Civil Procedure

09.02.2013

Drafting a Complaint (review):

-Rule 8 General Rules

-Generous to plaintiff Rule 8(a)(2)

-3 ways complaint can go wrong

1. No violation of law in allegations – fails to state a claim

- Enforced through motion to dismiss for failure to state a claim 12(b)(6)

2. Not sufficiently specific in factual allegation

-failing to be specific enough to satisfy 8(a)

- enforced through motion for a more definite statement under 12(e)

\*\*For these two requirements, one can tell just by looking at the piece of paper whether it meets standard – do not need to know anything else about the case

3. Lack of evidentiary support for factual allegations

-Does plaintiff have sufficient grounds to justify discovery

-Cannot tell from paper

-Rule 11 and Rule 56 address

- weeding out such cases was not considered to be the function of Rule 8 (a)

- Under Rule 11 plaintiff should have reasonable evidentiary grounds to make allegation in complaint – if R 11 is violated sanctions can be imposed

- usually one finds that R 11 has been violated by a complaint only after discovery shows that the plaintiff had no evidentiary support (harm has been done to the defendant by having to go through discovery)

-Rule 11 can be satisfied if an allegation has evidentiary support or if one has a reasonable belief that there will be evidentiary support during discovery- this belief can get you off the hook sometimes.

-If you have no evidence and no reasonable belief, you get SANCTIONED.

- If the case moves to discovery, then defendant can also move for summary judgment if there is no evidence.

-Rule 56 - summary judgment after discovery before trial

Why is Supreme Court trying to add to this system for addressing cases with inadequate evidentiary support?

1. Rule 11 is not being used enough

-as a result, frivolous lawsuits that should not have even made it to discovery are being brought

- if R 11 was used enough these would be deterred

2. Discovery has gotten way more expensive. When FRCP drafted discovery and summary judgment were thought to be an cheap way of avoiding the expensive option of trial. But now discovery has gotten very expensive too.

We can see that in coming up with rules for pleading and for evidentiary support for allegations one is balancing:

1) the goal of assuring that the substantive law is vindicated

- If that were the only concern one would always go to discovery and find out everything possible

Against 2 and 3) Efficiency and the interests of parties and witnesses

- always having discovery is expensive and burdensome

- So have to stop complaints that cannot justify the burdens of discovery even if some of those cases would have been found to have merit after discovery

- FRCPs try to stop such complaints by deterring them through R 11

- those actions that should not have been brought are sanctioned

- But another method is to screen them out before on the basis of some formal characteristics of the complaint – this is what Twombly and Iqbal (Twiqbal) do

Theme of Course: How can you balance the need to vindicate substantive law, the need to be just to all parties, and the need for efficiency? In some instances, the law will not be vindicated, the process will be inefficient, and parties will have unfair burdens place upon them. But balance is sought, so no one interest is pursued over the others.

Were there special characteristics about Twiqbal that make the holding in those cases not appropriate for other lawsuits?

\*Iqbal – Suing Fed. Gov. officials still in process of doing their jobs

-Gov’t officials facing lawsuit based on their carrying out their duties on the job

-Part of motivation of the court about preventing frivolous lawsuits against gov’t officials?

-Particular Iqbal motivation: cost of pulling away government officials from important work. The court might be motivated to make important procedural rulings based not on considerations that apply generally, but only to actions against gov’t officials.

\*Twombly – Very expensive discovery

\*Sierocinski – the considerations in Twiqbal do not apply: defendant is a private corporations, not a gov’t official – and discovery would not have been that expensive

A bit more on Failure to State a claim

a. What if defendant does not raise the defense in response to a pleading that does not state a claim?

b. Discovery happens

c. Case goes to trial and jury

d. If they agree everything is true plaintiff gets judgment/money, even though no law has been violated

e. The burden is on the defendant to raise the defense – but it can be brought up at any time during trial.

f. When does the defendant waive the right to raise defense of failure to state a claim?

