Civil Procedure: Pleadings

Eric M. Fink
Elon Law School

1 History

1.1 Ancient writ system

- Each substantive claim had an associated procedural form and writ
- Highly technical pleading Requirements
  - Failure to use "magic words" could result in dismissal

1.2 Code pleading

- Field Code (NY): 1848
  - Many other states adopted versions of the Field Code
- Common form of action for all claims (trans-substantivity)
  - Still requires detailed factual pleading

1.3 Notice pleading

- Federal Rules of Civil Procedure: 1938
  - Before FRCP, federal courts followed state procedure
  - 35 states have adopted versions of FRCP
    - Exceptions include CA, IL, NY, PA
- Allocate different functions to different steps
  - Pleadings: providing notice of claims & defenses
    - Less factual detail required
      - But see Twombly/Iqbal
    - Emphasize substance over form
  - Rule 11 & Rule 12(b): weeding out baseless claims
  - Discovery: developing facts
  - Summary judgment: narrowing factual issues

2 Pleading Under the FRCP

2.1 Applicable Rules

Rule 1

> *These rules govern the procedure in all civil actions and proceedings in the United States district courts .... They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.*

Rule 2

> *There is one form of action–the civil action*

Rule 3

> *A civil action is commenced by filing a complaint with the court*

Rule 7

> *(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.*

Rule 8

> *(a) Claim for Relief. A pleading that states a claim for relief must contain:*
>
> *(1) a short and plain statement of the grounds for the court's jurisdiction ...;*
>
> *(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and*

> *(3) a demand for the relief sought, which may include relief in the alternative or different types of relief*

Rule 9(b)

> *In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.*

2.2 Notice Pleading

- "Short and plain statement": What is sufficient?
  - Form 11–Complaint for Negligence
- Compare code pleading
  - "In an action or defense based upon negligence, it is not sufficient to allege the mere happening of an event of an injurious nature and call it negligence on the part of the party sough to be charged. This is necessarily so because negligence is not a fact in itself, but is the legal result of certain facts. Therefore, the facts which constitute the negligence charged and also the facts which establish such negligence as the proximate cause, or as one of the proximate causes, of the injury must be alleged." *Gillespie v. Goodyear Svc. Stores*, 258 N.C. 487 (1963), quoting *Shives v. Sample*, 238 N.C. 724 (1953).[1]

3 Motions Under Rule 12

3.1 Defenses/Motions to Dismiss

3.1 Rule 12(b)

- Grounds
  - 12(b)(1): Subject Matter Jurisdiction
  - 12(b)(2): Personal Jurisdiction
  - 12(b)(3): Improper Venue
  - 12(b)(4) & (5): Defects in Service or Form of Process
  - 12(b)(6): Failure to State a Claim
  - 12(b)(7): Failure to Join Necessary Party under Rule 19
- May be asserted by motion or as a defense in an Answer
  - But if asserted by motion, must be done before filing an Answer

[1] N.B. The current NC Rules of Civil Procedure follow the FRCP model. *Gillespie* pre-dates the adoption of these rules.

3.2 Joining Motions

Rule 12(g)

- May combine any of the Rule 12(b) grounds in a single motion
- Successive motions on same grounds not allowed

3.3 Timing & Waiver

Rule 12(h)

- Defenses listed in Rule 12(b)((2)-(5) are *waived* if,
  - omitted from a 12(b) motion, or
  - neither raised by motion nor included in responsive pleading
- Defenses under Rule 12(b)(6) & (7) may be raised,
  - in responsive pleading,
  - by motion, or
  - at trial
- Defense under Rule 12(b)(1) is never waived

4 Challenging the Sufficiency of a Complaint

4.1 Motion to Dismiss

- Rule 12(b)(6)
  - Failure to state a claim upon which relief can be granted
  - Challenges sufficiency of complaint under Rule 8
    - Even if everything in the complaint is true, the plaintiff does not show an entitlement to relief
      - No such claim
      - Insufficient allegations to support claim

4.2 Plausibility Standard

Bell Atlantic v. Twombly (US 2007)

- Sherman Act, § 1: "Every contract, combination ... , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."
  - Critical element: Agreement
    - Mere "parallel conduct" not sufficient for liability

        - This is a matter of substantive antitrust law
    - Court assumes truth of allegations re: common pricing, no geographic competition
    - But court treats allegation of an agreement as conclusory
        - Plaintiffs merely recite the element, without alleging facts about agreement
        - Why isn't this sufficient?
            - Plaintiffs are relying on parallel conduct to raise an *inference* of an agreement; the implicit assertion is that the parallel conduct must have resulted from an agreement, rather than independent decisions by each defendant.
            - Majority says the inference of an agreement isn't sufficiently *plausible* given only parallel conduct
                - Alternative explanation: market efficiency
    - What more should the plaintiffs have done to satisfy the Court?
        - They Court isn't saying they have to allege detailed facts about the agreement (who, what, where, when). But they must allege enough to suggest that an agreement is a plausible inference.
        - But does that place an unreasonable burden on plaintiffs in cases this this, where the relevant facts aren't readily observable or disclosed?
    - What concerns motivate the majority
        - Burden on defendant in having to answer and defend suits
    - Are these valid concerns in the context of the FRCP?
        - Rule 8(a) is supposed to require only notice of the claim, saving proof for discovery
        - Rule 11 subjects parties to sanctions for alleging facts or asserting claims without a reasonable foundation

Ashcroft v. Iqbal (US 2009)

- Discrimination claim against Attorney General & FBI Director
    - "Constitutional tort" under federal common law
        - Deprivation/violation of federal civil rights by a federal officer
    - No respondeat superior liability
        - High officials liable only for their own intentional actions
    - Critical element: *Intent* to discriminate on basis of national origin/religion
        - Discrimination must have resulted from a policy or practice adopted for the purpose of discrimination
        - "Disparate impact" is not enough
            - If policy/practice is adopted for a non-discriminatory purpose, there is no liability even if the policy/practice has a greater impact on a particular group
- Insufficiency of allegations
    - What did plaintiffs allege?
        - Facts about who was detained and how they were treated

    - What did the Court regard as mere legal conclusions?
        - Discriminatory motive for the detentions
- Plausibility
    - Absent direct evidence of discriminatory intent, plaintiffs rely on factual allegations about detention to raise inference
        - Majority says that inference isn't sufficiently plausible given alternative innocent inference

4.2.1 Making Sense of Twombly/Iqbal

Steps to analysis:

- Assume truth of all (non-conclusory) factual Allegations
- Ignore allegations that are mere legal conclusions
    - Treat these as "inferences" that must be plausible based on the factual allegations
- Do the factual allegations plausibly suggest an entitlement to relief?
    - Meaning, if the factual allegations themselves are not sufficient on their face to satisfy the elements of the claim, do those allegations support plausible inferences of liability?

What does "Plausibly" mean?

- Legal Plausibility
    - Do the facts alleged plausibly satisfy the elements of the claim?
        - Court considers "obvious alternative explanation"
    - Criticism
        - Shouldn't weigh competing explanations at pleadings stage; that's for discovery and summary judgment.
- **Not** factual plausibility
    - The Court in both cases disclaims this meaning of "plausible"
        - Discredit factual allegation only if facially incredible (e.g. "little green men")
    - At dismissal stage, not supposed to weigh likelihood that plaintiff will prove its allegations
        - Isn't that what the majority is really doing with "more likely explanations"?

Plausibility & Inferences

- Inference: Additional fact(s) or conclusion(s) drawn from factual allegations in the complaint
    - Twombly: Plaintiffs relied on factual allegations about defendants' common pricing and lack of geographic competition to establish an *inference* of an agreement
    - Iqbal: Plaintiff relief on factual allegations about detention based on religious/national origin profile to establish an *inference* of discriminatory intent

- In each case, the majority concluded that the inference was not sufficiently plausible
  - Too great a leap from the factual allegations to the inference, where the factual allegations are at least equally consistent with some other (innocent) explanation
    - Twombly: conduct resulted from market efficiency
    - Iqbal: detention policy and profile were adopted to target persons likely to be involved in or have information about 9/11 attacks

Applying Twombly/Iqbal - How does the Complaint in Form 11 fare under the Twombly/Iqbal standard? " On [DATE] at [PLACE], the defendant negligently drove a motor vehicle against the plaintiff." - Is negligence a plausible inference from the fact that defendant drove vehicle into plaintiff? - How does the Complaint in *Swierkiewicz v. Sorema* fare under the Towmbly/Iqbal standard? Is discrimination based on national origin a plausible inference from the facts alleged?

