CIV PRO CLASS NOTES – Monday 10/2/16

1. Review
   1. Dismissal for Improper Venue
   2. transfer from a district without venue to one with venue
      1. 28 U.S.C. §1406
   3. Transfer from a court with venue to a more convenient court
      1. 28 U.S.C. §1404
      2. Takes factors into account spelled out in the MacMunn case into account
      3. Van Dusen v. Barrack
         1. transfer will not change choice of law
         2. the choice-of-law rules of the transferor court will be used
   4. Dismissal to bring a case outside the U.S.
      1. forum non conveniens
      2. takes similar factors to those in 28 U.S.C. §1404 into account
2. Drafting A Complaint
3. purpose of complaint –
   1. notice to defendant
   2. also in combination with answer by defendant, in which parties agree to what is at in dispute, it narrows scope of discovery and trial
      * 1. efficient
   3. also allows the defendant and court to identify actions that can be dismissed pre-trial/discovery
      1. wrong forum
         1. should be evident in plaintiff’s allegations of jurisdiction
      2. failure to state a claim
         1. court can tell from facts as alleged by plaintiff in complaint whether they add up to a violation of the law
         2. can assume that everything the plaintiff says it true
      3. inadequate evidentiary support…?
         1. if there is inadequate evidentiary support for the plaintiff’s factual allegations (the action by the plaintiff is frivolous), then it would be wrong for the plaintiff’s action to proceed
            1. Plaintiff must justify putting the defendant through the discovery process and trial
            2. Have enough of a showing to justify those burdens on the defendant and court
         2. but can you tell that from the complaint – ?
            1. remember a complaint is a piece of paper – the court examining cannot see what stands behind it
4. Code Pleading however did use pleading standrads to try to weed out frivolous actions pre-trial
   1. at the time there was only a pleading period and trial – no discovery period
   2. if an action could not be weeded out at the pleading period you would go to trial
   3. There was a demand in code pleading to plead detailed facts
      1. no bare legal conclusions – had to alleged facts from which those conclusions followed
         1. called “ultimate facts
         2. could not allege that the D negligently drove
         3. have to allege how the defendant was negligent (eg texting)
      2. but also should not allege evidence (eg the witnesses you had)
   4. These strict systems were intended to prevent people from bringing frivolous allegations to court
   5. but there were two main problems with this approach
      1. first, specificity of allegations is a poor indicator of evidentiary support
         1. you can be specific just by lying without evidentiary support
         2. and you can be general even though you have evidentiary support
         3. a process that looks to the support (the evidence) rather than a proxy (the words in the complaint) is better
      2. second – demanding specificity can be unfair to the plaintiff because the evidence needed to be more specific may be in the hands of the defendant
   6. in addition under code pleading the focus is a cause of action
      1. the plaintiff must allege separately his causes of action
5. Modern Approach
   1. Much more generous about pleading standards
   2. all that is required is “a short and plain statement of the claim showing that the pleader is entitled to relief” FRCP 8(a)(2)
   3. Conclusory allegations allowed
      1. Ex: “defendant negligently drove a motor vehicle against the plaintiff”
      2. offered in a Form as an example of an adequate allegation
      3. not saying specifically how the defendant drove negligently
      4. but what if the plaintiff is vague because he has no evidence of negligence…?
         1. We screen these out not through pleading standards but through discovery
         2. after discovery it will be clear if the plaintiff had inadequate evidentiary support when making his factual allegations
         3. and then can bring R 11 sanctions and summary judgment
   4. also Pleading need not specify a cause of action
      1. Don’t need “magic words” of the elements of the wrong
      2. focus is on a claim, not a cause of action
      3. a claim is a transaction or event that is the reason for the demand for relief
      4. that said, you will have to justify why you state a claim if D brings a motion to dismiss
6. Procedure for addressing the 3 things that can be wrong the (non-jurisdictional) factual allegations in a complaint under the Federal Rules system
   1. Legal insufficiency – factual allegations do not add up o a violation of the law
      1. How does a defendant bring this up?
      2. Motion to dismiss for failure to state a claim (or can be put as a defense in your answer)
      3. generally the plaintiff will have allowed to amend complaint once to try to state a claim
         1. if plaintiff fails to state a claim twice, the presumption will be that the claim is dismissed “with prejudice” – can’t be brought again
