circuit explained the “deficiency” approach in terms of the “futility” of repleading.¹⁴⁷ The court articulated that repleading is not required when repleading is futile, and “repleading is futile when the dismissal is ‘on the merits[,]’” which means that the dismissal was “with prejudice or based on some legal barrier other than want of specificity or particularity.”¹⁴⁸ However, this guidance is puzzling. If a court had dismissed a claim with prejudice, the issue of whether to replead would not have been an issue at all, because this whole issue was premised on a court’s dismissal with leave to amend, and a court would never dismiss a claim both with leave to amend and with prejudice.¹⁴⁹ Thus, the Third Circuit’s instruction to analyze whether the dismissal was with prejudice in order to resolve the repleading issue is ineffective.

The second reason why the “deficiency” approach does not best serve the administration of speedy and inexpensive determinations is because litigants may end up expending resources on a level similar to that under the “replead all” approach. A litigant facing this waiver issue, having difficulty deciding whether a claim is legally or technically deficient and fearing that a wrong decision would lead to waiver, may decide to play it safe and replead regardless of whether he or she believes the

145. *See id.* at 682.

146. *See id.*

147. *United States ex. rel. Atkinson*, 473 F.3d 506, 516, 517 n.17 (3d Cir. 2007).

148. *Id.* at 516.

149. *See* BLACK’S LAW DICTIONARY 537 (9th ed. 2009) (defining a claim to be “dismissed with prejudice” when it is “removed from the court’s docket in such a way that the plaintiff is foreclosed from filing a suit again on the same claim or claims”).

claims would be preserved under the “deficiency” approach. Although this strategy maximizes the chance of justice on the merits, it undoubtedly costs some time and money—for both the parties and the court—to go through the repleading process.

In sum, although the “deficiency” approach promotes justice by allowing for some claims to be preserved without repleading, this approach is not the most speedy or inexpensive because it requires resources to be spent deciphering trial court orders that are not always clear in conveying why claims are dismissed.¹⁵⁰ Indeed, the “deficiency” approach fails to meet the rule-making principle of simplifying procedures.

D. The “No Repleading” Approach Promotes Just, Speedy, and Inexpensive Determinations

Unlike all the other approaches, the “no repleading” approach is best because it appropriately balances the civil procedure priorities of securing just, speedy, and inexpensive determinations.

First, the “no repleading” approach preserves all dismissed claims, regardless of the type of pleading deficiency or the level of futility in repleading. Accordingly, the most claims are reached on the merits under this approach, thus producing the most just determinations.

In *Atkinson*, the Third Circuit conveyed a concern with allowing preservation of a claim that was technically deficient: when claims are dismissed against a whole defendant, it would be unjust to drag the defendant back into the lawsuit years later on appeal without notice that the defendant might potentially be on the hook.¹⁵¹ This reasoning is unpersuasive. Appellate review is a pillar of the American judicial system,¹⁵² and all litigants must be held to a standard of at least knowing that all trial court decisions are subject to at least one appellate review.¹⁵³ Moreover, even if the

150. See *Elfenbein v. Gulf & W. Indus., Inc.*, 590 F.2d 445, 447–50 (2d Cir. 1978) (finding it “impossible to determine [with] any real degree of certainty what the district court intended” and strongly encouraging trial courts to only use “the terms ‘with prejudice’ or ‘without prejudice’ only when making a determination as to the Res [sic] judicata effect of a dismissal”).

151. *Atkinson*, 473 F.3d at 518.

152. See *Walters*, *supra* note 2, at 909–10 (“For civil cases, the right to appeal a trial court decision developed at English common law and came with the colonists to America.”).

153. See MODEL RULES OF PROF’L CONDUCT R. 1.1 (2009) (“Competent representation requires the legal knowledge, skill, thoroughness and preparation

dismissed defendant is summoned back to the litigation, the party would be granted adequate time to prepare a defense. Instead, the injustice is in allowing a whole defendant to escape liability without ever reaching the merits of the dismissed claims.

Second, the “no repleading” approach is best because it is the most speedy and inexpensive approach by way of spending no resources on determining whether claims pass the “deficiency” approach test.

Finally, the “no repleading” approach is consistent with the automatic nature of the other rules of preserving appellate review on pretrial rulings: preservation is automatic when the court denies the defendant’s motion to dismiss,¹⁵⁴ preservation is automatic when the court denies the plaintiff’s motion to strike a defense,¹⁵⁵ and preservation is automatic when the court denies either party’s motion for partial summary judgment.¹⁵⁶ These rules, like the “no repleading” approach, are clear and simple.

