* in the cases in the Glannon chapter, distinguish two types of challenges of the plaintiff’s complaint.
* 1st - Really about failure to state a claim  
  - D is not claiming that the P does not have evidentiary support for the allegations  
  - 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)
  + this is addressed by Conley v. Gibson, 355 U.S. 41 (1957) – (Which Prof. Green thinks is still good law).
    - Conley v. Gibson - “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”  
      not really about failure to state a claim
* 2nd - D thinks P does not have evidentiary support for the allegations
  + all the elements for a cause of action are there but the D thinks that P does not have sufficient evidentiary support for an element (that is why the P lacks specificity)
  + before 2007 this was solely a matter to be dealt with through discovery-Rule 11-summary judgment. Now…Twiqbal
  + Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ***“show[n]”***—“that the pleader is entitled to relief.” Fed. Rule Civ. Proc. 8(a)(2).
* how to plead to satisfy Twiqbal… It’s dangerous to read Twiqbal as demanding too much. It has to be pretty bad to block someone from their day in court just from the words in the complaint.
* Iqbal
  + “[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.”
  + “[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.
  + “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense”
* Twombly – likelihood of evidence, after taking out the legal conclusions.
  + “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.”
  + Satisfies Twombly?: the defendant drove negligently into the plaintiff (NO! Conclusory. How were they negligent?)
  + What about allegations that cannot really be specific such as state of mind? You throw in some evidence: (How much evidence do you need? More than just a bare claim)
  + Exam question example:
    - On January 12, 2011, Jane Jones, who was updating Joe Smith’s files, negligently left her laptop computer on a bench outside her office building at 1000 5th Ave., New York, New York.
    - Sensitive financial information concerning Joe Smith, including his Social Security Number and credit card numbers, were negligently left unencrypted on Jane Jones’s laptop.
    - Joe Smith is himself careful with his financial information.
    - Six weeks after the loss of the laptop, Joe Smith was the victim of identity theft, perpetrated by someone as yet unknown, in which a fake credit card was created under his name
    - Duty, breach, negligence, causation
    - What, if anything, is the Twiqbal problem here? Lack of specificity about the negligence element? No. Does Twiqbal really require more than describing the negligent act of leaving the laptop lying around with unencrypted financial info? That is surely specific enough.
    - The real issue is causation. Did the negligence cause the harm (causation)? Evidence plaintiff is relying on is that these two events happened close together time-wise, not that there is actual causation. How do you operationalize Twiqbal for a case like this?
      * This is taken from a real case – the majority thought that Twiqbal was satisfied but there was a dissent. The time gap between the negligence and the financial harm was greater though.
  + Twiqbal forces you to be more specific in your claim. It’s scaring plaintiffs and their lawyers, but in the right way? Twiqbal is defendant-protective.
* do you need a smoking gun to satisfy Twiqbal? Well, it would satisfy Twiqbal. But, no, it is not necessary.
  + Ocasio-Hernandez v. Fortuno-Burset, 639 F. Supp. 2d 217 (D.P.R. 2009) (“As evidenced by [Iqbal], even highly experienced counsel will henceforth find it extremely difficult, if not impossible, to plead a section 1983 political discrimination suit without ‘smoking gun’ evidence. In the past, a plaintiff could file a complaint such as that in this case, and through discovery obtain the direct and/or circumstantial evidence needed to sustain the First Amendment allegations.”) First amendment claim that they were being discriminated against for their political views.
  + reversed by Ocasio-Hernandez v. Fortuno-Burset, 640 F.3d 1 (1st Cir. 2011) – said plaintiff had enough to satisfy twiqbal.
  + The complaint states that the defendants asked several plaintiffs about “the circumstances pertaining to how and when they got to work at Fortaleza”; that an aide to Berlingeri similarly “asked each of them as to how and when they began work at the Governor's Mansion,” taking notes on their responses; and that confidential clerical personnel brought in by the new administration “insisted on interrogating them in order to ascertain their respective political affiliations.” … In short, in light of the pleadings as a whole, these allegations plausibly show the defendants' awareness of the plaintiffs' political affiliation at the time that they were terminated.
  + As we have often emphasized, one rarely finds “smoking gun” evidence in a political discrimination case. Circumstantial evidence must, at times, suffice. Moreover, the requirement of plausibility on a motion to dismiss under Rule 12(b)(6) “simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of the illegal [conduct].” The allegations above plausibly show that each defendant possessed knowledge of and shared some responsibility for the termination of employees at La Fortaleza.
  + Evidence: The plaintiffs alleged that they were fired less than ten weeks after Governor Fortuño assumed office. Although the district court is correct that temporal proximity between the change in political administration and the turnover of staff is not itself sufficient to satisfy a plaintiff's burden of proof on the causation element of a political discrimination claim, it unquestionably contributes at the motion to dismiss stage to the reasonable inference that the employment decision was politically motivated. In contrast to their treatment, the plaintiffs alleged that NPP-affiliated employees were promoted to high-level trust positions following the change in administration. Similarly, the plaintiffs alleged that their positions at La Fortaleza were filled almost immediately by NPP-affiliated workers.

