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.

Rule 11

There to keep frivolous pleadings/actions/defenses from proceeding. Frivolous because: legally frivolous (legal arguments are unreasonable), improper motive, or insufficient evidentiary support (most important for us). Twiqbal has started to weed out that last one during the pleading phase because rule 11 wasn’t doing its job. Twiqbal sets a threshold before allowing you to proceed, “safer” because it’s not declaring the lawyer did something WRONG. But dangerously looking for the evidentiary support in the allegations. (Best solution would be a preliminary hearing).

Are frivolous actions a problem…?

Congress, American Medical Association would have you think so. But medical malpractice suits and amounts are going down (and not just because of tort reform).

Frivolous doesn’t mean it’s going to LOSE. Could be sufficient evidentiary support to go forward, so it’s hard to tell if there actually are many frivolous causes.

Why bring a frivolous case with a very low probability of success.

- Lawyer makes money even if it loses? (contingency fee agreements are great for preventing that)

-Punish the D (vindictive P)

-Unmeritorious P mimics legitimate P against D and tries to get settlement

- Strike suit: brought and settled for less than the cost of litigation to the other side – both sides could know it’s frivolous but it is cheaper for the D to settle than litigating and winning

11(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney’s name — or by a party personally if the party is unrepresented. The paper must state the signer’s address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney’s or party’s attention.

Court won’t look at anything without a signature. Be careful what you sign: you assert it’s true to the best of your knowledge after an inquiry reasonable under the circumstances…

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

objective standard - Rule 11 is a negligence standard rather than an intentional standard – does not matter that you truly believed that it wasn’t frivolous

continuing duty

Back to 11(b). Every time you are signing, filing, submitting, or later advocating you are making the Rule 11 certification - if it’s not true later and you’re advocating it you’re violating rule 11. Be careful. Usually the allegations you’re making (let’s say in a complaint) are constantly being advocated in the course of the lawsuit as you ask for relief. If the certification is suddenly not true anymore, you’re in trouble.

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

Improper purpose

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

Not GOOD FAITH Non- frivolous is objective.

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and  
  
(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Evidentiary support provision is important here for us. Balancing act justifying when a suit can go forward (sometimes D has the evidence of wrongdoing). Must be reasonable that evidence will arise late (may need evidence of probable evidence).

Denials require evidentiary support and satisfy rule 11. This is most likely most violated by frivolous denials/answers.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37. S

Separate rule for discovery. Still can’t be as frivolous as you want. We’ll get to that.

11(c)(2) Motion for Sanctions.   
A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.

Scalia dissented to this 21-day safe harbor rule. Serve on other party before bringing to the court to give them time to cure. This was introduced to try to reduce litigation about rule 11.

Assume each allegation in a complaint was prefaced with the following statement:  
  
 “The following allegation is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery”  
  
Would R 11(b)(3) be satisfied?

No. Still violates if it’s not reasonable. You’re certifying that it’s likely to have evidentiary support. You have to specifically identify that the allegation doesn’t have evidentiary support with this language, so rarely used.

can a plaintiff lose at summary judgment and nevertheless have satisfied R11(b)(3) at the pleading stage?

Reasonable to THINK you had or would get evidentiary support for example. So yes.

can a plaintiff defeat a motion for summary judgment and nevertheless have violated R11(b)(3) at the pleading stage?

You have sufficient evidentiary support because you got it in discovery even though it was not reasonable to think you would (this is less likely but can happen) from say a fishing expedition and got lucky. Yes.

did the complaint in Twombly satisfy R 11(b)(3)?

Had circumstantial evidence with the baby bell’s parallel behavior. Is this proto-evidence (that more will come up in discover)? SCOTUS didn’t think so. But it’s entirely possible that it is enough on its own to justify going forward.

what kind of evidentiary support satisfies 11(b)(3)?

Does not have to be enough (at that point) to defeat summary judgment. Doesn’t have to be enough that a reasonable juror would believe you. Doesn’t have to be admissible evidence.

(“Plausible” is a term of art SCOTUS made up in Twiqbal. Reasonable is more objective. Nobody knows what the plausibility standard is through the lens of Twiqbal)

what part of the complaint violated 11(b)(2)?

But there are cases where you can offer nonfrivolous arguments for change in the law - Yes Brown v. Board.

do you have to mention the non-frivolous argument for a legal contention when the contention is made?

Arguments come out later in response to R 11 motion – same for evidentiary support

sanctions?

11(c)(5) Limitations on Monetary Sanctions. The court must not impose a monetary sanction:  
  
(A) against a represented party for violating Rule 11(b)(2)…

11b2 is frivolous legal contention. Lawyers should be responsible for the legal arguments.