- Can bring it up at least through the point at which a judgment is issued (can raise at any point through trial) – does not waive

-Can her bring it up for the first time on appeal? May have been waived

g. Can the trial court bring up the defense itself without a motion from defendant? (called sua sponte)

- usual view is that they can do it

- Does court has the obligation to do so (according to Prof. Green it does - must uphold the law)

- there is no case law on whether there is an obligation

h. Are there any defenses where the court *must* bring it up

yes – in Fed Court – subject matter jurisdiction SMJ

-if there is no SMJ, case is not one that fed courts should be adjudicating, belongs to the state courts to decide. - SMJ involve states’ interests – federal court must protect those interests – it does not matter that it is not brought up by the defendant

i. Personal jurisdiction – courts *may not* bring it up on their own

- defendant has control

- when does defendant waive it? Defendant must bring it up almost immediately (we will discuss later)

\*\*With respect to a defense consider

* when does it have be brought up or is waived.
* Is it under the complete control of the defendant (like personal jurisdiction) or may the court bring it up sua sponte or must the court bring it up sua sponte

\*\*Example Subject Matter Jurisdiction: must be brought up whenever it is discovered – including on appeal - action must be dismissed.

2. Sierocinski:

a. Court of Appeals holds 8 (a) means what it says – “simple and plain statement”

b. Look to Blog answer about striking the allegation of negligence – seemed unnecessary

c. Appellate court remands the case back to the trial court – there is a trial

d. Defendants move for directed verdict – denied – the jury finds negligence

e. Defendants move for judgment notwithstanding the verdict (judgment n.o.v.) – denied – appealed

f. Appellate court reverses – trial court should have granted directed verdict and judgment n.o.v.

g. Does this mean that the Ct. App.’s first decision was wrong? – no, that was about specificity of allegation of negligence, now question is about the evidence for negligence

h. Still – haven’t the FRCPs failed? There was a trial needlessly. Couldn’t it have been avoided through specificity in pleading standards? Sierocinski was so vague in complaint about negligence because had no evidence of negligence (that was what Du Pont’s was thinking) –

h. But the Fed. Rules to address problem of lack of evidence were not used in Sierocinski case

1. D should have moved for summary judgment after discovery (did not happen)

2. Should have moved for sanctions under Rule 11 if at the time of drafting the complaint that there was no evidence and plaintiff and lawyer knew it.

Notice: Rule 11 is the only thing that in the end stops plaintiffs from lying in complaint even with Twombly& Iqbal standards

i. First 2 allegations Sierocinski’s complaint – jurisdiction

1. The plaintiff is a resident of the City and County of Philadelphia.  
2. The defendant, E.I. DuPont DeNemours & Company, is and was at the time of the occurrences hereinafter described, a corporation duly organized and existing under the laws of the State of Delaware, and duly authorized to transact business in the Commonwealth of Pennsylvania . . . .

Alleging subject matter jurisdiction

- how is this case one entertainable by in federal court?

- is the P suing under federal law?

- no state law

- what state’s law?

- PA law b/c where it happened?

- maybe but could be the law of the place of manufacture…

\* Because suit was under state law it must have been a diversity case - plaintiff from PA and defendant is DE b/c of Incorporation (there is more complexities here that we will talk about later)

\* also alleges Personal jurisdiction –

- under FRCPs, a federal court usually can have PJ only of a state court in the state where the federal court is located would have had PJ

- so must allege facts that would justify PJ in PA state court

\*Du Pont cannot be hailed before PA state court w/o contact with state – here P alleges that the D was transacting business in PA

\*Venue – must allege that E. District of PA is a district with venue

- Green: it is, b/c that is where the cap exploded (will talk about later)

j. Plaintiff is trying to hedge against affirmative defenses in points 6-8

\*Show no contributory negligence

6. The Ehret Magnesia Manufacturing Company furnished to the plaintiff dynamite caps manufactured by the defendant, which dynamite caps were in the same condition as they were when distributed by the said defendant.   
7. On or about September 24, 1936, the plaintiff was engaged in crimping a dynamite cap, manufactured and distributed by the defendant, when it prematurely exploded causing injuries hereinafter set forth.   
8. In the crimping of the said dynamite cap, the plaintiff acted in the usual and customary manner, the process being a necessary one in the using of the said dynamite cap for the purpose for which it was manufactured and distributed , and such action on his part having been anticipated by defendant.

\*Plaintiffs have no burden to do this

Why do people put so much stuff in complaints if they do not have to?

