**Tuesday September 3, 2013 Civil Procedure Notes**

Announcement:

Review Sessions (tentative pending library lab schedules):

Mondays 3:30-5:00 Room 133 weekly review sessions

***Twombly***

* Distinction of three ways a complaint can be insufficient seems to fall apart in *Twombly*
	+ Failure to state a claim
	+ Factually nonspecific
	+ Evidentiary support behind claim to warrant discovery
* Green: failure to state a claim implies that “the words that make up the cause action are missing”
	+ Although SCt in Twombly claimed that the complaint failed to state a claim because it did not satisfy the plausibility standard, the *Twombly* complaint did not actually fail to state a claim because it established an antitrust violation with the word “agreement”
	+ “Failure to state a claim” idea exists because if the complaint cannot allege a violation of the law, it should not proceed.
	+ In *Iqbal* SCt tied the plausibility standard not to the requirement of stating a claim but too 8(a)’s “showing” language.
	+ Green: If the Twombly plaintiffs had alleged a handshake (or some other non-wink-nudge) agreement, there could be an argument that they failed to satisfy the notice pleading requirements in 8(a), the defendant would have been justified in asking for clarification of the pleading to put them properly on notice – e.g. when, where and between whom did the agreement occur
		- But Plaintiffs were alleging a wink-nudge agreement
			* Evidence for that offered at trial would be that the defendants were behaving economically irrationally absent the existence of an agreement
		- Given the plaintiffs were alleging a wink-nudge agreement, the defendants were clearly put on notice by the complaint
	+ Green: The USSC’s real motivation for kicking out claims for lack of “plausibility” is that the plaintiffs had insufficient evidence to justify the burden of discovery
	+ Two ways to satisfy “plausibility” standard:
		- 1) Talk about evidence you do have or expect to find during discovery
			* E.g. mention the evidence you have that the Ds parallel actions would be irrational absent a wink-nudge agreement
			* Problem: creates extremely long complaints and frustrates the other purposes of the complaint (defining scope of discovery, which is now huge)
		- 2) Be adequately specific about facts without mentioning evidence
			* E.g. mention when, between whom, and where a handshake agreement occurred
			* Problem: plaintiff could invent facts just for the sake of being factually specific.
	+ Green: the FRCP are not set up for screening out actions with insufficient evidence at the pleading phase—Rules 11 and 56 are supposed to be used to deal with frivolous action, rather than using pleading standards to weed out frivolous claims
		- See can be seen in *Sierocinski* – pleading standard did not screen out action that was later shown to have inadequate evidence
	+ ***Twombly*** Facts
		- Class action suit by consumers against Bell Atlantic and other baby bells
		- Baby bells accused of being in agreement via observation of parallel conduct: baby bells’ behavior of not cutting into one another’s territory and making it difficult for other companies to enter the market in that territory
* Magic words for *Twiqbal*: complaint must be ***plausible***
	+ Calls for enough fact assumed to be true to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.
		- Problem with plausibility standard: How can you tell from a complaint what discovery will reveal? If a complaint is incredibly detailed, plaintiff could still be lying (and Rule 11 would have been a proper answer to this action, and pleading standards could have been left alone)
		- How can a complaint reveal evidence?
* In *Twombly*, it is actually plausible that no evidence of an antitrust conspiracy would have arisen during the discovery period
	+ All the Ps appeared to have was parallel conduct and that is not adequate evidence of an agreement, nor is it reason to believe that evidence of an agreement will arise in discovery
	+ Would have been good for plaintiffs to introduce in complaint evdience that it was economically irrational for defendants to behave the way they did unless there was an agreement
	+ Or, if alleging a handshake agreement, could have alleged very specific facts (handshake agreement in California on September 2, 1999, between A and B) – this would not discuss evidence but would *suggesting* that Ps had it
* With *Twombly* standard, complaints are too long and frustrate the other purposes of the complaint during trial (determining scope of discovery is difficult because complaint is so long and scope is so broad)

***Iqbal***

* Case is about allegation of discrimination (discriminatory intent = state of mind)
* Plaintiff’s evidence (disproportionate number of Muslims in prison) could not prove the state of mind he alleged because it could have been explained in other ways
* Discriminatory intent is like the agreement in Twombly and the negligence in Sierocinski – the critical element of the cause of action. The disparate impact like the parallel conduct in Twombly and the blasting cap exploding in Siercosinki – inadequate evidence of the critical element.
* Though Sierocinski’s conclusory allegation of negligence was acceptable, in a post-*Twombly* world, Iqbal could not give a conclusory allegation of a state of mind
* Tons of citations of *Twombly* and *Iqbal* since the standard was set shows that courts are struggling with new standard and that a large number of complaints are being thrown out; EXPENSIVE for legal system
* **Iqbal identifies source of higher standard of pleading in 8(a)(2) with “showing” language**
	+ Plaintiff must satisfy *Twiqbal* standard with a plausible complaint “**showing**” entitlement to relief
	+ Would *Twiqbal* apply to **counterclaims**? Yes, because you are making a claim FOR RELIEF, just like a normal complaint.
	+ Doesn’t apply to **answers** (affirmative defenses) because those are not claims FOR RELIEF.
	+ This doesn’t really sound fair because it places a greater burden on the plaintiff to allege with heightened standards.
		- If the argument for the *Twiqbal* standard is to prevent frivolousness, then the heightened standards should apply to both defendant and plaintiff, since both can submit things (complaints, answers, affirmative defenses) to the court that are frivolous.

