**Lect 5**

* **Twombly**
* Majority opinion was that the problem with complaint was that it failed to state a claim, but it clearly did state a claim
* Later in Iqbal the theory was that the plausibility standard was part of R 8(a)(2)
  + Still implausible, because there was surely notice about what was alleged in Twombly – namely an implicit agreement
* real problem is – insufficient evidence to justify the burden of discovery
  + should be handled by sanctions under R 11, but arguably R 11 is not working
* new plausibility standard
  + - Souter: 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.
* Problem: there is nothing in the Federal Rules that suggest that a plaintiff has to put *any* evidence in a complaint
  + 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?
  + Arguably yes
  + Twiqbal seems most relevant for complaints in which one alleges a mental state (implicit agreement, intent to discriminate) and includes a description of one’s evidence

* Can the plaintiffs in the Twombly case try suing the same defendants again with a better complaint?
* Generally claim precluded when dismissed on Twiqbal grounds, especially if one already had opportunity to amend one’s complaint (will discuss later)

**Ashcroft v Iqbal (US 2009)**

* Applies Twombly standards beyond antitrust cases

P – Pakistani Muslim

D – John Ashcroft, secty of state, also Robert Mueller director of FBI, many others – eg guards

* claims include
  + tortured
  + denied medical attention
  + right to practice religion interfered with
  + denied access to counsel
  + also chosen for incarceration because of national origin, religion, race
    - this is the allegation that is most relevant
* analogue to Twombly
  + what does P need to show
    - discriminatory intent against Muslims
  + what evidence does the P have
    - disparate impact on Muslims
    - not enough to justify going into discovery
    - there is an alternative explanation for the disparate impact, namely that Sept. 11 was perpetrated by Muslims

Note: Iqbal ties the plausibility standard to R 8(a)(2)’s requirement of a “showing”

* Does Twiqbal apply to counterclaims (yes – a claim for relief under 8(a)(2))

Does it apply to affirmative defenses? – disagreement among federal courts

* 8(a) does not speak of defenses – only claims for relief
* On the other hand if Twiqbal does not apply to affirmative defenses, it seems unjustifiably pro-defendant

**RULE 9(b)**

- Rule 9(b) heightened pleading standard for fraud/mistake

does it apply to affirmative defenses?

Yes

Policies behind 9(b)

- notice – need more detail to defend against a claim of fraud?

- in particular, need to know exactly what was said and when it was said?

- allegation of fraud is more likely to be frivolous? So need to discourage through higher pleading standards?

what is particularity with respect to falsity of the statement in an action for fraud?

*why* it is false – e.g. why a prediction is false would concern why it was unreasonable when made

Exception for scienter – WHY?

* weird to ask for particularity about mental states?
* Or is the idea that the FRCPs assume that you will not have sufficient evidence of the D’s mental state at the time of drafting the complaint?
  + If so, arguably incompatible with Twiqbal

**RULE 11**

Requirement of honesty about facts and law, reasonable inquiry into facts and law

Really is the method the FRCPs use to solve the problem of frivolous complaints

* **Why are there frivolous cases at all?**
  + if likely to lose, why bring it in first place?

- here is one possible explanation: strike suits

* + - can settle with D for less than D’s cost of defending
    - D will settle even if he knows that it is frivolous
  + Notice, not clear that there are lots of frivolous suits brought
    - It is hard to identify what is a frivolous suit
    - The fact that the plaintiff loses does not mean the suit was frivolous – we may still have wanted the P’s action to proceed to discovery/trial

Rule 11 is in part about *signing* pleadings and other papers

* w/o a signature, it will not be accepted
* signed by atty of record or if suing pro se, signed by party
* BUT one can violate R 11 even if one did not sign
  + By presenting paper to the court - whether by signing, filing, submitting, or later advocating it

- the signature or presentation makes a *certification* – so you are putting yourself on the line

* certification is about reasonable inquiry into facts and law
* certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, certain things are true (this is an objective standard):

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

Rare to be sanctions for violation of this on its own

- because if the pleading/paper is otherwise justified, one can always say that the fact that it was justified was one’s motivation

(b)(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;

- will discuss later  
  
(b)(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  
  
(b)(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.

(b)(3) balances the need to avoid fishing expeditions against the recognition that sometimes the evidence of wrongdoing is under the control of the defendant

“will likely have evidentiary support after a reasonable opportunity for further investigation or discovery”

* Note:
* (d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.
* There is a separate provision 26(g) that is analogous to R 11 for discovery and disclosure

**Murphy v. Cuomo**

Murphy brings federal civil rights suit and action under fed drug statute

injuries from being sprayed with pepper spray

- allegations: defendant Zarc is part of conspiracy to spray innocent people to test effects

sued gov’tal defendants (incl. Mario Cuomo) and Zarc Int’l, the manufacturer of spray

setting aside fed drug statute, does his complaint state a claim – yes

Is Twiqbal satisfied?

- unclear

- this may have been a case where Twiqbal could have stopped the case before discovery

- Zarc moved for summary judgment and for Rule 11 sanctions

- notice it looks like *only* Zarc is getting out of the case

- both motions granted

sum j?

- Pilot study existed BUT

- no evidence it was intended to test on innocents

- and even if is was, no evidence that Zarc was involved

R11 – what provision was violated?

- allegations had no evidentiary support

-

- evid support can be weak – evid need not be admissible

- not being asked to prove case