         2. have to ask for a dismissal without prejudice
   2. inadequate specificity
      1. Are the factual statements sufficient to satisfy rule 8(a)(2)?
      2. Not enforced through failure to state a claim
      3. Enforced through a motion for a more definitive statement
      4. P then amends to be more specific
      5. If he fails, the court “may strike the pleading or issue any other appropriate order” the order can include a dismissal
   3. inadequate evidentiary support for factual allegations
      1. this is addressed generally after discovery through…
      2. Motion for sanctions for rule 11 violation
         1. the complaint is signed
         2. the signing is a certification about what is said in the complaint – including that the factual allegations have evidentiary support
         3. If was certified falsely signer can be sanctioned
         4. Way to discourage frivolous clams
         5. Rule 11 motions themselves can be frivolous, may be sanctioned under rule 11!
         6. Green: Judges probably don’t sanction under this rule enough to properly prevent frivolous claims
      3. Motion for Summary Judgment
         1. On the basis of evidence found during discovery, no reasonable jury could find for plaintiff
         2. this stops the frivolous case before trial
7. EXAMPLE of difference between legal insufficiency, inadequate specificity, and inadequate evidentiary support:
   1. Defendant Jefferson Hunt intentionally engaged in contact with the person of Plaintiff Michael Green that was harmful or offensive, causing damages.
      1. What is wrong with this?
      2. It is inadequately specific under 8(a)(2)
         1. What kind of damages?
         2. When/where/how was Professor Green wronged?
            1. what was this harmful or offensive touching…?
      3. It does state a claim – all the elements of battery are there
      4. NOTE: one could also say that it has inadequate evidentiary support, since this did not happen, but the main problem with the complaint on its face is 8(a)(2)
   2. On Wednesday, September 27, 2017 at 2:41 p.m., Defendant Jefferson Hunt 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.
      1. what is wrong with this?
      2. It is specific enough for 8(a)(2) –
         1. It gives defendant proper notice of what he is accused of
      3. problem is legal insufficiency - it fails to state a claim
         1. this claim does not add up to a violation of the law
8. On Wednesday, September 27, 2017 at 2:41 p.m., Defendant Jefferson Hunt hit Plaintiff Michael Green in the face, causing him extensive physical harm.
   1. This is adequately specific under 8(a)(2)
   2. it also states a claim (for battery)
   3. Only issue is that Green has no evidentary support (we know this because it did not actually happen…)
      1. We can’t actually screen this out in the pleading stage
      2. The wording of the complaint is adequate, so the only way to stop it from proceeding is after discovery
      3. then will bring rule 11 sanctions, and motion for summary judgment
9. Why cant you always get to discovery? – just slap a complaint together that states a claim and is adequately specific
   1. You can be sanctioned under a Rule 11
10. Why have this system? Why not rely on pleading standards to screen out actions with inadequate evidentiary support?
    1. too hard to tell from language of complaint what level of evidentiary support is behind it
    2. Sometimes the evidence you need is in the hands of the defendant – there is no way you could get it without discovery
       1. We want to allow cases like this to go to discovery so we can see if there is evidence of a wrongdoing
       2. Balancing act between plaintiff’s right to bring suit and defendants interest in not having to contest frivolous lawsuits
11. Question: why don’t judges sanction under rule 11 more often?
    1. It is a really serious accusation
    2. It may be difficult to prove
    3. Failure of Rule 11 enforcement is why we have cases like Twombly/Iqbal
12. It is useful to distinguish two types of challenges of the plaintiff’s compliant that are made in the cases on pleading in Glannon
    1. *First type*: D is not claiming that the P does not have evidentiary support for the allegation  
       - D is worried that what is alleged does not add up to a violation of the law (some element of a cause of action looks like it is missing)
       1. Example: assume that under the relevant law there is no strict liability for product defects, only negligence liability
