1. 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 (the tort)
         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
2. 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

* 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.