**Lect. 2**

* Three things (among others) that can be wrong with a complaint and that are easily confused:
1) legal sufficiency of factual allegations
2) level of specificity in factual allegations
3) evidentiary support for factual allegations
* 1) legal sufficiency of factual allegations – do they add up to a cause of action?
- If not, dismissable under Fed. R. Civ. P. 12(b)(6)

EG: What are the elements of a cause of action for negligence?

Duty

Breach

Causation

Damages

* assume that you rely upon my Civ Pro lecture as a lawyer, I’m wrong, and you suffer damages
* Could you sue me for negligence
	+ I have no relevant duty of care to you (surprisingly)
* What about the following case?

P alleges that D drove 100 mph through stop sign, causing an accident resulting in damages to P
Does P’s complaint fail to state a claim because he fails to mention that he already sued D about this accident and lost?

No – claim preclusion is an affirmative defense – plaintiff need not plead lack of claim preclusion

* The D must brinhg it up

Distinguish

Burden of allegation – who has the burden of introducing the issue in a pleading

* P has burden for elements of cause of action, D has burden for elements of affirmative defense

Burden of proof – who has burden of introducing evidence concerning the matter at trial

* P has burden for cause of action and D has burden for affirmative defense
* If neither side introduces evidence the person with the burden of proof loses concerning that matter

Standard of proof – what does the person with the burden of proof have to show?

* Civil – usually preponderance of the evidence (sometimes clear and convincing)
	+ Criminal – beyond a reasonable doubt

What’s wrong with this complaint?

* Defendant Jake Albert intentionally engaged in contact with the person of Plaintiff Michael Green that was harmful or offensive, causing damages.
* Insufficient specificity – it does state a claim
* Also – does in fact have inadequate evidentiary support

On Tuesday, August 26, 2013 at 2:31 p.m., Defendant Jake Albert intentionally failed to praise Plaintiff Michael Green for Plaintiff’s exemplary lecture on civil procedure, in circumstances in which praise would have been reasonable, thereby causing Plaintiff substantial psychological distress.

Failure to state a claim – it is sufficiently specific

Imagine that D did not mention failure to state a claim – what would happen?

* Case would proceed (but D can bring it up later, including during discovery and trial)
	+ We spent some time discussing why allowing the D to bring it up outside of the pleading period makes sense
	+ We also discussed why it makes sense that a court can bring up failure to state a claim sua sponte (on its own motion)

Over the period of June 30, 2013 to August 18, 2013 Defendant Jake Albert operated a moon base which emitted mind rays directed at Plaintiff Michael Green, allowing Defendant to read Plaintiff’s thoughts and causing Plaintiff to experience severe headaches and ringing in the ears.

* Lack of evidentiary support –

Can the moon base complaint be dismissed at the pleading stage?

* Unlikely – states a claim and is sufficiently specific
* Could get rid of it only during discovery

Seems too easy to get to the discovery stage – just slap a complaint together that is sufficiently specific and states a claim

* what stops plaintiffs from doing it?
* R 11 – they will be sanctioned
* How will you know R 11 is violated?
	+ Only in discovery
	+ Isn’t that too late…?

Is this a problem with the Fed. Rules approach?

Maybe we should weed out complaints that are likely to lack evidentiary support on the basis of something that can be identified in the pleading stage –

* Eg use heightened requirements of specificity

**Let us return to why the Fed Rules have a weak standard of specificity**

* Pleading standards can be understood in the light of the purposes of a complaint
* What are these purposes?
* what purpose does service of a complaint on the defendant serve?
	+ Notice of nature of suit, so he can assemble witnesses, evidence
	+ Does not require much specificity
* what purpose does the answer to a complaint serve?
	+ Can narrow scope of lawsuit (discovery and trial) through D’s admissions
		- Argues for some specificity
			* Green thinks D is more likely to admit to a specific factual allegation (you were driving 80 mph) than a general claim (you were driving negligently)
		- But the more detailed the complaint, the more burdensome the answer – that argues against too much specificity
* **Big question - any way that specificity in a complaint can be used to dispose of frivolous suits?**
* Historically this was the case
	+ common law pleading
	+ later Field Code
	 - called “fact” or “code” pleading
	+ Both used pleading standards to weed out frivolous actions before trial
	+ One important aspect – pleadings could not be conclusory
		- could not say “negligently drove” – that is the legal conclusion
	+ had to say facts leading to legal conclusion
	+ then went immediately to trial, without discovery
	+ compare Form 11, which uses a conclusory allegation
	+ Drafters of the Fed Rules concluded that older method didn’t work – they instead relied on discovery, R 11 and summary judgment to get rid of and discourage frivolous actions