Prof.Green says he’s inclined to believe that Twiqbal doesn’t matter in many garden variety cases, but cases where you have to get to intent/state of mind, it can come into play.

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.

Responding to a complaint…

* Entry for default – clerical, but it is the equivalent of the def. submitting an answer and not contesting any of the facts
* Motion for a default judgment – you need more than just all of the admissions to get the judgment. Judge has to make sure judgment is appropriate. Judge has to determine if plaintiff has stated a claim. Judge can do this sua sponte anyway, but normally the def.’s lawyer would take care of that. When you default, the judge has to do it for you. They have to bring it up to avoid using improper legal principles for wasting the public’s resources. Remember, court has to look to if they have SMJ. Sometimes, they’ll even look to if there is PJ. Then, after these administrative determinations, determining if/what type of relief is appropriate.

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.
* Collateral Attacks:
  + - P sues D in federal court in New York  
      D appears and argues lack of PJ and SMJ  
      D loses and appeals are not pursued  
      P then sues on the judgment in state court in CA, where D has assets  
      Can D challenge the federal judgment for want of SMJ and PJ?
      * No, it’s issue precluded – issue has already been decided against him.
      * What if D had appeared but not brought it up? He consented to it.
    - P sues D in federal court in New York  
      D defaults  
      P brings a motion for a default judgment  
      The court determines whether it has SMJ and PJ before entering the default judgment  
      P then sues on the default judgment in state court in CA, where D has assets  
      Can D challenge the default judgment for want of SMJ and PJ?
      * Pennoyer. Yes, you can bring it. What if the first court determined there was PJ. That is not enough. It’s not binding on the defendant because the def. wasn’t even there, so they’re not issue precluded. He can still collaterally attack it.
      * There is an argument that the answer is “No.” Even though it is not waivable in the original proceedings. It seems like you should be able to if you can challenge PJ, but that’s not always the case. Some courts say you can challenge a default judgment for SMJ (Prof. Green agrees you should be able to).

Pleadings – only a certain number of pleadings are allowed.

**FRCP 7. Pleadings Allowed; Form of Motions and Other Papers**(a) Pleadings. Only these pleadings are allowed:  
    (1) a complaint;  
    (2) an answer to a complaint;  
    (3) an answer to a counterclaim designated as a counterclaim;  
    (4) an answer to a crossclaim;  
    (5) a third-party complaint;  
    (6) an answer to a third-party complaint; and  
    (7) if the court orders one, a reply to an answer.

Pre-answer motions – you have to admit or deny each element of a claim, and there is no reason to do that if you can get rid of it quickly and easily. Getting rid of the actions before you have to go through the process of an answer.

* A motion is very bare bones – it is a request of the court to do something (the arguments for/against the motion will be in the briefing)
* Possible Pre-answer motions: FRCP 12(b) How to Present Defenses.  Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:  
      (1) lack of subject-matter jurisdiction;  
      (2) lack of personal jurisdiction;  
      (3) improper venue;  
      (4) insufficient process;  
      (5) insufficient service of process;  
      (6) failure to state a claim upon which relief can be granted; and  
      (7) failure to join a party under Rule 19.
* FRCP 12(b): “No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.”
  + What is this about? Remember that in special appearances, by answering that you failed to state a claim, you submit to PJ.
  + But this provision makes is clear that the federal approach is even more generous to the D than a special appearance
    - Can challenge PJ and bring up defenses on the merits
* “If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.”
  + What is this about?
  + First of all - FRCP 12(c) Motion for Judgment on the Pleadings. A motion usually brought after pleading period stating that on the basis of the pleadings, without looking at bthe evidence, one can see that a judgment should be given to the P or to the D.
    - After the preanswer motion period, a motion to dismiss for failure to state a claim will be in the form of a motion for a judgment on the pleadings
    - But a P can also get a judgment on the pleadins
      * Eg the defendant accepts all of the plaintiff’s allegations but introduces a legally insufficient affirmative defense –
    - If there are any disagreements about the facts, a motion for a judgment on the pleadings won’t work, you’ll have to consider the evidence and dispose the case through summary judgment or trial.
  + Now someone who is making a motion to dismiss for failure to state a claim or a motion for a judgment on the pleadings (both of which do not consider evidence at all, but simply look at what is said in the pleadings) might introduce evidence
  + If that is the case, then it must be treated as a motion for summary judgment and both sides must be given a reasonable opportunity to present all the evidence that is pertinent to the motion.
* 12(e) Motion for a More Definite Statement.  A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.
* 12(f) Motion to Strike.  The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:  
      (1) on its own; or  
      (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

