Civil Procedure notes: October 4, 2017

Purposes served by a complaint under the Federal Rules (as originally intended)

* Give notice to D
* Allow D and ct to tell before discovery and trial whether the case is before the wrong forum – whether there is jurisdiction or not
* Allow D and ct to tell before discovery and trial whether a claim is stated.
* BUT not used to screen out factual allegations that don’t have evidentiary support; complaint is just a piece of paper. P could satisfy pleading standards by just lying.
* How to screen out frivolous complaints (that is those with factual allegations with insufficient evidentiary support to justify burden of discovery and trial)? Determine if frivolous after discovery, and then use Rule 11 sanction. To stop frivolous cases from going to trial, summary judgment.
* Determining whether a case has sufficient evidentiary support is a subtle matter - Want P to have day in ct, also want cases with merit to go forward. Evidence in complaint is often in hands of D. But also don’t want to burden the D with costly discovery, and “fishing expeditions”.

Procedure for addressing the three things that can be wrong with the (non-jurisdictional) factual allegations in a complaint under the Federal Rules system:

1. legal insufficiency – motion to dismiss for failure to state claim or defense of failure to state a claim in answer
2. Inadequate specificity – not specific enough to give sufficient notice. Motion for a More Definite Statement. FRCP 12(e) 0 can be used to dismiss case too
3. Lack of evidentiary support to justify discovery/trial – no evidence to support. Must go to discovery, Rule 11 sanction, summary judgement. – But Twiqbal changes things herte.

Inconsistent pleading:

* Used to need a consistent theory, in an attempt to flush out cases that are frivolous.
* Now, nothing wrong with pleading inconsistently, since a lot of facts unknown for P – but do have to satisfy R 11 with respect to each

Important to distinguish two type of challenges to P’s complaint in cases in Glannon book:

1. Really wonder whether the words satisfy a cause of action (did not use the ‘magic words’), not about whether P is being truthful. Conley: be generous, use interpretation of words that allow a claim to be stated. Green: In this sense Conley is still good law. Twiqbal addresses a different problem.
2. Not really about failure to state a claim, but really wonder if P has evidentiary support. Twiqbal problem. Used only ‘magic words’ because no evidentiary support.

Twombly recap:

* What was wrong with the complaint?
* Ps used the magic words, ‘agreement’, ‘conspiracy’ in restraint of trade. So is just false that they failed to state a claim under federal antitrust law.
* What 8(a)(2) violated then? They did not give notice of the nature of the agreement (between whom? When was it made?)
* Problem is that you don’t need a ‘handshake’ agreement, just need to show an implicit understanding between baby bells. Just show that behavior is not economically logical, so must be an agreement. P trying to show a tacit agreement. The Ds were put on notice about that.
* The real problem is evidentiary support. What Ps had was parallel behavior (baby bells all did the same thing). But there is an innocent and reasonable explanation (baby bells under similar economic pressures), so not enough evidence to support a costly discovery. Cost of discovery is high and Rule 11 sanctions have been insufficient, so must try to screen out these cases early. Pleading needs to have enough to suggest that there will be enough evidence during discovery.
* Does Twombly frustrate other purposes of a complaint?
	+ D must answer the complaint, which has a lot of factual allegations. D must deny/admit all of them. The longer the complaint is the harder answering is. Complaints now become hundreds of pages. They can no longer provide a roadmap for trial.
* Does SCt have power to change the rules for pleading like this? SCt makes the F.R.C.P. But the rule making process was ignored: rules committee, notice and comment - people would respond, goes to congress (who can veto).

Iqbal:

* Claim is Muller and Ashcroft were discriminatory. Policy that is being objected to: plaintiff and others were held captive until they are cleared; defendants would not make this policy if it was for Christians and not Muslims.
* In Twombly: the magic word was ‘agreement’, the evidence was ‘parallel conduct’, which was not enough to justify moving into discovery. In Iqbal, magic words were ‘discriminatory intent’, the evidence was ‘disproportionate impact on Muslims.” That too was not enough since there was an innocent explanation for the disproportionate impact (namely that the hijackers in 9/11 were Muslim). Discovery not is not only expensive but would prevent Ds from doing their jobs.
* Again the problem was not failure to state a claim (the magic words were used). And it was not that the D’s were not put on notice. But SCt doesn’t think P has sufficient evidentiary support, as shown by conclusory nature of the allegation s in the complaint. What could P have put in the complaint? Evidence of the discriminatory intent of the Ds, which is hard to get during pleading.
* How does Iqbal ct justify plausibility standard, given 8(a)(2)?
	+ The word ‘showing’ in 8(a)(2): “a short and plain statement of the claim **showing** that the pleader is entitled to relief.” – The Twiqbal standard is what is required to “show”
* Is there another way to weed out frivolous complaints before discovery without using heightened pleading standards? Assuming Rule 11 is broken.
	+ Have mandatory Rule 11 proceeding at the beginning of lawsuit, and show ct what each side has for evidence. Don’t try to do it indirectly through pleading standards.

What allegations does Twiqbal apply to?

* Allegations of jurisdiction? No, because word ‘showing’ is not there. Twiqbal doesn’t need to apply to jurisdiction because it’s not costly like discovery, and not a lot of frivolous claims regarding jurisdiction.
* Does it apply to counterclaims? Yes.
* What about affirmative defense? Not a claim for relief, ‘showing’ wording is not there in pleading rule for affirmative defenses - 8(b) - so most courts hold Twiqbal does not apply. But if one is concerned about the purposes behind Twiqbal it should apply to affirmative defenses bas much as requests for relief.
* Compare to Rule 9(b), does it apply to affirmative defenses? Yes.

How to plead to satisfy Twiqbal:

* Allegations have to be “plausible.” Suggest there is evidentiary support during discovery. Conclusory allegations might be frowned upon.

Responding to a complaint – Default

Virgin Records America, Inc. v. Lacey

* 21 days to answer or submit preanswer motion
* D didn’t
* Motion for Entry of Default was supposed to be mailed to the D, but was not done in this case. But ct concluded this was not a problem because the entry of default was mailed to her.
* Entry of default – clerical, legal consequence: D admits to all facts in complaint. But that does not mean that you get your relief.
* P must first bring motion for Default judgment – in the default judgment the court orders relief. Ct first needs to figure out whether a claim is stated. Then decide whether relief is appropriate.