

Form 18's Proper Place after *Twombly* and *Iqbal*

By Allison K. Levine

The Supreme Court's recent clarification—and effective revision—of the Rule 8 pleading standard in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* is a source of controversy in Congress (see Notice Pleading Restoration Act of 2009, S.1504, 111th Cong. (2009); Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009)) and uncertainty in the courts (see Jeremiah J. McCarthy and Matthew D. Yusick, “*Twombly* and *Iqbal*: Has the Court ‘Messed Up the Federal Rules?’” 2010 *Fed. Cts. L. Rev.* 1, 8 (2010) (“The tension between Rule 84 and the Court’s pronouncements in *Twombly* and *Iqbal* has created an unhappy state of affairs for the federal court pleader, not to mention the federal court judge.”)). These decisions have created tension in patent-infringement cases by contradicting the standard embodied in Form 18. Courts have split as to how to reconcile Form 18 with *Twombly* and *Iqbal*, but an emerging approach likely to be tested by the Federal Circuit soon is to confine Form 18 to a narrow set of cases involving direct infringement of a simple device patent. For all other patent-infringement cases, Form 18 may fail to satisfy *Twombly* and *Iqbal*'s heightened standard.

Twombly and *Iqbal* vs. Form 18

Rule 8 of the Federal Rules of Civil Procedure provides that a complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Under *Conley v. Gibson*, 355 U.S. 41, 47 (1957), the Supreme Court had long interpreted Rule 8 to require a plaintiff to merely “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” A complaint was not to be dismissed for failure to state a claim “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the Supreme Court retired the “no set of facts” construction of the notice-pleading regime, deeming that phrase “best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may

be supported by showing any set of facts consistent with the allegations in the complaint.” *Twombly*, 550 U.S. 544, 563 (2007). To adequately state a claim, the Court held, allegations must establish a *plausible* claim to relief, above the speculative level. *Id.* at 555–56; *Iqbal*, 129 S. Ct. 1937, 1949–50 (2009). The plaintiff’s obligation to provide the “grounds of his entitlement to relief” requires “more than labels and conclusions,” and “a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555; *Iqbal*, 129 S. Ct. at 1949.

In the aftermath of *Twombly* and *Iqbal*, courts have struggled to reconcile the heightened Rule 8 standard with the standard set forth in Rule 84, which references a set of model pleading forms in the Appendix and states that those forms “suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.” These forms are simple and largely conclusory and therefore inconsistent with the pleading standard recently articulated by the Supreme Court. See McCarthy, *supra* at 5–6 (2010) (discussing the conclusory nature of several Appendix Forms, including Form 12, 15, and 19).

This is particularly true with respect to a model pleading for patent infringement, represented by Form 18. Form 18’s model pleading contains *only* the following:

(1) statement of jurisdiction; (2) On date, United States Letters Patent No. ___ were issued to plaintiff for an invention in an electric motor. The plaintiff owned the patent throughout the period of defendant’s infringing acts, and still owns the patent; (3) the 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; (4) the plaintiff has complied with the statutory requirement of placing a notice of the Letters Patent on all electric motors it manufactures and sells and has given the defendant written notice of the infringement.

Young lawyers may be particularly interested in this article because they often deal with pleading standards.

This conclusory pleading would not survive the *Iqbal*-proscribed inquiry. Form 18 fails to state, for instance, which features of the accused device are alleged to infringe the limitations of those claims. Yet, according to Rule 84, the pleading suffices. Thus, as Justice Ginsburg has commented, “the *Iqbal* majority messed up the Federal Rules.” Justice Ruth Bader Ginsburg, Remarks for Second Circuit Judicial Conference (June 12, 2009), available at www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_06-12-09.html. (According to the Rules Enabling Act, the Federal Rules may not be enacted or amended other than in compliance with the procedures established therein, adherence to which “is essential to maintaining the constitutional system of checks and balances among the branches of government.” 1 James Wm. Moore et al., Moore’s Federal Practice § 1.04[3][a] (3d ed. 2010). Thus, commentators have expressed concern over what is considered to be the Supreme Court’s unilateral revision of Rule 8. See Erwin Chemerinsky, “Moving to the Right, Perhaps Sharply to the Right,” 12 *Green Bag* 2d 413, 416 (2009) (“The Court’s activism in this area is striking. There was no amendment to [Rule] 8. Congress did not pass a statute changing pleading standards. . . . Yet, on its own the Court has altered the very essence of the notice pleading system created by the Federal Rules.”).) As a result, in the past few years, courts have divided over what patent plaintiffs must plead. See R. David Donoghue, “The Uneven Application of *Twombly* in Patent Cases: An Argument for Leveling the Playing Field,” 8 *J. Marshall Rev. Intell. Prop. L.* 1, 9 (2008) (“Without strong Federal Circuit guidance, district courts have been scattered in their application of *Twombly* to patent cases.”).

One approach that courts have taken to harmonize Form 18 with modern patent law and pleading standards—that is likely the best approach—is to restrict Form 18 to *only* those claims involving direct infringement of a simple device patent.

Limiting Form 18 to Simple and Direct Claims

Since the Federal Rules of Civil Procedure were enacted in 1938, significant developments in patent law—including the 1952 Patent Act and the 1982 creation of the Federal Circuit—have altered the landscape of enforcing patent rights. See Jonathan L. Moore, “Particularizing Patent Pleading: Pleading Patent Infringement in a Post-*Twombly* World,” 18 *Tex. Intell. Prop. L. J.* 451, 497–500 (2010). Moreover, patents have become far more complex than they were in 1938, based on the underlying technology and the number of claims per patent. Form 18 is therefore outdated for purposes of modern patent litigation.

