**Lect 4**

* **Twombly**
* **Facts?**
* antitrust action under Sherman Act - requires an *agreement* to restrain trade
* Ps (as class) suing baby bells
* Alleging they conspired to restrain trade
  + inflated charges for access by non-baby bells 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

SCt reversed 2d Cir, which had reversed district court’s dismissal

* dismissed for what?
  + - failure to state a claim
  + what was the element that was left out?
    - conspiracy or agreement
  + did they fail to say there was an agreement in the complaint?
    - they did allege an agreement
    - Paragraph 51  
      “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.”
    - This was Stevens’s point in his dissent
    - Stevens: But the plaintiffs allege in three places in their complaint, ¶¶ 4, 51, 64, App. 11, 27, 30, that the ILECs did in fact agree both to prevent competitors from entering into their local markets and to forgo competition with each other. And as the Court recognizes, at the motion to dismiss stage, a judge assumes “that all the allegations in the complaint are true (even if doubtful in fact).” Ante, at 1965.

Is the problem that the plaintiffs alleged that the parallel behavior was the agreement?

* That would fail to state a claim
  + An analogy in Sierocinski would be if S alleged that the cap blowing up was negligence per se (res ipsa loquitur)
* But they didn’t make this mistake – they claimed that the parallel behavior was *evidence* of the agreement
  + If the real problem was not failure to state a claim, what about arguing that it was insufficiently specific under 8(a)
    - Perhaps the facts alleged provided insufficient *notice* about the agreement
      * The Ds did not know when, where, between whom the agreement was made
    - Problem with this argument – the Ps were alleging a tacit agreement under the Sherman Act
    - Given that, were the Ds put on notice by the complaint
      * Yes
* real problem that the Twombly Court tried to address was – insufficient evidence of a tacit agreement to justify the burden of discovery
  + all the Ps have is parallel behavior
  + that is not enough evidence to justify going to discovery
* But why isn’t that problem solved through R 11/summary judgment?
  + Green: R 11 is not being used enough, so Ps are not discouraged from bringing such actions
    - Thus the SCt is looking for a different approach: screen out these actions at the pleading stage
* new plausibility standard
  + - Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

Assume that the complaint had alleged a handshake agreement among the CEOs of the baby bells at a particular meeting and named the date. No evidence is offered at all. Is Twombly satisfied?

* + - Probably
    - Twombly seems relevant only when Ps mention evidence in the complaint in favor of an element of the cause of action and the evidence is not enough to justify moving into discovery
  + so would Twombly make a difference to Sierocinski?
  + Maybe not
* **let’s say that Twombly really amended the FRCP**
  + **is it OK for the SCt to do this?**

Who makes the FRCP?

The SCt

**28 U.S.C. § 2072. - Rules of procedure and evidence; power to prescribe**

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals. . . .

So OK?

* No – If the SCt does it by an opinion rather than the amendment process, no possibility of a legislative veto

**28 U.S.C. § 2074(a)**The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section [2072](http://www.law.cornell.edu/uscode/text/28/2072) is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law. The Supreme Court may fix the extent such rule shall apply to proceedings then pending, except that the Supreme Court shall not require the application of such rule to further proceedings then pending to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies.