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 fact/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.
* 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 discovery/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.

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.