THE SCRIVENER

Shotgun Pleadings

By Scott Moïse

My history with shotguns is not good. I was a pre-teen the first time I ever picked up a shotgun. Daddy thought I should have a target practice lesson in our back yard, but the recoil from my first shot almost took off my shoulder. So that was the last time I shot the gun. Many years later, I was going through airport security so I could board a flight to New York for depositions. While I was waiting for my big canvas carryon bag to reach the end of the baggage screening conveyor belt, the TSA agent ordered me to the side. Frowning and tense, he asked if I wanted to declare anything in my bag. "Rats," I thought, "I forgot to take out the Diet Coke." Within minutes, four additional agents surrounded me, total overkill for a Diet Coke. One agent then reached into the bag and—to my complete shock—reported into his walkie-talkie that he had confiscated "five rounds of live ammo." Five. Rounds. Of. Live. Ammo. In. My. Bag. In. An. Airport. The live ammo turned out to be shotgun shells that I am 99% sure belonged to my high-school son, although he denies this fact. Unbelievably, after taking my identification and making several calls while I waited, paralyzed, the agents returned smiling and said I could go board my flight. Yes, it had a good ending, but I never wanted to see another shotgun or shell, ever.

Then, along came shotgun pleadings, bane of my existence.

What are shotgun pleadings, and why are they so bad?

Over 130 years ago, a judge in Georgia described the ideal pleading:

> Pleading is pure statement; just as much as a letter addressed to your sweetheart or your wife or your friend. The plaintiff complains that he has such a case, and he tells you what it is. The defendant says either that that is not so, or something else is so, and he makes his statement. The true rule ought to be this: the statement ought to consist precisely of what has to be [proven]. It ought not to fall short, or go beyond. If it goes beyond, it has surplusage matter that is unnecessary. Whatever is irrelevant, whatever is non-essential in statement, ought not to be in. Let the law declare that every man's pleadings shall embrace a full and clear statement of all matters of fact, which he is required to [prove], and no other.

Weiland v. Palm Beach Cty. Sheriff's Office, 792 F.3d 1313, 1316 (11th Cir. 2015) (quoting Logan Bleckley, "Pleading," 3 Ga. Bar Assoc. Report 40, 41–42 (1886)). Shotgun pleadings are the opposite of this.

South Carolina federal district courts have defined a "shotgun pleading" as "[a] complaint that fails to articulate claims with sufficient clarity to allow the defendant to frame a responsive pleading." *In re SCANA Corp. Sec. Litig.*, No. CV 3:17-2616-MBS, 2019 WL 1427443, at *5 (D.S.C. Mar. 29, 2019); *Hill v. Stryker Sales Corp.*, No. 4:13-CV-0786-BHH, 2014 WL 4198906, at *2 (D.S.C. Aug. 20, 2014) (citations omitted). The *Stryker* court noted that when reading a shotgun pleading, "it is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief." 2014 WL 4198906, at *2.

Further, shotgun pleadings violate two pleading rules of civil procedure: (1) Rule 8(a)(2) requires that "[a] pleading which states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." (2) Rule 10(b) requires that "[a] party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence—and each defense other than a denial—must be stated in a separate count or defense."

But violating rules and bedeviling defendants are not the only problems with shotgun pleadings. A shotgun pleading, whether filed by plaintiffs or defendants, "exact[s] an intolerable toll" on the trial court's docket; leads to unnecessary and unchanneled discovery; imposes unwarranted expense on the litigants, the court, and the court's personnel and resources; delays justice; and causes difficulties to the courts of appeals and their litigants. *Amin v. Mercedes-Benz USA, LLC*, 349 F. Supp. 3d 1338, 1349 (N.D. Ga. 2018). The "unifying characteristic" of all shotgun pleadings is that they fail to give the defendants adequate notice of

the claims against them and the grounds upon which each claim rests. *Weiland*, 792 F.3d at 1323.

How can I recognize a shotgun pleading?

After reading many cases that spoke evil about shotgun pleadings, I knew they were deficient, but it was hard to recognize one when I saw it because a lot of complaints are difficult to answer but they do not get dismissed or denigrated by the courts. The Eleventh Circuit, which has led the judicial charge against shotgun pleadings, had "engaged in a 'thirty-year salvo of criticism aimed at shotgun pleadings'" but had not clearly defined them. To remedy the situation, the court did a lot of research and identified four types of shotgun pleadings:

(1) a complaint containing multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint;
(2) a complaint that does not commit the mortal sin of re-alleging all preceding counts but is guilty of the venial sin of being replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action;
(3) a complaint that does not separate into a different count each cause of action or claim for relief; and
(4) a complaint asserting multiple claims against multiple defendants without specifying which defendant is responsible for which acts or omissions, or which defendant the claim is brought against.

