IMPACT OF THE SUPREME COURT’S
TWOMBY & IQBAL RULINGS
ON PATENT LITIGATION

by
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In the few years since the U.S. Supreme Court decided Iqbal and Twombly, those decisions have quickly risen through the ranks of the most-cited Supreme Court rulings of all time. Together, they imposed more rigorous pleading standards under Federal Rule of Civil Procedure 8, providing that, while Rule 8 “does not require ‘detailed factual allegations,’ … it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’”

The application of these pleading standards to patent litigation, however, remains uncertain. The U.S. Court of Appeals for the Federal Circuit has said little on the subject, and practice varies widely among district courts. This divergence results in part from differing views over the significance and continuing force of Form 18 (a model patent complaint appended to the Federal Rules of Civil Procedure), which is complicated by the existence of local patent rules in some federal district courts that require plaintiffs to provide additional detail about their allegations (although not at the pleading stage).

**Federal Circuit Guidance.** The Federal Circuit has said little about pleading standards post-Twombly. Most significant is McZeal v. Sprint Nextel Corp., in which a divided panel overturned dismissal of direct infringement allegations. Although perhaps of limited precedential value – it came after Twombly but before Iqbal, and concerned a pro se plaintiff – it is a useful primer to the core pleading issues that arise repeatedly in district court litigation over pleading standards in patent litigation.

At issue in McZeal was a complaint that, although 95 pages long, provided little detail about the theory of infringement – it asserted ownership of the relevant patent, named the defendants, asserted that the patent was infringed, and alleged that “[t]he defendant’s INTERNATIONAL WALKIE TALKIE machine physically have [sic] or perform all of the basic elements contained in the patent claims of the plaintiff and further infringes under the doctrine of equivalents.” The majority placed weight on the fact that McZeal was pro se, and on the modest requirements of the model patent form. That form, the majority concluded, requires:

only the following elements: 1) an allegation of jurisdiction; 2) a statement that the plaintiff owns the patent; 3) a statement that defendant has been infringing the patent by making,
selling, and using the device embodying the patent; 4) a statement that the plaintiff has given
the defendant notice of its infringement; and 5) a demand for an injunction and damages.

The lack of specificity concerning the plaintiff’s infringement theory was, the majority concluded, a problem
for another day: “The specifics of how Sprint Nextel’s purportedly infringing device works is something to
be determined through discovery.”

Judge Dyk dissented in relevant part. Although in his view “a bare allegation of literal infringement
using [the form] is inadequate to provide sufficient notice to an accused infringer under a theory of literal
infringement,” he reluctantly concluded that Rule 84 – which makes the forms “sufficient under the rules” –
meant that the complaint was sufficient. After urging that the form be revised or eliminated through the
rulemaking process, Judge Dyk considered the sufficiency of the infringement allegation under the doctrine
of equivalents, which he believed the only theory of infringement actually presented. After Twombly, he
reasoned, “the forms should not be interpreted as going beyond the fact situation described in the form”; the
form does not deal with the doctrine of equivalents; and under general notice standards, the complaint was
deficient because it did not “specify which limitations are literally infringed and which are infringed by
equivalents, or, as to the limitations alleged to be infringed by the doctrine of equivalents, how the accused
product is insubstantially different from the patented devices.”

The Federal Circuit has not revisited this issue in a published decision. In Colida v. Nokia, Inc.,
another case with a pro se plaintiff, the court cited Iqbal in the course of affirming dismissal of the complaint
alleging infringement of a design patent, but had no occasion to interpret Iqbal. The court suggested in
passing that Form 18 may not apply to design patents, and noted that the form has not been updated since
Iqbal was decided. 7

What Role for Form 18? Form 18 has been a focus of the district court decisions addressing Iqbal
and Twombly, and many of those courts recognize the substantial tension between Form 18 as currently
drafted and the Supreme Court’s teachings. The example contained in the model form includes little detail
about the plaintiff’s theory of infringement, asserting merely that “[t]he defendant has infringed and is still
infringing the Letters Patent by making, selling, and using electric motors that embody the patented
invention, and the defendant will continue to do so unless enjoined by this court.” Iqbal, by contrast,
 instructs that Rule 8 “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation,”
and forbids “‘a formulaic recitation of the elements of a cause of action.’” 8 At least for direct, literal
infringement under 35 U.S.C. § 271(a), therefore, “it is difficult to reconcile the guidelines set forth in
Twombly and Iqbal with Form 18,” as multiple courts have recognized. 9

It is beyond the scope of this paper to evaluate whether a Form can be abrogated by a Supreme Court
decision – it seems difficult to believe that a model form could take precedence over a decision of the Court.
On the other hand, the Court itself is responsible for Rule 84, which gives the Forms legal force, and has not
amended either that rule or the form under the Rules Enabling Act. 10 What is plain is that this conflict
between Form 18 and the Supreme Court’s decisions has led to varying approaches in the federal trial courts.
Some courts have relied on Form 18 to reject challenges to patent complaints. 11 Some courts, even while
nominally affirming the force of Rule 18, have dismissed complaints under Twombly and Iqbal – particularly
on the theory that identifying only the type of purportedly infringing product, but not the specific product,
does not provide the accused infringer with sufficient notice of the claims. 12 Other courts have dismissed
infringement complaints on the basis of Twombly and Iqbal, and in the process have implicitly 13 or expressly
rejected the adequacy of Form 18. In Medsquire v. Spring Medical Systems, for instance, the court dismissed
a complaint under Twombly and Iqbal, and concluded that McZeal was not controlling because that decision
predated Iqbal and involved a pro se plaintiff, and because the Federal Circuit in Colida subsequently stated
that “a complaint must have ‘facial plausibility.’” 14

