

Update on pleading standards in patent cases

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It has been nearly two years since the Federal Rules of Civil Procedure were amended to eliminate Form 18, the World War II-era sample form that authorized plaintiffs to commence patent infringement litigation with only bare-bones allegations.

In the absence of Form 18, it is widely accepted that patent infringement complaints are now governed by the “plausibility standard.”

The Supreme Court spelled out this standard in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

However, given the apparent subjectivity built into the standard — and the lack of appellate guidance on what it requires in patent cases — a consensus on pleading standards has been slow to emerge from district courts.

From the inception of the Federal Rules of Civil Procedure in the 1940s until amendments made to them in December 2015, the template for pleading direct patent infringement was spelled out in Form 18 of an Appendix of Forms, which was incorporated into the federal rules via Rule 84.

The forms were originally intended to provide examples of just how little detail was required under the then-novel “notice pleading” approach introduced by the federal rules.

During most of that seven-decade span, Form 18 was relatively uncontroversial.

However, with the rise of patent monetization entities and so-called patent troll litigation over the past 10 years or so, the form made it possible to easily mass-produce copy-and-paste patent infringement complaints, arguably often without including sufficient detail for accused infringers to discern how their products allegedly infringed the patents.

TWOMBLY AND IQBAL

Although a number of proposed patent reform laws have been introduced over the past several years — including some that expressly addressed pleading standards — the elimination of Form 18, along with the entire Appendix of Forms, happened through an entirely separate process of updating the federal rules.

The elimination of Form 18 was not accompanied by any replacement instructions about what information must be included in a patent infringement complaint.

It was generally assumed that, in the absence of Form 18, the pleading standard would be governed by the *Twombly* and *Iqbal* cases.

In fact, a consensus has emerged that *Twombly* and *Iqbal* now govern pleading standards in these suits.

These cases stand for the proposition that, to pass muster as sufficiently pleaded, a complaint must allege enough case-specific facts to show that the claim is “plausible.”

Conclusory allegations, including mere recitations of legal standards, are not enough.

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Determining that the *Twombly* and *Iqbal* holdings apply to patent suits leaves open the question, though, of how much detail a complaint must provide to make a claim “plausible.”

Because appellate courts have thus far paid virtually no attention to this issue, district courts have largely been left to apply their own plausibility thresholds.

Even in the absence of binding, precedential appellate guidance, we can make some general observations.

At one extreme, the level of detail must be at least as much as was required under Form 18.

At the other extreme, the level of detail needs to be no greater than that required for preliminary infringement contentions under local patent rules in jurisdictions that have adopted such rules.

There is a wide range between these extremes.

Another data point is a body of case law that precedes the 2015 amendments and relates to pleading standards for claims of indirect infringement.

In 2012 the U.S. Court of Appeals for the Federal Circuit in *In re Bill of Lading, Transmission & Processing Systems Patent Litigation*, 681 F.3d 1323 (Fed. Cir. 2012), decided that Form 18's application was to be limited to its four corners and that the form covered only direct infringement claims.

Under the Federal Circuit's reasoning, claims for indirect infringement were subject to the plausibility standard set by *Twombly* and *Iqbal*.

But district courts have not consistently applied the Federal Circuit's ruling, and no clear standard has emerged concerning how much detail must accompany claims of indirect infringement.

BIG DEAL

Judging by their litigation activity, patentee-plaintiffs view the elimination of Form 18 as a big deal.

Over 500 suits were filed in the last week of November 2015, which was more than five times the number filed during the same week in 2014 and 2016.

On Nov. 30, 2015, the Monday after Thanksgiving, 260 suits were filed. In 2014 and 2016, the post-Thanksgiving Monday saw 14 and 10 suits filed, respectively.

In the 12 months after the rules changed, patent litigation filings were down 26 percent compared with the previous 12-month period.

The strongest inference to be drawn from this spike and subsequent decline is that plaintiffs were making a last-minute bid to file cases before Form 18 expired.

Since Dec. 1, 2015, there has been a marked increase in the number of motions challenging the sufficiency of pleadings in patent cases.

As of November 2016, roughly 44 percent of those motions were successful.

For the practitioner looking for concrete guidance, *Twombly* and *Iqbal* do not provide a single clear pleading standard that must be followed in patent cases.

Must a complaint now identify any asserted claims? All asserted claims? Only some?

Must a complaint identify all accused products?

Do allegations of infringement need to be as detailed as those found in typical infringement claim charts?

Must the allegations also include specific information, such as the litigation history of the patent and whether the patent is standards-essential?

Plaintiffs would have needed to provide all this information under the pleading standard that was included in the patent reform legislation that stalled in Congress over the past several years.