Weiland, 792 F.3d at 1320 (11th Cir. 2015); *see also Amin v. Mercedes-Benz USA, LLC*, 349 F. Supp. 3d 1338, 1348–49 (N.D. Ga. 2018).

Defense lawyers, please note that although complaints may be the most likely violators of the shotgun rule, any pleading can be a "shotgun." *See Prayor v. Fulton Cty.*, No. 1:08-CV-3772-WSD, 2009 WL 981996, at *5 (N.D. Ga. Apr. 13, 2009) ("It goes without saying that a plaintiff with a solid case does not need to file a shotgun complaint. By the same token, a defendant with a strong defense need not file a shotgun answer.").

(1) Incorporating the allegations of all preceding counts into subsequent counts

This is the most common type of shotgun pleading, and what makes it confusing is that it seems to be explicitly allowed under Rule 10(c), which allows statements in a pleading to be incorporated by reference in a different part of the pleading or in any motion. "Properly used, such incorporation promotes simple, concise pleadings." *Defestino v. Kennedy*. No. CV-F-08-1269 LJO DLB, 2009 WL 63566, at *4 (E.D. Cal. Jan. 8, 2009).

However, the practice of wholesale incorporation of all allegations from preceding paragraphs may constitute shotgun pleadings. *See, e.g.*, *Lilly v. Ozmint*, No. 2:07-1700-JFA-RSC, 2009 WL 632094, at *2 n.2 (D.S.C. Jan. 6, 2009) (noting with disfavor the plaintiff's use of shotgun pleading in which he incorporated nonspecific allegations from a prior complaint into an amended complaint); *see also Bailey v. Janssen Pharmaceutica, Inc.*, 288 Fed. App'x 597, 602–04 (11th Cir. 2008) (chiding litigants for incorporating several counts from preceding paragraphs, resulting in later counts containing irrelevant factual allegations and legal conclusions); *Jackson v. Bank of Am., N.A.*, 898 F.3d 1348, 1356 (11th Cir. 2018) ("[I]t is an incomprehensible shotgun pleading. It employs a multitude of claims and incorporates by reference all of its factual allegations into each claim, making it nearly impossible for Defendants and the Court to determine with any certainty which factual allegations give rise to which claims for relief. As such, the amended complaint patently violates Federal Rule of Civil Procedure 8.").

In *Weiland*, the complaint incorporated prior paragraphs; however, those paragraphs were fact-only paragraphs divided into three sections that the court found to be roughly relevant to each count. While acknowledging that the complaint was "not a model of efficiency or specificity," the court reversed the district court's dismissal of federal constitutional claims in a shotgun complaint, noting that allegations of each claim were not rolled into every successive count on down the line, and the complaint put the defendants on notice of the claims against them. In contrast, the complaint in *Ace Tree Surgery, Inc. v. Terex Corp.*, No. 1:16-CV-00775-SCJ, 2017 WL 1836307, at *3 (N.D. Ga. Feb. 21, 2017), referred back to "all allegations of fact *in all preceding paragraphs*," which the court noted would include all factual allegations made for each count in subsequent counts: "This is the precise concern of the Eleventh Circuit with shotgun pleadings where factual allegations irrelevant to subsequent claims are still yet included by reference in every other claim." *Id.* (emphasis in original).

Although the practice of incorporation prior paragraphs into later sections of a pleading is widely used in South Carolina, it has had a devastating effect in some insurance cases. In *Collins Holding Corp. v. Wausau Underwriters Insurance Co.*, 379 S.C. 573, 576–79, 666 S.E.2d 897, 899–900 (2008), the supreme court held that an insurer had no duty to defend a case in which the underlying complaint had incorporated facts from earlier paragraphs that were inconsistent with a claim of negligent misrepresentation, the only claim that would have given rise to insurance coverage. Although the drafter of the underlying complaint probably did not intend for its "incorporation" language to incorporate inconsistent factual and legal allegations, that was its ultimate effect. *Id.* at 579, 666 S.E.2d at 228; *see also Mfrs. & Merchants Mut. Ins. Co. v. Harvey*, 330 S.C. 152, 163, 498 S.E.2d 222, 228 (Ct. App. 1998) ("These allegations [of intentional acts that were incorporated into the negligence claim] do not constitute mere alternative

pleading. Rather, the allegations are factually incompatible in that they characterize intentional conduct as negligent conduct.").

