A possible way to synthesize and outline *Twiqbal*
Civil Procedure—Gómez-Arostegui Fall 2025

I. Filter out allegations in the complaint relating to a claim that are:

A. Pure statements of the law;

1. *E.g.*, "The elements of a claim of negligence are: (1) . . . ."

B. Conclusory statements of ultimate issues; and

1. *E.g.*, *bare* allegations that "defendant committed the tort of negligence" or "defendant breached our contract."

2. *E.g.*, *mere* recitation of an element or elements of the claim: "defendant owed me a duty of reasonable care, breached that duty, and actually and proximately caused me injury."

3. This step is the one that is most susceptible to manipulation by a court.

C. Patently ridiculous statements of fact that could never be proved at trial.

1. *E.g.*, time travel, trips to Pluto, pigs practicing transcendental meditation at 30,000 feet in the air.

This filtering leaves you with "well-pleaded" facts under Rule 8 relating to a claim.

II. Dismiss the claim if the well-pleaded facts are also subject to a particularity requirement that has not been met, like Rule 9(b). The first such dismissal will likely be with leave to amend. Failure to cure could lead to dismissal of the claim with prejudice (meaning, the claim would be dismissed permanently).

A. Rule 9(b) specifically requires that claims *involving* fraud (so it is not necessarily limited to a fraud claim) be pleaded with particularity. Typically, this means the complaint must detail the statements or omissions at issue; identify the speaker; state where and when the statements or omissions were made; and explain why the statements or omissions are fraudulent. There are other special FRCPs and statutes that impose heightened pleading requirements, but I will not be testing you on those.

III. Assume all well-pleaded facts are true, even if doubtful, solely for purposes of ruling on the motion to dismiss.

IV. Assess whether a claim based on those well-pleaded facts is good for purposes of ruling on the motion to dismiss:

A. Dismiss the claim if it entirely omits well-pleaded facts on one or more essential elements of the claim. The first such dismissal will likely be with leave to amend. Failure to cure could lead to dismissal with prejudice.

1. Imagine, for example, that a claim of negligence requires a showing that (1) defendant was negligent; (2) plaintiff suffered a legally cognizable harm; (3) defendant was a cause in fact of that harm; and (4) defendant was a proximate cause of that harm. Now imagine a complaint contains facts suggesting negligence (exceeding the speed limit), that there was a car accident, and that defendant's negligence caused the accident. The complaint says nothing about the harm, if any, the plaintiff suffered to her person or to her property. So there are *no facts* pled supporting the (2) element of the cause of action.

2. Before *Twiqbal*, many judges would dismiss a complaint that had this type of problem, albeit typically with leave to amend. Other judges were willing to overlook it given the *Conley* standard. The judge I worked for would dismiss a claim with this problem with leave to amend, and if a plaintiff could not fix it after we pointed out the problem, we would likely dismiss it with prejudice. If anything, *Twiqbal* makes it more likely that this avenue of dismissal will be used, given that it has retired *Conley*'s "no set of facts" rule.

3. To me, this would have been the best way to dismiss the claim in *Twombly* without invoking its new plausibility standard. The complaint had to contain at least some facts indicating there was a conspiracy, which is an essential element of a § 1 Sherman Act claim. Roughly, a plaintiff must demonstrate (1) *that the defendants conspired with each other*; (2) defendants knowingly entered that conspiracy; and (3) the purpose of the conspiracy was to restrain trade. The complaint did allege a lot of facts, but those facts all went to showing parallel conduct, *i.e.*, that the defendants were all doing or not doing the same thing to preserve their own businesses. In this context, parallel conduct was expected and by itself was entirely lawful. As we learned in *Twombly*, the Court had previously held that for a § 1 Sherman Act claim, evidence of parallel conduct was effectively irrelevant unless coupled with other evidence that tended to show a conspiracy. Failure to provide that other evidence meant you lost on summary judgment or you lost at trial. Thought of another way, parallel conduct can corroborate other evidence of conspiracy, but it cannot prove that fact on its own. So because the complaint in *Twombly* only alleged parallel conduct, that meant that, in effect, the complaint had failed to allege any (as yet) relevant facts on an essential element of the cause of action: existence of a conspiracy.