GENERAL OBSERVATIONS

Plaintiffs should identify at least one asserted claim and at least one accused product, explaining in more than conclusory terms how the accused product is alleged to infringe.

Defendants considering a *Twombly/Iqbal* challenge may not find the judge to be sympathetic if their motion relies solely on a lack of factual detail that can easily be provided via an amended complaint.

Some courts have set the pleading bar quite low. In *InCom Corp. v. Walt Disney Co.*, No. 15-cv-3011, 2016 WL 4942032 (C.D. Cal. Feb. 4, 2016), the court found sufficient a complaint that identified specific accused products, described the key functionality claimed in the patent, and alleged infringement, without identifying specific patent claims or providing an element-by-element analysis.

On the other hand, some courts have set the bar higher.

One prominent example is *Atlas IP LLC v. Exelon Corp.*, 189 F. Supp. 3d 768 (N.D. Ill. 2016). In that case, the plaintiff provided a claim chart with the complaint but left gaps as to three limitations.

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The court dismissed without leave to file another amended complaint, saying amendment would be futile because the theory of infringement depended on a claim construction that was incorrect as a matter of law.

Similarly, in *RainDance v. 10x Genomics*, No. 15-cv-152, 2016 WL 927143 (D. Del. Mar. 4, 2016), the plaintiff filed a lengthy complaint, reciting lots of detailed facts about the accused products but failing to relate those facts to the elements of the asserted patent claims.

The court dismissed the complaint.

Finally, even the patent-friendly U.S. District Court for the Eastern District of Texas has exhibited sympathy to motions to dismiss complaints where the facts alleged affirmatively show the implausibility of the theory of the case.

For example, in *Ruby Sands LLC v. American National Bank of Texas*, No. 15-cv-1955, 2016 WL 3542430 (E.D. Tex. June 28, 2016), the District Court dismissed with prejudice a complaint that accused a bank of infringing a patent claim covering a mobile device capable of transferring images, on the basis that the bank didn't make mobile devices.

And in *Iris Connex LLC v. Acer America Corp.*, No. 15-cv-1909, 2016 WL 4596043 (E.D. Tex. Sept. 2, 2016), the District Court dismissed another complaint, this one alleging

that a smartphone with front and back cameras infringed a claim covering a personal communication device with a “multi-position” reading head.

The court dismissed this suit on the basis that two separate fixed-position cameras were not a physically moveable reading head.

UNTIL THE FEDERAL CIRCUIT WEIGHS IN

If multiple patents are asserted against multiple accused products, it may be useful to narrow the scope of the case by narrowing the focus of a *Twombly/Iqbal* motion to the most vulnerable of the asserted theories.

Depending on the particular claims asserted, this could reduce potential damages, limit the scope of discovery or otherwise reduce the burden of the suit.

The U.S. District Court for the Northern District of California entered just such a ruling in one recent case, *Atlas IP LLC v. Pacific Gas & Electric Co.*, No. 15-cv-5469, 2016 WL 1719545 (N.D. Cal. 2016), which involved a complaint that asserted infringement of only one patent claim.

After finding the complaint was sufficient to satisfy *Twombly* and *Iqbal*, the court limited discovery to the claims that were actually detailed in the complaint.

Until the Federal Circuit weighs in, district courts will likely continue to apply varying standards.

Unfortunately, it is not likely that the Federal Circuit will be weighing in anytime soon.

The most likely way for the issue to be raised on appeal is for a complaint to be dismissed without leave to amend, thus creating a final appealable judgment.

While it is possible that other rulings on motions concerning the sufficiency of pleadings might be raised on appeal, that seems less likely.

A defendant whose motion to dismiss is denied would raise the issue on appeal only if it loses at some later stage of the proceedings.

Likewise, a plaintiff whose initial complaint is found lacking, but whose subsequent complaint is deemed acceptable, is generally not likely to raise the issue on appeal.

Until the Federal Circuit squarely addresses the issue, it may occasionally issue limited pronouncements, such as its dicta in *Peralta v. California Franchise Tax Board*, 673 Fed. Appx. 975 (Fed. Cir. 2016).

Without a doubt, the 2015 amendments to the Federal Rules of Civil Procedure profoundly altered the pleadings landscape for patent cases.

But exactly what the new standard requires is still unsettled.

The steady and growing body of trial court rulings on dismissal motions under *Twombly/Iqbal* is continuing to provide insights.

But until a dominant standard emerges, different courts — and even different judges on the same court — may continue to apply different standards regarding how much factual detail makes a claim for patent infringement “plausible.”

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