5 Answers

5.1 Requirements

Rule 8(b):

5.2 Ineffective Denials

Reis Robotics, USA, Inc. v. Concept Industries, Inc. (N.D. Ill. 2006)

- "To the extent the alleged 'contract' ... failed to warrant [quality of goods], it was procured by fraud and was of no validity; accordingly, the remaining allegations in this paragraph are denied as true"
  - This is "equivocal and serves to confuse the issues that are in dispute".

5.3 Affirmative Defenses

Rule 8(c)

- Affirmative defenses waived if not be raised with answer
  - Substance over form
  - Mistaken designation of defense as counterclaim (or vice versa) is ok

5.4 Twombly/Iqbal and Answers/Defenses

- Majority view: Twombly/Iqbal does not apply to answers/defenses

6 Amendments

6.1 Amending as a Matter of Course

Rule 15(a)(1)

- One time
  - within 21 days of service, or
  - within 21 days of responsive pleading or Rule 12(b)/(e)/(f) motion

6.2 Amendment by Leave of Court

Rule 15(a)(2)

- Consent of opposing party, or
- Leave of court: "freely give[n] when justice so requires"

Shiflet v. Allstate Ins. Co. (D.S.C. 2006)

- Facts & Procedural History
  - Plaintiff sued defendant for breach of contract & bad faith over denial of insurance claim
  - Defendant filed an answer denying liability.[2]
  - Defendant then sought leave to amend answer to include defense of arson.
    - Plaintiff opposed on grounds that amendment was prejudicial, in bad faith, and futile.
- Analysis & Holding
  - Mere delay is not sufficient reason to deny leave to amend
    - Party opposing amendment must show prejudice, bad faith, or futility
  - No prejudice by undue delay:
    - Defendant filed motion for leave to amend within time allotted by court's scheduling order, and with more than three months remaining for discovery,
      - Defendant alleged discovery revealed new information previously unavailable that suggested arson

[2]Defendant also moved to join the plaintiff's husband as a necessary party, or to dismiss the claim for failure to join a necessary party, under FRCP Rule 19. This is not relevant to the issue of whether defendant may amend their answer.

    - Proposed amendment not futile:
        - Arson provides complete defense to plaintiff's claims.
        - Amendment is futile only if "clearly insufficient or frivolous on its face"

Beeck v. Aquaslide "n" Dive Corp.

- Facts & Procedural History
    - Plaintiff was injured on a swimming pool slide and sued the manufacturer
    - In its answer, Defendant admitted that it manufactured the slide
        - After further investigation, the Defendant concluded it had not really manufactured the slide.
        - Defendant moved to amend its answer to deny manufacture
            - Court granted leave to amend
    - Case went to trial on the issue of whether defendant manufactured the slide
        - Jury found for defendant on that issue and court entered judgment in favor of defendant
- Analysis
    - Standard:
        - Leave should be granted, absent
            - evidence of undue delay, bad faith, or dilatory motive, or
            - undue prejudice to plaintiff
        - "Abuse of discretion" review applies on appeal
    - Prejudice
        - Burden is on party opposing amendment
            - Will amendment "sound the 'death knell'" to plaintiff's claim?
            - Can plaintiff proceed against other (proper) parties?
        - Co-defendants still in the case
            - How much does this influence the court's decision?
    - Can plaintiff amend to name real manufacturer?
        - Would amendment relate back in this case?
            - Probably not under 15(c)(1)(C)
            - But, if real manufacturer fraudulently labelled the product with the defendant's name, equitable tolling might extend the statute of limitations.
    - No prejudice to plaintiff where "the amendment would merely allow the defendant to contest a disputed factual issue at trial"
    - Denial of leave to amend would prejudice defendant
        - They shouldn't be stuck admitting a disputed fact, where their initial mistake was reasonable

6.3 Relation Back

Rule 15(c)

- When permitted by law providing the applicable statute of limitations. Rule 15(c)(1)(A)
  - You'd look to the substantive law for this.
- Claim or defense arising out of conduct, transaction, or occurrence set out in original pleading. Rule 15(c)(1)(B)

6.3.1 Same Conduct, Transaction, or Occurrence

Example

- Blandings hires Simms to design & build a new house. Alleging that the house collapsed because Simms used shoddy materials, Blandings sues for breach of contract.
- Blandings seeks to amend to add a claim for negligence
  - Amended complaint should relate back, because it arises out of the same conduct (the construction of the house) as the original breach of contract claim.