Be aware that incorporating irrelevant or numerous outside documents into your pleading may also cause trouble. When a pro se plaintiff attempted to "incorporate by reference" all of his submissions from seven previous cases, despite having been given multiple chances to remedy the problem, the court dismissed the complaint, which was found to be an impermissible shotgun pleading. *See Odom v. South Carolina*, No. CA 5:14-2441-RMG-KDW, 2014 WL 5323949, at *7 (D.S.C. Sept. 12, 2014), *report and recommendation adopted,* No. 5:14-2441-RMG, 2014 WL 5323963 (D.S.C. Oct. 17, 2014) (citing *Davis v. Coca–Cola Bottling Co. Consolidated,* 516 F.3d 955, 980–84 (11th Cir. 2008) (holding that parties and court should object to shotgun pleading, including excessive incorporation of outside documents); *Iowa Health Sys. v. Trinity Health Corp.,* 177 F. Supp. 2d 897, 905–06 (D. Iowa 2001) ("Excessive incorporation by reference from one count to another can lead to the introduction into the pleadings of considerable unnecessary matter."); *U.S. Gen., Inc. v. City of Joliet,* 598 F.2d 1050, 1051–52 (7th Cir. 1979) (stating that a claim that "appears to be a legal bouillabaisse with bits of [several different claims] . . . all stirred and served as one count" should be dismissed); *Jennings v. Emry,* 910 F.2d 1434, 1436 (7th Cir. 1990) (holding that a pleading must be presented "with clarity sufficient to avoid requiring a district court or opposing party to forever sift through its pages in search" of the pleader's claims)).

(2) a complaint containing conclusory, vague, and immaterial facts that are not obviously connected to any particular cause of action

According to the Eleventh Circuit, this category is the second most common type of shotgun pleading, and although these pleadings do not include the "mortal sin" of realleging all prior preceding counts, nevertheless it is "guilty of the venial sin of being replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action." *Weiland*, 792 F.3d at 1322. Oh yes, this category is far more irritating to defendants than merely "incorporating all allegations above" because it truly fails to give notice of exactly what it at issue.

Many courts have found shotgun pleadings falling within in this category. *See Novero v. Duke Energy*, 753 F. App'x 759, 765 (11th Cir. Oct. 16, 2018 ("Plaintiff's original complaint is a shotgun pleading. It includes a laundry list of accused violations in paragraph 1 followed by a recitation of the 'Factual Bases for Lawsuit' unconnected to any of the potential violations previously listed."); *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1359 (11th Cir. 1997) ("[P]laintiffs' complaint is an all-too-typical shotgun pleading. The four counts it presents follow forty-three numbered paragraphs of factual allegations, many of which are vague. Each count has two numbered paragraphs, the first

of which incorporates by reference all 43 paragraphs of factual allegations. Many of the factual allegations appear to relate to only one or two counts, or to none of the counts at all. Thus, a reader of the complaint must speculate as to which factual allegations pertain to which count."); *Cramer v. State of Fla.*, 117 F.3d 1258, 1261 (11th Cir. 1997) (describing the complaint as "a rambling 'shotgun' pleading that is so disorganized and ambiguous that it is almost impossible to discern precisely what it is that these appellants are claiming"); *Ebrahimi v. City of Huntsville Bd. of Educ.,* 114 F.3d 162, 164 (11th Cir. 1997) (describing a complaint that "offered vague and conclusory factual allegations in an effort to support a multiplicity of discrimination claims leveled against 15 defendants" as a "prototypical 'shotgun complaint' "); *Anderson v. State Att'y's Office,* No. 20-20861-CIV, 2020 WL 6054079, at *2 (S.D. Fla. Oct. 14, 2020) ("Plaintiff simply alleges a private citizen falsely accused him of a crime and that he is entitled to monetary relief as a result.").

(3) a complaint that does not have separate counts for each cause of action or claim

I would have expected this to be a rare pleading, but the Eleventh Circuit has seen many. *See, e.g.*, *Davis v. Coca–Cola Bottling Co. Consol.,* 516 F.3d 955, 979–80 (11th Cir. 2008) (complaint with "untold causes of action, all bunched together in one count"); *Bickerstaff Clay Prods. Co. v. Harris Cnty.,* 89 F.3d 1481, 1485 n.4 (11th Cir. 1996) (complaint in which some counts presented more than one discrete claim for relief); *Cesnik v. Edgewood Baptist Church,* 88 F.3d 902, 905 (11th Cir. 1996) (complaint that "was framed in complete disregard of the principle that separate, discrete causes of action should be plead in separate counts"); *Novak v. Cobb Cnty. Kennestone Hosp. Auth.,* 74 F.3d 1173, 1175 & n.5 (11th Cir. 1996) (complaint pleaded multiple causes of action in a single count); *Cole v. United States,* 846 F.2d 1290, 1293 (11th Cir. 1988) (complaint set forth, in one count, "every act, [regardless of which defendant committed the act], which, in the pleader's mind, may have had a causal relationship to the [injury]").