Timing

* FRCP 12(a) Time to Serve a Responsive Pleading.  
      (1) In General. Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:  
          (A) A defendant must serve an answer:  
              (i) within 21 days after being served with the summons and complaint; or  
              (ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent . . .  
          (B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.  
          (C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.
  + What happens if the court denies your pre-answer motion? You have 14 days to answer.
* 12(a)(4) Effect of a Motion.  Unless the court sets a different time, serving a motion under this rule alters these periods as follows:  
          (A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court’s action; or  
          (B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.
  + Motion for a more definite statement, granted, you get the new claim, now you have 14 days to answer.

Waiver of defenses (“HIGHLY TESTABLE”)

* About particular defenses in things like PJ, venue, service of process, etc… If you don’t bring it up in a timely manner, they are waived.
* 12(g) says in your motion, you have to list everything that is available to you at the time
* 12(h) consequences of not bringing them in

SMJ, can be brought up at ANY time, NOT waivable

Failure to state a claim, if you bring up in a pre-answer motion under R 12, you can’t bring it up in a second pre-answer motion (unless it was not available to you at the time), but you can bring it up in your answer or later, so really not a big deal

These are the big deals (they’re things you know about): pj, venue, process, service

* If you submit a pre-answer motion under R 12, it must be in it – it cannot be brought up in a second pre-answer motion (unless it was not available to you at the time)
* If your first response is instead an answer it must be in it (unless you can add it through an amendment “as a matter of course” or it was no available to you at the time)
* Examples:
  + - P serves D in suit for battery  
    - Within 21 days D makes a motion to dismiss for lack of PJ  
    - D’s motion is rejected by the court
  + May D make another pre-answer motion to dismiss for improper venue? NO,
    - - unless it wasn’t available to you the first time, like: if your first motion was for a more definite statement and couldn’t have known there was no venue from the allegations without the more definite statement.
      * Transactional venue is all about what the plaintiff alleges happened. Facts of the merits overlap sometimes with facts of venue.
  + - May D introduce venue as a defense in his answer? No (again, unless not available first time)
  + May D introduce failure to state a claim in a second pre-answer motion?
    - No (unless not available at that time), not in a second pre-answer motion, but can do it later in his answer or after the pleading period.  
      - In his answer? Yes!  
      - After the pleading period? Yes!
  + - May D introduce lack of SMJ in a second pre-answer motion? Yes!  
    - In his answer? Yes!  
    - After the pleading period? Yes!
  + (In fed. Court)P serves D in suit for battery  
    Within 21 days D answers  
    May D include with that answer (not pre-answer motion) the defense of lack of PJ? Yes!  
    After the answer may D make a motion to dismiss for lack of SMJ? Yes!  
    After the answer, may D ask for a judgment on the pleadings on the ground that P fails to state a claim? Yes!  
    After the answer, may D make a motion to dismiss for insufficient service? NO, it is waived unless it wasn’t available at the time.  
    May D save the defense of insufficient service by including it the answer by an amendment under R. 15 “as a matter of course”? Yes, the weird thing where if your first response is an answer, there is a narrow time where you can amend as a matter of course. We will discuss later
  + (In fed. Court) P serves D in suit for battery  
    Within 21 days D makes a motion for a more definite statement and a motion to dismiss for lack of PJ. The court grants the motion for a more definite statement but denies the motion to dismiss. P responds to the motion for a more definite statement, serving D with an amended complaint. D makes a motion to dismiss for failure to state a claim and a motion to dismiss for insufficient service.
    - Are they available or waived? Service – rule 5 applies to amended complaint, not rule 4. Service is waived because PJ has already been mentioned and you could’ve mentioned service then.
      * Nature of amendment matters for failure to state a claim – it was probably amended b/c of having something to do with this, so probably not waived.

Hunter v. Serv-Tech Inc. (E.D. La. 2009)

* Def. didn’t bring up PJ in his first response, but tried to say “I reserve the right to bring it up later,” but that doesn’t work in this area.