In short, the “no repleading” approach satisfies the policy of the maxim of issue preservation—issues raised and argued are preserved. And because litigants are always on notice of the potential for appellate review, the policy of the maxim of original complaint supersession is not a concern.

E. Conclusion—Determining the Best Approach

The “replead all” and “deficiency” approaches insufficiently balance the competing priorities of justice, speediness, and inexpensiveness. The “replead all” approach does not reach enough claims for adjudication on the merits, and the “deficiency” approach requires too many resources for achieving, interpreting, and applying the standards for preservation.

In contrast, the “replead all” approach appropriately balances the competing priorities by meeting the civil rules’ core principles. The principle of facilitating decisions on the merits is achieved by preserving the most decisions for adjudication on the merits. The principle of simplifying procedures is achieved by allowing preservation automatically. And the principle of minimizing technicalities is achieved by removing the waiver trap for

reasonably necessary for the representation.”).

154. See *Wilson v. First Hous. Inv. Corp.*, 566 F.2d 1235, 1238 (5th Cir. 1978), vacated on other grounds, 444 U.S. 959 (1979).

155. See *id.*

156. See *Bastian v. Petren Res. Corp.*, 892 F.2d 680, 683 (7th Cir. 1990).

unsuspecting plaintiffs. In sum, the “replead all” approach is the best approach for securing just, speedy, and inexpensive determinations.

V. PRESERVING CLAIMS IN THE EIGHTH CIRCUIT

In the Eighth Circuit, the issue of whether a plaintiff is required to replead claims dismissed with leave to amend in order to preserve them for appellate review may be puzzling due to conflicting case law. Although a panel of this circuit court created the “deficiency” approach in *Williamson*,¹⁵⁷ another panel applied the “replead all” approach a century later in *Tolen*.¹⁵⁸ Which approach is the precedent in the Eighth Circuit? And more importantly, how can plaintiffs in the Eighth Circuit preserve dismissed claims in light of conflicting case law?

A. *Eighth Circuit Precedent—Williamson’s “Deficiency” Approach or Tolen’s “Replead All” Approach?*

Historically, the Eighth Circuit has had a “peculiar approach” to resolving conflicting prior panel opinions.¹⁵⁹ The general rule was that one panel was “not at liberty to disregard a precedent handed down by another panel.”¹⁶⁰ However, if a second panel violated this general rule, then subsequent panels were “free to choose which line of cases to follow.”¹⁶¹ With this freedom, some panels resolved intra-circuit splits by upholding the “better approach” based on the panels’ own analysis of the issues as well as those of other circuit courts.¹⁶² Meanwhile, other panels employed the “better practice [of] follow[ing] the earliest opinion, as it should have controlled the subsequent panels that created the conflict.”¹⁶³ And recently in *Mader v. United States*, the Eighth Circuit “definitively rule[d]” en banc that “the earliest opinion must be followed” while noting the “almost universal” acceptance

157. *See supra* Part III.B.1.

158. *See supra* Part III.C.2.

159. *Williams v. Nat’l Football League*, 598 F.3d 932, 934 (8th Cir. 2009) (Colloton, J., dissenting from denial of rehearing en banc).

160. *Drake v. Scott*, 812 F.2d 395, 400 (8th Cir. 1987).

161. *Kostelec v. State Farm Fire & Cas. Co.*, 64 F.3d 1220, 1228 n.8 (8th Cir. 1995).

162. *E.g.*, *United States v. LeBrun*, 363 F.3d 715, 719 (8th Cir. 2004).

163. *E.g.*, *T.L. ex rel. Ingram v. United States*, 443 F.3d 956, 960 (8th Cir. 2006).

of this practice by other federal circuit courts.¹⁶⁴

In light of *Mader*, *Williamson*'s "deficiency" approach is likely the prevailing precedent over *Tolen*'s "replead all" approach for a simple reason: *Williamson* is earlier.¹⁶⁵ However, one hesitates to definitively label *Williamson* as the law of the land in the Eighth Circuit. Because although *Williamson*'s earlier panel opinion must be followed by subsequent panels, "the en banc court is not bound by [the earlier opinion's] interpretation."¹⁶⁶ And the fact that *Williamson* was decided over a century ago may contribute to the court's future preference for *Tolen*.¹⁶⁷ But the precedential value of a case is not necessarily eroded over time,¹⁶⁸ and the *Mader* decision does not suggest that the "earliest opinion" rule is contingent on a short lapse of time between conflicting panel opinions.¹⁶⁹ Thus, the rule articulated in *Williamson* appears to be safe for now.