Example

- Mottley sues R.R. for breach of contract, based on R.R.'s failure to honor lifetime free pass
  - R.R. moves for summary judgment, arguing the contract is void as a matter of law based on federal statute prohibiting free passes
  - Mottley seeks to amend, asserting claim that R.R. fraudulently induced Mottley to accept free pass in settlement of personal injury claim, knowing it would be voidable.
- Relation back depends on whether the offer of the free pass in exchange for settling the injury claim forms part of the same CTO as the subsequent dishonoring of the free pass
  - Same CTO, because they are logically connected
  - Different CTO, because they are distinct in time & place

Moore v. Baker (11th Cir. 1993)

- Facts & Procedural History
  - Moore sued Baker for failure to advise her of therapy as alternative to surgery
  - Trial court granted summary judgment for Dr. on that claim
    - Moore sought leave to amend to add claim for negligence in performance of surgery
    - Dr. objected based on statute of limitations, which ran out on day original complaint was filed
- Holding
  - Malpractice claim, arising from performance of surgery, does not relate back to original complaint, which stated claim arising from conduct in consultation before the surgery
  - Turns on how broadly to construe "conduct, transaction, or occurrence"
    - Plaintiff's argument: Course of treatment is a single CTO

        - Defendant's argument: Consultation & surgery are separate CTOs
    - Court accepts defendant's view, focusing on whether original complaint, based on conduct before surgery, put defendant on notice of potential claims for negligence during & after surgery
        - Claims require proof of "completely different facts"

6.4 Change of party or naming of party

15(c)(1)(C)

- Permitted if, within period for service under Rule 4(m), newly-added or newly-named party:
    - received such notice of the action that it will not be prejudiced in defending on the merits; and
    - knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity

6.4.1 Notice & knowledge

Krupski v. Costa Crociere, S.P.A. (US 2010)

- Facts & Procedural History
    - Plaintiff sued Costa Cruise Lines for injury on a cruise ship
        - Costa Cruise Lines moved for summary judgment, asserting it was not the proper defendant
    - Plaintiff sought leave to amend to name Costa Crociere as defendant instead.
        - Trial court granted motion
        - Costa Crociere moved to dismiss based on one-year limitations period
        - Plaintiff argued amended complaint should relate back to date of original filing
- Issue
    - Whether relation back under Rule 15(c)(1)(C)(ii) was proper where plaintiff knew or should have known identity of Costa Crociere, but chose to sue Costa Cruise Lines instead
- Analysis
    - Rule 15(c)(1)(C)(ii) applies to "mistake concerning the proper party's identity"
    - "Mistake" is not precluded where plaintiff knew of proper defendant's existence

7 Good Faith in Pleadings

7.1 Signature

FRCP Rule 11(a)

- Signature required for "every pleading, written motion, and other paper"
  - Does not apply to discovery
    - Discovery requests and responses are not submitted to the court
    - Discovery requests and responses are covered under Rule 26(g)

7.2 Representations

Rule 11(b)

- Representations to the Court
  - No improper purpose
    - harassment
    - delay
    - increase cost
  - Claims and defenses warranted by law
    - existing law, or non-frivolous argument for extension, modification, reversal
  - Factual allegations supported by evidence
    - or likely to be supported after investigation and discovery
  - Factual denials warranted on evidence or reasonably based on belief or lack of information
- Standard
  - Objective standard: "Reasonable lawyer"
  - Requires "reasonable inquiry" before filing

Cf. Model Rules of Professional Conduct Rule 3.1 ("Meritorious Claims and Contentions")

7.3 Sanctions

- Imposition of sanctions
  - Rule 11(c)(2): on motion
  - Rule 11(c)(3): on court's own initiative
- Nature of sanction: Rule 11(c)(4) & (5)
  - May be monetary or non-monetary
  - "limited to what sufficed to deter repetition of the conduct or comparable conduct by others similarly situated"
  - No monetary sanction against represented party for violation of Rule 11(b)(2)

