**Lect 3**

What did we do last time –

Played around with three ways factual allegations in a complaint can be improper

* **Not only ways**
* But three important ways that can be easily confused
* Want to make you aware of the different ways that the fed rules take care of them
1. Legal sufficiency of factual allegations
	* Can you resolve that during the pleading period?
	* Yes, through motion to dismiss for failure to state a claim
		+ **FRCP 12(b) How to Present Defenses.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
		...(6)failure to state a claim upon which relief can be granted; and ...
		+ Why is that fair to do before discovery?
			- On the one hand, is seems fair because to state a claim all you need to do is allege facts that add up to a cause of action – you don’t need to offer evidence
			- But it can be problematic when one takes into account the requirement under Rule 11 to have evidentiary support for one’s factual allegations
			- One may not be able to make factual allegations that state a claim because one does not have the necessary evidentiary support, although one could get such support if one could only get to discovery
				* But one can’t get to discovery because one cannot state a claim....
		+ We will discuss later how Rule 11 attempt to deal with this
2. Specificity of the factual allegations
* 8(a)(2) – generous to plaintiff
* Rule 8. General Rules of Pleading

(a) Claim for Relief. A pleading that states a claim for relief must contain:
(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
* Can you resolve that in the pleading period?
* How**, w**e shall deal with soon
	+ - Why is that fair to do before discovery?
			* On the one hand, is seems fair because to allege with specificity all you need to do is allege facts that are sufficiently specific – you don’t need to offer evidence
			* But, again, it can be problematic when one takes into account the requirement under Rule 11 to have evidentiary support for one’s factual allegations
			* One may not be able to satisfy R 8(a)(2) because one does not have the necessary evidentiary support, although one could get such support if one could only get to discovery
				+ But one can’t get to discovery because one cannot satisfy R 8(a)(2)

3) evidentiary support for factual allegations

How is this enforced?

Sanction under R 11 if you fail to have the adequate evidentiary support

And summary judgment for the defendant if, after discovery, no reasonable jury could find for the plaintiff on the basis of the relevant evidence the parties have

**Problem – can’t find use R 11 and summary judgment (generally) until after discovery**

**------------------------------------------------------**

* **Sierocinski Case**
	+ **Blasting cap exploded while S was crimping it**
	+ **Manufactured by DuPont**
* **Suit original brought where? ED Pa**
* **Opinion you read is written by 3rd Circuit**
* **What law is he suing under – Pa state law**
* **How did S get into fed ct? - diversity**
* Who is appellant? (loser below - Sierocinski)
* Appellee is DuPont
* **Q what are decisions that are being appealed?**
* **The striking of the allegation of negligence in the complaint and the dismissal of the action**

**Notice that the defendant first asked for a motion for a more definite statement under R 12(e), but DuPont was dissatisfied with the amended complaint too**

12(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

* Action was dismissed either for failing to state a claim (it no longer had an allegation of negligence, since that was struck) or as an “other appropriate order” under 12(e)

**3d Cir reverses and remands**

* **Q What is problem D has with complaint?**

Appellee, admitting that a manufacturer is liable for injuries to a person from the use of a defectively manufactured article, argues that it is not put on notice by the complaint as to whether it must meet a claim of warranty, of misrepresentation, of the use of improper ingredients, or of faulty inspection.

* + **Q. part of problem is S is giving several theories – e.g. negligence and breach of warranty**
	+ not allowed previously, it is under Fed Rs (will discuss later)

other problem –

* Insufficient specificity concerning negligence
* use of improper ingredients, faulty inspection, faulty manufacture?
* 3d Circuit’s response?
* But there is a specific averment of negligent manufacture and distribution of the cap in such a fashion as to make it explode when crimped. A plaintiff need not plead evidence.
* **Is it true that DuPont is looking for evidence?**
* **What would satisfy DuPont? Greater specificity about the negligence**
* aspect of the cap that led it to explode when crimped
* how defendant was careless
* what would it look like to offer evidence? – talk about witnesses’ testimony, documents etc.
* 3rd Cir’s real point should be – D is looking for particularity and don’t need particularity under 8(a)(2)
* See Form 11, which simply says that defendant negligently drove
* **Q. do subsequent events in the case show this opinion is wrong? What happened?**
	+ remand, at trial the P wins
	+ D makes motion for directed verdict and judgment notwithstanding the verdict, it is denied
	+ on appeal, 3d Cir reverses
	+ what does that mean?
	+ 3rd circuit thought that on the basis of evidence no reasonable jury could have found D was negligent
		- * **shows that the 3d circuit was wrong the 1st time around?**
	+ No - wholly sufficient pleading can fail

BUT doesn’t that show that R 8(a) is bad – let the case go forward when it shouldn’t?

Not necessarily – is this the kind of case we would want to make it to discovery, even if that provided no adequate evidence?

Arguably yes – the cap blew up – that is enough to suggest that the might be evidence of negligence in discovery

Another puzzle – why didn’t the D use summary j? could have avoided trial

* **LOOK at Sierocinski’s complaint**
* **What are paragraphs 1-3 for?**
* **Allegations of jurisdiction**
* Does he state more than he needs to?
	+ what affirmative defenses are anticipated?
	+ contributory negligence

Why do people put so much in pleadings?

* + trying to butter up judge
	+ trying to intimidate opposition to encourage settlement
* 2) what is the danger of doing so?
	+ plead why they cannot recover
	+ will plead an affirmative defense
* 1st Conley v Gibson case
* odd language “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.”
* Sounds like it is about the evidence the plaintiff has, but we know that whether the P states a claim is not about evidence
* Green: it is about reading ambiguous language in a complaint
* read generously so that it will state a claim
* **Twombly**
* **Facts?**
* antitrust action under Sherman act requires an agreement to restrain trade
* Ps suing as class against baby bells
* baby bells conspired to restrain trade
	+ inflated charges for non-baby bells for access to local network
		- engaged in parallel conduct to inhibit growth of non-baby-bell competitors
	+ agreements by baby bells not to compete against one another
* does this sound plausible? who is suing?
* Consumers are suing
* Competitors to baby bells would likely have sued if baby bells were really conspiring to restrain trade