(4) a complaint asserting multiple claims against multiple defendants without specifying which defendant was responsible for which acts or omissions or against whom the claim is directed

In *Addahoumi v. Pastides*, No. 3:16-CV-1571-CMC-SVH, 2018 WL 636122, at *2 (D.S.C. Jan. 30, 2018), the plaintiff was allowed to amend his complaint twice to clarify it enough for the defendants to answer. However, the amended complaint incorporated all factual allegations contained in 138 paragraphs and were made against all defendants. "This requires the court to constantly cross-reference the lengthy facts section and 'wade indeterminately through the morass of superfluous detail.' " *Id.* (quoting *North Carolina v. McGuirt*, 114 Fed. App'x 555, 559 (4th Cir. 2004)). By this time, the court's patience had understandably run out, and the

complaint was dismissed with prejudice. The *Addahoumi* court is not alone in dismissing these complaints. *See, e.g.*, *Odom*, 2014 WL 5323949, at *8 (dismissing a complaint in which the plaintiff "uses the collective term 'defendants' in all his allegations without specifying to which Defendant or Defendants he is referring. No specific allegations make it clear which of the named Defendants did what to Plaintiff and when such actions occurred . . . ."); *Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001) (affirming the district court's dismissal of a complaint that incorporated by reference 146 numbered paragraphs of factual allegations into each claim, incorporated the allegations of each preceding claim, entailed numerous immaterial and rambling factual allegations, and charged "all defendants" in each count).

However, if the identical claims are pleaded against all the defendants, the court will likely consider the complaint is sufficient if enough facts are pleaded for each separate defendant, and then incorporating those facts by reference elsewhere in the complaint. *See vonRosenberg v. Lawrence*, No. CV 2:13-587-RMG, 2018 WL 4039324, at *6 (D.S.C. Aug. 23, 2018) ("Plaintiffs [are not] required to repeat Paragraph 33 of the Second Amended Complaint or Paragraph 87 of the Third Amended Complaint 55 times because each parish allegedly uses the same marks.").

What is the remedy when faced with shotgun pleadings?

If the pleading is truly deficient enough so that it fails to give notice as to the opposing party's claims and defenses, the Eleventh Circuit counsels that a party "is not expected to frame a responsive pleading. Rather, the defendant is expected to move the court, pursuant to Rule 12(e), to require the plaintiff to file a more definite statement." *Anderson v. Dist. Bd. of Trustees of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 366 (11th Cir. 1996).

However, if the pleader is given one or opportunities to amend the pleading but fails to correct it, a motion to dismiss the complaint is appropriate. *See Addahoumi*, 2018 WL 636122, at * ("Plaintiff first argues Defendants should have sought a more definite statement under Fed. R. Civ. P. 12(e) instead of moving to dismiss the [second amended complaint]. The court disagrees. Plaintiff had multiple chances to file a complaint complying with Rules 8(a) and 10(b), Fed. R. Civ. P., and was advised by the Magistrate Judge why his previous complaints did not meet the requirements. However, Plaintiff failed to amend in accordance with these rules, instead filing similar complaints each time. Defendants were not required to file a motion for a more definite statement.").

In either situation, as with all motions, be clear as to what is deficient about the pleading and why adequately responding to the pleading is impossible. *See Hill v. Stryker Sales Corp.*, No. 4:13-CV-0786-BHH, 2014 WL 4198906, at *2 (D.S.C. Aug. 20, 2014) ("Turning to the Defendant's allegation that the Plaintiff's complaint is a 'shotgun pleading,' the Court notes that the term 'shotgun pleading' is itself a 'label,' and parties seeking dismissal on such a basis must do more than simply attach it to the other side's submission.").

Shotgun blues

I thought that I had put all my shotgun problems behind me at the age of 12, but they continued to cause trouble. Shotgun pleadings may not kill me or get me arrested, but they can still destroy my lawsuit and antagonize judges. Although we may not reach the pleadings nirvana that Judge Bleckley wished for so long ago, we can all agree that some "shotgun control," through drafting clearly worded and organized pleadings, would go a long way to making our professional lives better.