       2. P alleges that D manufactured the product “improperly”
       3. Does the P fail to state a claim or not – how generous should we be in reading the allegations?
       4. This is what Conley addresses – it is also what is going on in the Dioguardi and in Doe v Smith
       5. Conley standard - 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
          1. the language “unless it appears beyond doubt that the plaintiff can prove no set of facts” is misleading
          2. the point is give a very generous reading – try to find a claim instead of finding no claim
          3. This may not be the best way to go about this – cases that fail to actually state a claim may get through to discovery phase
    2. Second type: D thinks P does not have evidentiary support for the allegations  
       - all the elements for a cause of action are alleged (there is no Conley problem) but the D thinks that P lacks evidentiary support for an allegation (that is why the P lacks specificity)
       1. Defendant argues that the allegation is vague because there is no evidence
       2. If there was evidence, the pleading would be specific instead of vague
       3. This is what is going on in Twombly and Iqbal
13. Dioguardi v. Durning
    1. Court is very generous in a reading of a rambling complaint and finds that it does state a claim
14. Doe v. Smith
    1. two minors – one films them having sex and shows to students at school
    2. suit brought in federal court
    3. Same situation – the pleading does not explicitly state a claim but the court of appeals gives it a generous reading and finds that it states a claim – another example of Conley rule
    4. Lots of state law violations listed
    5. There is just ONE federal claim – wiretapping statute
    6. DCt dismisses it for failure to state a claim – failed to allege an interception
       1. then dismisses state law claims
       2. does not dismiss them for lack of SMJ
          1. they have supplemental jurisdiction, because of the federal wiretapping action
             1. even a federal action that fails to state a claim can “arise under” federal law and so be the federal hook for supplemental jurisdiction
       3. the state law actions are instead dismissed according to a discretionary rule of abstension (we will discuiss it later) – the state law actions have supplemental jurisdiction but ct chooses to dismiss them because they would be better entertained in state court
    7. Ct App reverses
       1. The statute prohibits intercepting “wire oral or electronic communication”
          1. Court assumes parties were likely talking while being filmed at some point
             1. so there was an oral communication
          2. also the filming was an interception of oral communication
             1. it was “the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device”
             2. This is a VERY generous (maybe too generous) reading
             3. This problem also could have been solved by asking the plaintiff to re-draft a complaint
    8. also - Liability generally requires proof that the interception or disclosure occurred in or through the means of interstate commerce, such as the telephone network.
       1. Ct App assumes that there was dissemination through email which would satisfy this
    9. Court also states plaintiff is not required to predict and contest potential defenses
    10. The court here has not “fudged” the law, but they have “fudged” what is actually written in the complaint in order to read into it a claim that was not explicitly written
15. Inconsistent Pleading
    1. Plaintiffs are allowed to state claims/defenses that contradict each other or incompatible with each other – but they all have to satisfy R 11 - have evidentiary support
       1. Example: defendant one or defendant two wronged me but not both
          1. Plaintiff can still sue both as co-defendants
          2. but factual allegations have to have evidentiary support
          3. you can have evidentiary support for contradictory claims
             1. eg one witness said A did it- the other said B did it
16. Pleading Special Matters (Rule 9)
    1. Allegations of Fraud or Mistake are held to higher pleading standards
       1. Why heightened pleading?
          1. These allegations are disfavored and can be fishy
             1. maybe higher pleading standards because they are more likely to be frivolous
          2. or maybe higher pleading standards just to satisfy notice to the D
             1. defendant needs to know exactly what statements they made constitute fraud
       2. Elements of Fraud:
          1. Statement or omission (if duty to speak)
          2. Of material fact
          3. That is false or misleading
          4. With knowledge of falsity
             1. Often intent that plaintiff rely
          5. Reasonable reliance on statement by plaintiff
          6. Causation of damages
       3. Allegations of mens rea can be stated generally
          1. Why this lower standard for these elements?
             1. Its very difficult to get evidence of a persons mental state
             2. There is no way to be specific about a person’s mental state
17. Leatherman Case
    1. Example of federal court trying to introduce a heightened pleading standard to weed out cases that are more likely to be frivolous – slapped down by SCt
18. Twombly Case
    1. Enormous anti-trust class action
    2. Under Sherman act, class claimed that the “Baby Bells” were colluding with one another to prevent competition – thereby harming consumers
       1. an *agreement* (conspiracy etc.) in restraint of trade is needed
    3. Action was dismissed for failure to state a claim
       1. Did the plaintiffs actually fail to state a claim?
          1. The plaintiffs use the “magic words” of the elements, shouldn’t that be enough?
             1. they said that there was an *agreement*
             2. Stevens’s dissent explains this frustration further
          2. Court makes a distinction between conclusory claims and factual claims
             1. Says only conclusory claim of an agreement was made
             2. But doesn’t this go back to code pleading requirements?
       2. Is the problem instead that 8(a)(2) was violated? Inadequate Specificity about the agreement?
          1. perhaps the problem is that the plaintiff does not allege when, where and between whom the agreement took place
          2. but you can prevail on an antitrust claim without an actual handshake agreement
          3. there can be a mutual understanding without communication
          4. how is this proven? – by showing that the competitors are not acting in a way that would be economically rational absent an agreement
          5. e.g. there is money to be made by going into each other’s territory, but they don’t – only way to explain is that they have an agreement not to compete
          6. so there is no need to allege when and where the agreement took place
          7. there was notice – the Ds knew what the P was saying they did wrong
       3. the real problem the majority sees is that there is inadequate evidentiary support for the claim of a tacit agreement
          1. Plaintiff only has evidence of parallel activity
          2. BUT the antitrust statute prohibits the AGREEMENT, not parallel behavior, which can be coincidental
             1. there is an innocent explanation for the parallel behavior – all the baby bells are doing the same thing because they have good economic reasons to do so
    4. This case was held to a higher standard because of how huge and expensive the discovery would have been