Form 18 is also ill-suited to pleading any type of divided or indirect infringement, particularly after *Twombly* and *Iqbal*. For example, a claim of joint infringement requires a showing of direct infringement plus the additional element of “control or direction” by one of the parties over the entire process such that every step is attributable to the controlling party. *Friday Group v. Ticketmaster*, No. 4:08CV01203 JCH, 2008 U.S. Dist. LEXIS 100529 at *10 (E.D. Mo. Dec. 12, 2008); *Desenberg v. Google, Inc.*, 08 Civ. 10121 (GBD) (AJP), 2009 U.S. Dist. LEXIS 66122 at *20–23 (S.D.N.Y. July 30, 2009). These allegations are nowhere to be found in Form 18.

Similarly, claims of infringement by inducement require allegations that the defendant “knew or should have known his actions would induce actual infringement” and actively and knowingly aided and abetted another’s direct infringement. See *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936 (2005). And contributory infringement claims require allegations of knowledge and sales of components or materials without substantial noninfringing uses. *BMC Resources, Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1381 (Fed. Cir. 2008). Thus, as the court noted in *Elan Microelecs. Corp. v. Apple, Inc.*, “[b]oth types of indirect infringement include additional elements, none of which Form 18 even purports to address.” *Elan Microelecs. Corp. v. Apple, Inc.*, No. C 09-01531 RS, 2009 WL 2972374, at *2 (N.D. Cal. Sept. 14, 2009).

The court in *Elan Microelecs.* therefore held that Form 18 did not support “a conclusion that Apple had adequately pleaded its counterclaims,” and that, instead, the court must “apply the teachings of *Twombly* and *Iqbal*.”

Moreover, through the lens of *Twombly* and *Iqbal*, even many *direct* infringement claims may be inadequately pled by following Form 18. A claim based on the doctrine of equivalents—which is intensely technical and factual in nature—requires allegations that the defendant’s product “performs substantially the same function in substantially the same way to obtain the same result.” *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 608 (1950). These allegations are not found in Form 18. So, literal infringement of complex method patents may require more than Form 18 pleading. That is exactly what the court recently held in *Prestige Pet Prods., Inc. v. Pingyang Huaxing Leather & Plastic Co., Ltd.* 2:10-cv-13541-RHC-MAR (E.D. Mich. filed Sept. 7, 2010), Opinion and Order Granting Defendants’ Motion to Dismiss, filed January 31, 2011.

In *Prestige Pet Prods.*, the plaintiff owned a patent for a “method of processing porkhide dog chews” that involved smoking the pork hide with gaseous smoke. The plaintiff’s complaint tracked Form 18, stating ownership of the patent, identifying specific infringing product lines of seven different defendants, and asserting that “Defendants practice the patented methods of the ‘212 Patent and/or import, manufacture, use, market, distribute and/or sell pet chew products” “made by the patented methods of the ‘212 Patent.”

On the defendants’ motion, the court dismissed the complaint under Rule 12(b)(6) as inadequate under *Iqbal*, notwithstanding the plaintiff’s reliance on Form 18 in its briefs and oral argument. The court first observed that a “process patent protects only the method of making a product as well as those products actually made using that method,” and, therefore, to show direct infringement of its process patent, the plaintiff bore the burden of “proving that Defendants have performed or used each and every step or element” of the claimed process. The court further observed that the plaintiff had provided no facts, aside from the list of product lines allegedly produced using the patent. The court held that, “[a]lthough the assertion that products have been produced with a patented method in violation of U.S. patent law is not inherently implausible, neither is it sufficient to nudge the allegations beyond ‘the mere possibility of misconduct’ (citing *Iqbal*). An adequate

claim, the court held, would require, at a minimum, “some articulated reason to suspect that the products were made in violation of the patent-in-suit.”

The Federal Circuit appears to be coming around to this limiting approach as well, as it has expressed doubt as to Form 18’s continued validity beyond the most basic of patent infringement claims. Following *Twombly* (but prior to *Iqbal*), a divided panel of the Federal Circuit in *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007), deemed a pro se plaintiff’s complaint that tracked Form 18 (then-Form 16) sufficient—but just barely—under *Twombly*, even though it asserted a theory based on the doctrine of equivalents (holding that the plaintiff had “met the low bar for pro se litigants to avoid dismissal” under Rule 12(b)(6), but noting that “by ruling in *McZeal*’s favor, we do not condone his method of pleading.”). In his dissent, Judge Dyk opined that Form 18 is not even adequate to provide sufficient notice to an accused infringer under a theory of literal infringement but noted that that defect would have to be cured through the rulemaking process. In the meantime, he argued, Form 18 should not be applied to a complex doctrine of equivalents claim, which is based on a doctrine articulated by the Supreme Court long after the forms became effective in 1938.

More recently, in *Colida v. Nokia, Inc.*, No. 2009-1326, 347 F. App’x 568 (Fed. Cir. Oct. 6, 2009), the Federal Circuit suggested in dicta that it may be inclined to embrace Judge Dyk’s view by noting that “Form 18 is a sample pleading for patent infringement, but it was not tailored to design patents and was last updated before the Supreme Court’s *Iqbal* decision.”

Conclusion

In light of the present uncertainty in the law, the Federal Circuit is likely to take up this issue again in the near future, and it may endorse Judge Dyk’s opinion in *McZeal* to restrict Form 18 to its limited utility—that is, as a model only for simple, direct infringement of product or device patents. Absent revision of Form 18 through the rulemaking procedure, such a limiting approach may be the only way Form 18 can coexist with Rule 8’s pleading standard in the age of *Twombly* and *Iqbal*.

Allison K. Levine is an associate at Mayer Brown, LLP, New York, New York. She may be reached at alevine@mayerbrown.com.