Local Patent Rules. As Judge Dyk noted in McZeal, “[t]o some extent, the problem with the brevity
of the form has been ameliorated by some local rules which ‘require[] both the plaintiff and the defendant in
case[s] to provide early notice of their infringement and invalidity contentions.” 15 Indeed, local patent
rules were intended to resolve the disconnect between pre-Twombly notice pleading standards “and the need
for patent litigants to have more specific notice of the issues they were litigating.” 16 Thus, some courts have
upheld thin pleadings because of the backstop provided by applicable local patent rules 17; others have gone
so far as to conclude that requiring additional specificity in pleading under Twombly and Iqbal “would
circumvent” those local rules. But, even if it were permissible to give local patent rules priority over the Federal Rules in this fashion, “local rules do nothing to require an adequate statement of the claim before discovery commences.” That latter consideration was a focus of the Supreme Court’s concern: “It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through ‘careful case management.’” In addition, many courts have no such rules, so relying on the existence of local patent rules will result in a gap in coverage and undermine national uniformity.

Claims and Defenses Other than Literal, Direct Infringement. “Form 18’s continuing viability after Twombly and Iqbal in contexts beyond literal infringement claims remains an open question.” The more a claim or defense differs from a direct-infringement claim, the more likely it is that a court will apply Iqbal and Twombly instead.

Thus, courts commonly hold that claims modeled on Form 18 do not suffice for contributory or induced infringement. This approach has not been uniform, however, with some courts declining to apply Iqbal and Twombly at all—typically pointing to the local rules, or the possibility of further detail being generated through discovery. For other, less-common patent claims, case law is sparse; Form 18 has been applied to allegations under 35 U.S.C. § 271(g) on the theory that it is a form of direct infringement, whereas Twombly has been applied to a suit to correct patent inventorship under 35 U.S.C. § 256. As to the doctrine of equivalents, notwithstanding Judge Dyk’s explanation in his McZeal dissent why Twombly should apply to such claims, on at least one occasion Form 18 was held to suffice. Allegations of inequitable conduct have been exempted from this debate because the Federal Circuit has held squarely that the heightened fraud pleading standards of Rule 9(b) apply to such a claim.

Particular uncertainty persists as to the pleading standards that will be applied to affirmative defenses and counterclaims. Iqbal and Twombly did not address affirmative defenses specifically, and “[c]ourts are widely divided with regard to the standard to employ when deciding whether an affirmative defense has been sufficiently plead.” This is an issue that is not exclusive to patent law, and likely will require broader resolution. A problem more particular to patent law is how to deal with counterclaims. Counterclaims are, after all, claims, which one ordinarily would expect to be subject to Iqbal and Twombly, but some courts have concluded that it would be inequitable to apply the heightened standard of Iqbal and Twombly to invalidity counterclaims when plaintiffs alleging infringement remain subject only to Form 18.

Conclusion. Form 18 has not significantly changed since it was issued in 1937, 20 years before Conley v. Gibson—the seminal decision about pleading standards that was interpreted by Iqbal and Twombly—and in an era when patent litigation was very different than it is today. The continuing validity of Form 18 deserves consideration by the relevant rulemaking bodies and, absent changes in the form, courts may need to confront in more rigorous fashion the question of whether Rule 84 (which gives force to Form 18) can trump a Supreme Court decision that in most cases would render the form insufficient.

ENDNOTES

2 Erwin Chemerinsky, Moving To The Right, Perhaps Sharply To The Right, 12 GREEN BAG 2D 413, 415 (2009) (“even though it is only two years old, Twombly is one of the five most frequently cited Supreme Court cases by lower federal courts in all of American history”).
3 Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 555).
4 Id. (quoting Twombly, 550 U.S. at 557).
6 501 F.3d 1354 (Fed. Cir. 2007).
7 347 F. App’x 568, 570-71 & n.2 (Fed. Cir. 2009) (per curiam).
8 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 555).


[8] 501 F.3d at 1360 n.3 (Dyk, J., concurring in part and dissenting in part).


[10] E.g., *Wistrong*, 2011 WL 4079231, at *3 (“[A] patent holder is obligated to provide infringement contentions shortly after the initial case management conference. *See* Pat. L.R. 3–1. Therefore, an alleged infringer is given some level of detail about the infringement early on in the case, albeit not at the outset.”).


[16] *DR Sys., Inc. v. Avreo*, Inc., 2011 WL 4850171, at *1 (S.D. Cal. Oct. 12, 2011); *Medisquire LLC*, 2011 WL 4101093, at *3-4 (“Form 18 is inapplicable to claims of indirect or contributory infringement,” and such claims “should include, at a minimum, a description of how the [accused device] infringes.”).