USSC really seems to be ignoring intent of drafters of Rule 8(a)

* Does it matter that the USSC is ignoring the FRCP? They created the FRCP
* but need to follow the Rules Enabling Act in changing the FRCP
	+ the Act requires that rules proposed by SCt must first be presented to Congress and if it does nothing, then become law
	+ also SCt works with a rules committee (including professors and judges) in coming up with Federal Rules – this was bypassed
* USSC’s power to make the rules comes from Congress.
	+ This is why the FRCP are regulations; Congress gave its power to regulate federal court procedure to the USSC.
* Circumventing Congress and the rules process by giving a ridiculous interpretation of 8(a) is arguably unconstitutional and ignores the checks and balance system.

What if Ps in Twombly find evidence of baby bells’ agreement after the case has been dismissed?

* Dismissal for failure to state a claim is always with prejudice unless otherwise stated (action is gone forever)
* As a result of Iqbal, however, dismissals for failing to satisfy plausibility standard are really about failing to satisfy 8(a), not failure to state a claim
* Courts have not clarified the default rule for dismissals under twiqbal
	+ Are they presumed to be with or without prejudice?
* Green: courts should presume dismissal is without prejudice now that *Twiqbal* standard is being applied – because the question is evidence that Ps had.
	+ However, even Green believes that at a certain point, you have to dismiss with prejudice to get finality at SOME point.
* Assume that failure to satisfy Twiqbal leads to a dismissal with prejudice and lawyer for P does not challenge the designation that it is with prejudice
	+ P loses claim forever
	+ This could be a ground for a malpractice action by P against his lawyer – lawyer should have challenged the designation that it was with prejudice

Pleading Special Matters

* Rule 9(b): In alleging fraud or mistake, plaintiff must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.
* Does heightened fraud pleading standard apply to affirmative defenses where defendant alleges P’s fraud as a reason he is not liable for breach of contract to P? Yes, since an affirmative defense can also be an allegation of fraud or mistake (no requirement for it to be a claim for relief).
* Fraud cause of action
	+ Statement (omission if duty to speak)
	+ Of material fact
	+ That is false (or misleading)
	+ With knowledge of falsity
		- Often intent that the plaintiff rely
	+ Reasonable reliance on statement by plaintiff
	+ Causation of damages
* Mistake = another type of defense to a breach of contract action – basically arguing that a mistake about the circumstances of the contract allows the D to get out of his contractual obligations
* Why have heightened pleading standards in fraud allegations? In connection with fraud, 8(a) needs to be satisfied with more particularity to give the defendant adequate notice of what is being alleged. Words are involved, and plaintiffs need to be specific as to which words, when they were said, and by whom
* Fraud can also be an especially frivolous allegation, hence higher pleading standards.
	+ If you want to weed out frivolous actions, why allow plaintiffs to be general as to *knowledge* of falsity (“Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally”)?
		- Would be unreasonable if they demanded specificity from plaintiff when evidence of state of mind is entirely in the defendant’s possession.
		- Courts realize that evidence of falsity would probably only come out during the discovery stage.
		- 9(b)’s allowance of general allegations of mental states (even in its heightened standard) is incompatible with *Twombly*’s higher standard for allegations of mental states (agreements, discrimination)
			* Shows that *Twiqbal* is wrong

**Rule 11**

* Person who signs document submitted to court is making a certain attestation
	+ Attestation is also made when the document is filed, submitted, or later advocated.
	+ What is being attested?
	+ 11(b) … to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

	(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

	(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

	(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

	(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.
* ***Objective standard*** requiring a reasonable inquiry.
* Rule 11(b)(1) generally only works when used in conjunction with another provision’s violation because counsel can just claim that the action has non-frivolous intent;
* 11(b)(2) frivolous legal arguments (not related to evidentiary support);
* 11(b)(3) evidentiary support for factual allegations or reasonable belief that it is likely that there will be evidence after reasonable opportunity for discovery;
* 11(b) (4) frivolous denials (common); denials must be reasonably warranted by evidence.
* Rule 11 not applicable to discovery (Rules 26 and 37 apply to discovery)

***Murphy v. Cuomo***

* Murphy sprayed with pepper spray while resisting arrest. Murphy alleged conspiracy between state officials (including governor of NY, Cuomo) and Zarc to test Zarc’s new pepper spray on *innocent* people.
	+ Cause of action: violation of civil rights for officials to spray people with test pepper spray to see what happens (1983 act)
	+ Also claimed it is a violation of drug statute (goofy)
* Setting aside drug statute - Murphy definitely states a claim since, if true, his allegations (though crazy) would add up to a violation of his civil rights
	+ Murphy does not allege a cause of action with his drug statute argument because there is no private right of action allowing Murphy to personally sue someone if the statute is violated.
* Does Murphy satisfy *Twiqbal*? It’s possible—he is certainly very specific with his factual allegations.
	+ Indicates that *Twombly* and *Iqbal* are only as good as Rule 11 because Murphy could have satisfied the *Twiqbal* standard with his bullshit, but highly detailed, allegations.
		- Another example of how you cannot tell from a complaint alone if the plaintiff has evidence.
* Zarc moves for summary judgment, which is granted because there was no shred of evidence that the alleged conspiracy existed.
* Murphy and attorney violated Rule 11(b)(3) in that their factual contentions lacked evidentiary support and they failed to withdraw their arguments even after it became clear that evidence was not materializing.