**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
    - e.g. 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
  + what would work? Show that what the baby bells are doing is econo0mically irrational unless there was an agreement
  + e.g. there is money to be made by cutting into each other’s territory but they don’t
* 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 to demand evidence only because the claim is one of a state of mind that must be shown indirectly
  + 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.

In addition, the rule-making process involves the Rules Committee (with judges and law professors coming up with options) and the notice and comment from the public

* Can the plaintiffs in the Twombly case try suing the same defendants again with a better complaint?
* The question is whether the dismissal has preclusive effect
* We will deal with in greater detail later
  + Dismissal for failure to state a claim have preclusive effect unless the court says it doesn’t
    - But the plaintiff has the possibility to amend the complaint once before the dismissal to make it satisfy
* Although it is not clear, the same thing may be true about a dismissal 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 but majority view is that it does not

* 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