B. Dismiss the claim if it is not recognized by the law (either because the claim is not cognizable, it is cognizable but preempted, or cognizable but otherwise barred). Attempts to cure likely to be futile, so dismissal of the claim will almost certainly be with prejudice.

1. Imagine, for example, that a defendant runs over my dog and kills it. And all of this is alleged in the complaint in excruciating detail. I could of course sue under a recognized state tort, like trespass to chattels or conversion, which both treat my dog as property. As a consequence, the amount in damages I

can recover is limited to the economic value of the property, and I have no opportunity to recover emotional-distress damages. So I also ask the federal court to recognize a new state common-law tort claim for "tortious interference with animal relations," which would allow me to recover for emotional distress. Some state courts in other jurisdictions have recognized such a claim. Because this is a new cause of action, and clearly substantive, the federal judge will have to predict whether the highest court of the state would recognize it as a matter of common law. If the court dismisses the claim, the judge is basically stating: (1) state law does not currently recognize this purported claim and (2) I do not believe the state's highest court would recognize it if given the opportunity. This problem likely cannot be cured by amending the complaint to alter the facts that have been pled, so the dismissal of the claim would almost certainly be with prejudice.

2. Imagine, for instance, that the plaintiff brings a federal claim for copyright infringement because the defendant has copied and sold the plaintiff's musical composition without permission. The plaintiff also brings a state law claim of conversion of chattels, claiming that the copyright in the composition is a form of intellectual property that the defendant has converted. The applicable state law in the jurisdiction does recognize that intangible property can be converted. The complaint alleges sufficient facts to lay out the grievance. Nevertheless, the federal copyright statute states that in the interest of national uniformity it preempts any and all analogous state-law claims in this federal field. This wipes out the state law claim—it is no longer cognizable in either federal or state courts under these facts. So a federal court would grant a motion to dismiss the conversion claim. Again, this problem likely cannot be cured by an amendment, so the dismissal of the conversion claim would almost certainly be with prejudice.

3. Imagine, for example, that a federal anti-discrimination statute lists the following as characteristics protected from discrimination: "race, color, religion, sex, or national origin." A plaintiff brings a claim in federal court alleging, in plenty of detail in the complaint, how the defendant has repeatedly discriminated against him based on his gender identity. The complaint further posits that discrimination based on gender identity falls within the scope of the word "sex" and is therefore unlawful. If the district court judge agrees, then the claim can move forward. But if the judge disagrees, then the claim for gender-identity discrimination is not legally cognizable, and the court will dismiss it for failure to state a claim. Again, this type of loss likely could not be cured by amending the complaint to alter the facts that have been pled, so any dismissal is likely to be with prejudice.

C. Dismiss the claim if it is not "plausible" on its face. The first such dismissal will likely be with leave to amend. Failure to cure could lead to dismissal with prejudice.

1. In assessing plausibility, a trial judge is to draw on his or her "judicial experience and common sense."

2. *Twiqbal* says that a claim that is "possible" or "conceivable" is not enough to survive a motion to dismiss, but the claim need not rise to the level of "probable" to survive a MTD. Unfortunately, the lines between possible, conceivable, plausible, and probable are not easy to find, especially the lines between possible and plausible, or between conceivable and plausible.

3. To some observers this inquiry under *Twiqbal* feels (problematically) like summary judgment, albeit with a different record of the facts. On a motion for summary judgment, the judge asks whether a reasonable jury could find in favor of the plaintiff on the claim. The motion will typically be based on and occur after the parties exchange discovery. If the evidence could lead a jury to go either way—i.e., either finding in favor of the plaintiff or the defendant—then summary judgment is improper and the case must go to trial (unless the parties settle of course). *Twiqbal* seems to call on the judge to do the same sort of analysis but based on the well-pleaded allegations left in the complaint, after the filtering steps noted above. Whereas a judge can grant summary judgment if reasonable jurors can come to only one conclusion on the facts, it appears a judge can now also grant a motion to dismiss if reasonable judges can come to only one conclusion based on the well-pleaded facts. The standard in *Twiqbal* might even be more rigorous than that applied at summary judgment given that the Court in *Iqbal* suggested that we must look for the "more likely explanation[]" when an allegation is consistent with an inference of lawful and unlawful behavior. Lastly, engaging in this sort of review at this stage might violate one's right to a jury trial under the Seventh Amendment, a topic we will cover later in the course.