        - Because client is entitled to rely on lawyer's expertise and judgment as to the law
    - No sua sponte sanctions unless court makes show-cause order "before voluntary dismissal or settlement"

7.4 Reasonable Inquiry

Turton v. Virginia Dept. of Educ. (E.D. Va. 2015)

- Facts & Procedural History
    - Plaintiff sued school districts for discrimination under federal law
    - Plaintiff also asserted state law tort claims against school district attorney
    - After court dismissed complaint, attorney moved for Rule 11 sanctions, arguing claims against him
        - lacked a legal basis
        - lacked a factual basis
        - were filed for an improper purpose
- Defendant's Arguments & Court's Ruling
    - No legal basis
        - Argument: Court lacked subject-matter jurisdiction over state law claims
            - Court: Based on precedent, plaintiff's lawyer could reasonably have believed court had subject matter jurisdiction over state law claims
        - Argument: Plaintiff failed to exhaust administrative remedies
            - Court: Plaintiff's lawyer identified no legal authority to support application of futility exception to administrative exhaustion requirement
        - Argument: No legal support for claim for breach of duty based on special relationship
            - Court: Settled Virginia law established that school district attorney owed no duty to any third party, and plaintiff's lawyer did not appear to have performed any legal research on the issue.
    - No factual basis
        - Argument: Complaint did not offer sufficient factual basis for claims
            - Court: Reasonable investigation would have revealed that defendant was not attorney for certain schools districts and was not involved in their actions, contrary to allegations in complaint. Failure to conduct reasonable factual investigation violates Rule 11.
    - Improper purpose
        - Argument: Plaintiff's "primary motives were to gain publicity, and to embarrass teachers, principals, and state and county officials." Relies on public statements by plaintiff's counsel "We took a chance because there was not a lot of case law … but something had to be done to wake up the defendants and get the information out there."

        - Court: No indication that plaintiff never intended to litigate (distinguishing *Kunstler*). But willful filing of baseless complaint supports inference that suit was improperly filed for a purpose other than to vindicate legal rights.

7.5 Good Faith Arguments for Change in Law

Hunter v. Earthgrains Co. Bakery (4th Cir. 2002)

- Facts & Procedural History
    - Attorney filed Title VII claims on behalf of bakery workers
    - Employer argued claims were subject to mandatory arbitration under CBA
    - Trial court granted summary judgment and imposed Rule 11 sanctions
- Issue
    - Whether attorney had a good faith argument for challenging the 4th Circuit's prior decision in *Owens-Brockway Glass Container*, holding CBA applied to Title VII claims?
- Analysis
    - Appellate court review for abuse of discretion
    - Purpose of Rule 11 sanctions
        - Deter future litigation abuse
- Standard:
    - Claim is frivolous under Rule 11 only where it has "absolutely no chance of success under the existing precedent"
        - This was not the case here
        - 4th Circuit's decision in *Owens-Brockway* was contrary to decisions of other circuits to have considered the issue
            - N.B. Trial court issued its decision imposing sanctions after the Supreme Court issued its decision in *Wright v. Universal Maritime Svcs Corp.* (1998), which adopted the position that Hunter advanced in support of her claims.
            - But even if the Supreme Court had ultimately decided the issue the other way, the existence of a split among the lower courts would be enough to give plaintiff a good faith argument for their position.
- N.B. The attorney in this case, Pamela Hunter, was censured by the NC State Bar Grievance Committee in 2010, for her conduct in connection with a medical malpractice case. Matter of Hunter. 10G0295 (2010)
    - The Grievance Committee found that Hunter violated Rule 3.1 by filing the suit with "no factual basis".
    - Hunter also violated Rules 1.4 & 1.8 by dropping the suit and personally paying her client $20,000, without explaining the purpose of the payments to the client, who though the case had settled.

7.6 Improper Purpose

Sussman v. Bank of Israel (2d Cir. 1995)

- Plaintiff's pre-filing communication to defendant, warning of adverse publicity in event of lawsuit, did not support Rule 11 sanctions on grounds of improper purpose, where Complaint was not frivolous
- Not improper for plaintiff with a colorable claim to communicate with defendant before filing suit, in an effort to settle claim
- Not improper for plaintiff to note the effect of potential adverse publicity, where plaintiff has a colorable claim