1. Did preanswer motions and waiver of defenses last time
2. Now – answers
3. Answers justify why the relief requested by the plaintiff is refused
4. There are four types of defenses in an answer
   1. PJ, SMJ, venue, service, process
      1. these are the procedural defenses, which could also have been in a pre-answer motion
      2. But they can also be in an answer (to the extent that they are not waived)
   2. failure to state a claim
      1. also could be put in a preanswer motion
      2. claims that even if everything the P alleges is true it does not add up to a legal ground for relief
   3. negative defenses
      1. the answer denies one of the factual allegations in the plaintiff’s complaint that is essential for the plaintiff stating a claim
         1. eg D denies he was negligent
   4. affirmative defenses
      1. defenses where the D must plead and prove his own factual allegations
      2. affirmative defenses defeat liability even if the P’s factual allegations states a claim and the P proves all his factual allegations
      3. Examples of this would be claim preclusion or statute of limitations. There are also affirmative defenses tied to particular causes of actions.
      4. **Rule 8(c)** lists some:  
                 • accord and satisfaction;  
                 • arbitration and award;  
                 • assumption of risk;  
                 • contributory negligence;  
                 • duress;  
                 • estoppel;  
                 • failure of consideration;  
                 • fraud;  
                 • illegality;  
                 • injury by fellow servant;  
                 • laches;  
                 • license;  
                 • payment;  
                 • release;  
                 • res judicata;  
                 • statute of frauds;  
                 • statute of limitations; and  
                 • waiver.
      5. Green: notice that this is just a procedural rule that lists some possible affirmative defenses. Whether they are actually available depends upon the relevant substantive law
         1. P (NY) sues D (Ill) in federal court in Illinois under Illinois negligence law  
              
            under Illinois negligence law, the plaintiff must plead and prove his own lack of contributory negligence in order to state a claim  
              
            does FRCP 8(c) make a difference to that?
         2. Green: No - at least with respect to who has the burden of proof, Illinois law must be followed in federal court – P must prove his own lack contributory negligence – Green thinks that even concerning pleading, 8(c) shouldn’t make a difference
5. Counterclaims are not defenses, they are claims for relief by the defendant against the plaintiff. – they can also be added to answer, but are not grounds for why the D is not liable to the P. They are claims by the D that the P is liable to the D
6. Affirmative defenses allege new facts. The pleading standard for them is in FRCP 8(b)(1)(A)
   1. (1) In General. In responding to a pleading, a party must:  
              (A) state in short and plain terms its defenses to each claim asserted against it;
   2. Most courts think that Twiqbal doesn’t apply to affirmative defenses because the word “showing” is not in 8(b)(1)(A)
7. 8(c)(2) if a counterclaim is mistakenly presented as a defense, or a defense is mistakenly treated as a counterclaim, the court should treat is as if it were done correctly.
   1. Why might the two be confused?
   2. The same fact can be the ground of an affirmative defense and a counterclaim
   3. E.g. P sues D for negligence. D denies negligence and alleges that P was negligent
      1. The allegation that P was negligent is the ground for an affirmative defense (contributory negligence) and the ground for a counterclaim against P for the damages P’s negligence caused D.
8. **Reis v. Concept industries** – Reis sues Concept, and Reis moves to strike parts of Concept’s answer.
   1. There was a motion to strike an “affirmative defense” of failure to state a claim, but this is not discussed in Glannon (it is not in the reading)
      1. The court strikes it for this reason:
         1. Concept's first affirmative defense is nothing more than a recitation of the standard for a motion to dismiss under Rule 12(b)(6). As alleged, the defense provides no explanation as to how and in what portion of the complaint Reis has failed to state a claim.
      2. Green: this is a mistake
         1. Failure to state a claim is not an affirmative defense and does involve any factual allegations
         2. To bring up the defense, you need only state that the P fails to state a claim
            1. Your argument that it fails to state a claim will be in the briefs
            2. True, there must be an argument in the briefs, not a bare assertion – usually this will involve listing some possible causes of action and showing why what the P alleges does not satisfy them
            3. Why did the court strike this defense without briefing