-Can be a real cost

1. Plead themselves out of court

2. Introduce affirmative offences, which unless defendant brought in would never have come into play

-Trying to scare the defendant never have to go into court - get them to settle

- also trying to make a case look like it has merit to the judge, who will read the complaint early on

3. Conley v. Gibson

a. Suing union over discrimination, were not representing the African-American members in collective bargaining.

b. Union says complaint is inadequately pleaded because no statement of specific discriminatory acts

-and no statement of evidence of our discriminatory intent

c. SCt affirms notice pleading – no need for specific acts or evidence

d. But Court’s also introduces curious language about failure to state a claim:

* “complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

- this cannot mean that a complaint should be dismissed for failure to state a claim if you know that the P has insufficient evidence

- failure to state a claim is *not about the evidence* - a complaint can state a claim even if the P has no evidence

- so what is the SCt talking about?

- probably saying that you should read the complaint broadly and generously

- e.g. if the complaint says the D “thumped” the P and you could read this as battery or not as battery, read it as battery

- the idea is that you imagine various sets of facts proved by the P that could conceivable fall under the language of the complaint and if one of the sets of facts would give the P relief, then the P states a claim.

4. Bell Atlantic Corp v. Twombly

a. Class action suit by customers. Alleged a violation of federal antitrust law:

1. Baby bells are staying in their own territory, even when not obligated to stay in their area - could compete with one another

2. Making it really difficult for new companies to come into their markets, working to make it hard for non ‘Baby Bells’ to compete

b. There must be an *agreement* in restraint of trade– meeting of the minds- to constitute violation of fed antitrust laws – so to state a claim the complaint must allege that the baby bells have agreed to do this together

c. Paragraph 51 of complaint was crucial –

* “In the absence of any meaningful competition between the [baby bells] in one another’s markets, and in light of the parallel course of conduct that each engaged in to prevent competition from [locals] within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that Defendants have entered into a contract, combination or conspiracy to prevent entry in their respective local telephone and/or high speed internet service markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.”

- speaks of parallel conduct by Ds (all doing the same thing)

d. If this parallel conduct was all the Plaintiffs had at trial and all they entered into evidence, what result?

- Defendant would move to directed verdict and get it

- no reasonable jury could find an agreement solely on the basis of parallel conduct

- there are plenty of explanations for the parallel conduct besides an agreement

- also would be appropriate to grant summary judgment to the Ds if parallel conduct was all the Ps had after discovery

e. But that is about evidence - Supreme Court dismissed this case at the *pleading* phase

-Reasoning: Failure to state a claim – fails to satisfy plausibility standard

- compare Sierocinski – directed verdict was appropriate on the basis of a lack of evidence, but P’s complaint could not be dismissed at pleading stage

f. Stevens – how can we say it fails to state a claim? Ps allege in 3 places that Ds *agreed* – has all the elements of a cause of action for antitrust

g. in Iqbal, the majority of the SCt changes its account of the plausibility standard – not required to state a claim, required to provide a “showing” under 8(a)

h. But real motivation is not that pleading standard in 8(a) was not satisfied (which is about notice) – real worry was that there was inadequate *evidence* of an agreement to justify discovery

- the SCt was really asking for evidence of an agreement beyond parallel conduct

- does not have to be evidence of a handshake agreement – can be a wink-nudge agreement

- what would evidence of a wink-nudge agreement be? –

- examples

* + the timing of the parallel conduct indicated a wink-nudge agreement
  + the baby bells’ actions were economically irrational except on the assumption that they were engaged in an agreement to restrain trade
    - e.g. could make money cutting into the business of the other but don’t

i. Hypothetical: Assume that the pleading alleged a handshake agreement between CEOs at a particular place – would that have met Twombly standard? – Probably - Even w/o evidence being alleged

- confusing: sometimes Twombly appears to require evidence (eg in wink nudge handshake agreement), but sometimes only demands particularity

j. A plaintiff can always lie to satisfy any requirement that the Supreme Court has held to be necessary. Therefore, it might be that the Twiqbal standard is only as good as R 11. But Twiqbal was created in response to R 11 not being used enough. Does that mean Twiqbal is worthless?

5. Summary Judgment/directed verdict/ judgment n.o.v for the defendant all have the same standard – no reasonable jury could find for the plaintiff given the evidence

a. The court, when ruling on motions for summary judgment, directed verdict and judgment n.o.v. has a right to interpret what a ‘reasonable jury’ would decide. Does this deprivation of a jury trial violate the seventh amendment? Green: no right under the 7th A to an unreasonable jury