B. *Tips for Preserving Claims in the Eighth Circuit*

Given that *Williamson*'s "deficiency" approach is likely the controlling precedent in the Eighth Circuit, and that the "deficiency" approach requires the potentially confusing process of categorizing claims as legally or technically deficient, a plaintiff in the Eighth Circuit can employ two methods to ensure the preservation of claims dismissed with leave to amend.

First, a plaintiff can replead the dismissed claims. This method ensures a second dismissal with prejudice that would preserve the claims for appellate review.¹⁷⁰ The downside to this strategy is the risk of sanctions for not following the court's order to amend.¹⁷¹

164. *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc).

165. *See id.* Compare *Williamson v. Liverpool & London & Globe Ins. Co.*, 141 F. 54 (8th Cir. 1905), with *Tolen v. Ashcroft*, 377 F.3d 879 (8th Cir. 2004).

166. *See Mader*, 654 F.3d at 800.

167. *See* 21 C.J.S. *Courts* § 199 (2011) ("[L]apse of time has been said to be a significant factor in determining the weight of a decision.").

168. *Id.* ("A deliberate decision does not lose its authority as a precedent solely by lapse of time, and it is not necessary for a court to reiterate the doctrine to keep it in force.").

169. *See Mader*, 654 F.3d at 800.

170. *See Bastian v. Petren Res. Corp.*, 892 F.2d 680, 682–83 (7th Cir. 1990) ("There was no appealable order until [the district judge] dismissed the amended complaint with prejudice. When a final decision is appealed, the appeal brings up all previous rulings of the district judge adverse to the appellant.").

171. *See USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council*, 31 F.3d 800, 811–12 (9th Cir. 1994) (reviewing the district court's award of Rule 11 sanctions against appellant for its "persistent reincorporation of stricken parts of the complaint in the amended complaints").

However, this risk is negligible in the Eighth Circuit because conflicting case law exists on the issue, thus the plaintiff would have a reasonable basis to replead for fear that an en banc court will follow *Tolen* instead of *Williamson*.¹⁷² Indeed, “Counsel [is] not required to risk forfeiting their client’s right to appeal in order to avoid sanctions.”¹⁷³

Second, a plaintiff can “stand on” the dismissed claims as suggested by the Third Circuit in *Atkinson*.¹⁷⁴ To do this, a plaintiff can either add a “Preserved Claims” section to the amended complaint or “file a notice with the district court” to convey the plaintiff’s intent to stand on the original pleading.¹⁷⁵ These two tactics are not the only ways to stand on the dismissed claims.¹⁷⁶ Whatever the plaintiff decides to do to stand on the original complaint, the key requirement appears to be that the plaintiff should engage in some minimal communication or affirmative action so that the plaintiff’s intent is clearly received by the court.

VI. CONCLUSION

Are claims dismissed with leave to amend waived if not raised again? The short answer: it depends on the court. Eight federal courts of appeals have articulated three different approaches to determine whether repleading is required for preservation. The best approach allows all claims to be preserved without repleading, thus securing just, speedy, and inexpensive determinations. And although conflicting case law exists within the Eighth Circuit, the “deficiency” approach is likely the precedent in light of a recent en banc decision that requires subsequent panels to follow the earliest opinion in the circuit. Lastly, litigants in the Eighth Circuit should be proactive in communicating with the court in order to preserve dismissed claims for appellate review.

172. See *Smith v. Nat’l Health Care Serv. of Peoria*, 934 F.2d 95, 99 (7th Cir. 1991) (“[T]he sanctions cannot stand [if] plaintiff’s repleading . . . was not without some support in the law at that time . . .”).

173. *USS-POSCO Indus.*, 31 F.3d at 812.

174. See *United States ex rel. Atkinson v. PA. Shipbuilding Co.*, 473 F.3d 506, 517 (3d Cir. 2007).

175. See *id.*

176. See *id.* (“We do not adopt a rigid requirement as to what a plaintiff must do to stand on a dismissed complaint.”).