Probably because it could not see how the P failed to state a claim – alleged the elements of breach of contract

* 1. As its second affirmative defense Concept states: “Reis breached the contract on which it purports to rely, and that contract may be void for fraud and/or failure of consideration.”
     1. The court strikes this based on 8(b) and 9(b) – the lack of consideration defense is so vague it doesn’t even satisfy its generous notice pleading standards under 8(b)
     2. The fraud defense is subject to 9(b)
  2. As its third affirmative defense, Concept alleges: “Reis's payment claims for the silencer fixture are barred because Concept never authorized Reis to begin manufacturing the fixture, as Reis itself has acknowledged.”
     1. the court strikes this because is not an affirmative defense – it is actually a negative defense – the D denies that there was a contract on the matter
     2. The defendant had a bad lawyer in this case.
  3. Concept's fifth affirmative defense states: “Reis's claims are barred or limited by laches, waiver, estoppel, unclean hands, or similar legal or equitable doctrines.”
     1. This is struck again as not satisfying 8(b) standards
  4. Concept's sixth affirmative defense states: “Concept reserves the right to add additional affirmative defenses as they become known through discovery.”
     1. This is not an affirmative defense either - the court knows you can amend your answer to add new affirmative defenses
  5. Note: Striking defense with prejudice means they cannot present the defense again. Without prejudice means you can try to re-allege with facts.
  6. Also a motion to strike the following denial:
     1. “To the extent the alleged ‘contract’ created by issuance of this purchase order failed to warrant the trim speed and cycle time that Concept required, it was procured by fraud and was of no validity; accordingly, the remaining allegations in this paragraph are denied as true.”
     2. This is not a denial
        1. It is actually the introduction of the affirmative defense of fraud
        2. Here is an analogy:
           1. P alleges that D was negligent  
                
              D answers – “to the extent that the plaintiff was contributorily negligent this is denied”

Not a denial of D’s negligence - it is the allegation of an affirmative defense of P’s negligence – cannot even tell if D’s negligence is denied

1. How can you tell if something is an affirmative defense or an element of the cause of action? Usually it is clear, but sometimes it isn’t
2. Ingraham v. U.S. –
   1. Suit for medical malpractice against the US
      1. Suit is under federal tort claims act
         1. Waives sovereign immunity for suits against US for torts
         2. Standards will be under state tort law
   2. D attempted to amend answer to introduce Tex tort reform statute limiting liability to $500,000 for pain and suffering (not medical costs)
   3. amendments to answers are allowed, but there is a point where it is too late
      1. whether what is requested to be added is an affirmative defense or not will be relevant to whether amendment is allowed.
         1. More likely allowed if the argument was that P failed to state a claim for relief above $500K
         2. Introducing a new affirmative defense too late in the game can be prejudicial to the plaintiff. If Ingraham knew there was a cap on pain and suffering, they would have changed the way they presented the damages.
   4. How to determine whether the cap is an affirmative defense
      1. Some considerations in favor of reading as an affirmative defense
         1. D is more likely to have access to relevant evidence than P
         2. The reason against liability is disfavored
         3. The reason against liability is extrinsic to the wrong – it is a reason to block liability even though there was a wrong, as opposed to a reason to think there was no wrong at all
      2. suggest that the cap is an affirmative defense
         1. Tort Reform – Doesn’t deny that there was a wrong for over the cap amount, but it bars recovery over that amount for good policy reasons – e.g. excessive malpractice insurance costs for doctors
3. Is a court permitted to bring up affirmative defenses sua sponte?
   1. Generally not – e.g. statute of limitations – no, contributory negligence - no
4. Plaintiffs will often plead more than they have to in a complaint and so plead why an affirmative defense does not apply
   1. That can be a mistake since they will bring into issue something that might not have come up otherwise
5. Rule 11 – Stops frivolous actions.