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WHAT’S BEHIND THE CURTAIN? EXPOSING THE CASE UPFRONT WITH TWOMBLY AND IQBAL

For decades, litigants essentially had a free ride, comforting themselves that “notice pleading” required only “a short and plain statement of the claim.”¹ In fact, it was “the accepted rule that a complaint should not 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.”²

Two recent cases, *Twombly*³ and *Iqbal*,⁴ have pulled back that curtain, however, and exposed the secret behind the buying-time wizard. In defense of the defense, the U.S. Supreme Court expressly jettisoned the “no set of facts” standard for a new “plausibility” test.

Now that the more rigorous pleading regime is in place, it is beginning to crop up in intellectual property cases. As a result, wise IP litigants and their counsel will make the new pleading rules part of their IP IQ.

U.S. Supreme Court Beefs Up Pleading Rules

Rule 8(a)(2), Fed.R.Civ.P.

Rule 8(a)(2) requires that, “A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . .”

This rule and its predecessors have been in place since at least 1937.⁵ Every lawyer currently practicing was taught notice pleading in federal court as a bedrock principle of civil procedure.

Rule 12(b)(6), Fed. R. Civ. P.

Pleadings failing to meet the requirements of Rule 8(a)(2) are subject to attack under Rule 12(b)(6) for “failure to state a claim upon which relief can be granted.”

Conley v. Gibson⁶ Requires “No Set of Facts” to Dismiss

The seminal case relating to modern notice pleading is the U.S. Supreme Court’s opinion in *Conley v. Gibson*. The 1957 case involved a class action claim for discrimination in union representation under the Railway Labor Act.⁷ Defendants moved to dismiss on several grounds, including the sufficiency of the complaint, for failure to state a claim upon which relief

1 Rule 8(a)(2), Fed. R. Civ. P.
 2 *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).
 3 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).
 4 *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937 (2009).
 5 Fed. R. Civ. P. 8(a)(2) advisory committee’s notes, 1937.
 6 355 U.S. 41 (1957).
 7 *Id.* at 42-43.

“Such simplified ‘notice pleading’ is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.”

“[A]lthough detailed factual allegations are not required, the obligation to provide ‘grounds’ for relief, ‘requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.’”

could be granted.⁸ The district court granted the motion, and the Fifth Circuit Court of Appeals affirmed.⁹ Reversing the court of appeals, and holding that the complaint adequately pled a claim, the Court stated,

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not 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.¹⁰

The Court specifically addressed and rejected defendants’ arguments that the complaint failed to set forth facts sufficient to support its general allegations, saying, “the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.”¹¹ For confirmation, the Court referenced the approved forms attached to the Rules.¹²

In words that still haunt all litigants in complex litigation, the Court observed, “Such simplified ‘notice pleading’ is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.”¹³

While courts balked at a literal application of *Conley*,¹⁴ the rule of the case remained undisturbed for 50 years. All the while, the actual cost of the “liberal opportunity for discovery” steadily increased for defendants

***Bell Atlantic Corp. v. Twombly* Requires Plausibility to Survive**

But then the tide began to turn. In *Bell Atlantic Corp. v. Twombly*, a massive class action by subscribers of local phone service and/or high speed internet services, begged the question of what a plaintiff must plead to state a claim under § 1 of the Sherman Antitrust Act.¹⁵ The district court dismissed the complaint for failure to state a claim, but the Second Circuit reversed.¹⁶

The *Twombly* Court first cited *Conley* for the proposition that the pleading rules require “fair notice” only.¹⁷ But then the Court said that, although detailed factual allegations are not required, the obligation to provide “grounds” for relief, “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”¹⁸ The Court said, “[f]actual allegations must be enough to raise a right to relief above the speculative level.”¹⁹ In a footnote, the Court observed,

While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant “set out *in detail* the facts upon which he bases his claim,” *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) (emphasis added), Rule 8(a)(2) still requires a “showing,” rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only “fair notice” of the nature of the claim, but also “grounds” on which the claim rests.²⁰

8 *Id.* at 43.

9 *Id.* at 43-44.

10 *Id.* at 45-46 (emphasis added).

11 *Id.*

12 *Id.*

13 *Id.* at 47-48.

14 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007).

15 550 U.S. 544, 554-55 (2007); 15 U.S.C. § 15 (a “contract, combination . . . , or conspiracy, in restraint of trade or commerce”).

16 *Id.* at 552.

17 *Id.* at 555 (“Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’ *Conley v. Gibson*, 355 U.S. 41, 47 (1957).”).

18 *Id.* at 555.

19 *Id.*

20 *Id.* n.3.

The Court specifically recognized the potential “*in terrorem*” effect of a “largely groundless claim” and commented on the lack of success of judicial supervision in stopping discovery abuse.

“Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is *plausible on its face*.”

Further addressing Rule 8(a)(2), the Court observed, “The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief.’”²¹

The Court specifically recognized the potential “*in terrorem*” effect of a “largely groundless claim”²² and commented on the lack of success of judicial supervision in stopping discovery abuse.²³

Against this backdrop, the *Conley* precedent quickly evaporated. The Court said that a literal reading of *Conley*’s “no set of facts” language could mean that “a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery.”²⁴

The Court then recounted a series of cases that had taken issue with the *Conley* standard before concluding, “We could go on, but there is no need to pile up further citations to show that *Conley*’s “no set of facts” language has been questioned, criticized, and explained away long enough. . . . [T]he passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement.”²⁵

The Court then dropped the axe on the outdated precedent, stating, “The phrase [“no set of facts”] is 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.”²⁶

Advancing a new “plausibility” standard for pleading, the Court suggested,

Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is *plausible on its face*. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.²⁷

***Ashcroft v. Iqbal*²⁸ Refines the Analysis**

Two years later, the U.S. Supreme Court took up *Iqbal*. The plaintiff, a Pakistani Muslim, was arrested on criminal charges following the September 11, 2001, terrorist attacks.²⁹ He sued federal officials, alleging that he was deprived of constitutional protections while in federal custody.³⁰

Petitioners, including former U.S. Attorney General John Ashcroft, moved to dismiss the case by alleging, in part, that the complaint was not sufficient to state a claim against them.³¹ The district court denied the motion to dismiss, and the Second Circuit Court of Appeals affirmed.³²

The Court granted *certiorari* to consider whether the plaintiff pled facts that, if taken as true, stated a claim.³³ The Court decided that he had not, saying, “Under *Twombly*’s construction of Rule 8, we conclude that respondent’s complaint has not ‘nudged [his] claims’ of invidious discrimination ‘across the line from conceivable to plausible.’”³⁴

21 *Id.* at 557.

22 *Id.* at 557-58.

23 *Id.* at 559.

24 *Id.* at 561 (internal quotations and citation omitted).

25 *Id.* at 562-63.

26 *Id.* at 563.

27 *Id.* at 570 (emphasis added).

28 *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937 (2009).

29 *Id.* at 1942.

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.* at 1942-43.

34 *Id.* at 1950-51.

“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”

“While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.”

Declaring the complaint insufficient, the Court clarified its rulings in *Twombly*. According to the Court, “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”³⁵

Analyzing *Twombly*, the Court opined, “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’”³⁶

The *Iqbal* Court helpfully explained the two working principles underlying *Twombly*. “First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”³⁷ “Second, only a complaint that states a plausible claim for relief survives a motion to dismiss.”³⁸

The Court then observed that determining whether a complaint states a plausible claim for relief will be a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”³⁹ It concluded, “where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it has not ‘show[n]’ -- ‘that the pleader is entitled to relief.’”⁴⁰

Elaborating, the Court stated, “In keeping with these principles, a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.”⁴¹

One district court neatly packaged *Twombly* and *Iqbal* when it observed,

Both *Twombly* and *Iqbal* urge courts to follow a two-step process when evaluating whether a complaint satisfies the requirements of Rule 8. First, the trial court should “begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth” and disregard them when taking factual allegations as true. Second, when the court is left with the “nub” of plaintiffs complaint after legal conclusions have been disregarded, the court should determine whether the remaining allegations “state [] a plausible claim for relief.”⁴²

Pleading in Patent Cases

The effect on patent cases of the new “plausibility” rule has been interesting and should be kept in the forefront of your IP thinking. A brief review of the basics provides context for these relevant rulings.

35 U.S.C. § 271

Patent infringement is governed by 35 U.S.C. § 271, which sets out the bases for claims of direct infringement (§ 271(a)), and indirect infringement, including inducing infringement (§ 271(b)), and contributory infringement (§ 271(c)).

35 *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

36 *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. at 557).

37 *Id.* at 1949 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. at 555).

38 *Id.* at 1950 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. at 556).

39 *Id.* at 1950.

40 *Id.* (citing Rule 8(a)(2), FED. R. CIV. P.).

41 *Id.*

42 *Tune Hunter Inc. v. Samsung Telecom. Am., LLC*, 2010 WL 1409245, *3 (E.D. Tex., April 1, 2010) (internal citations omitted).

To date, just a few Federal Circuit opinions have dealt with the adequacy of pleadings for relief.

“The Rule 12(b)(6) pleading requirements for a complaint of infringement cannot be extended to require a plaintiff to specifically include each element of the claims of the asserted patent.”

Rule 84, Fed. R. Civ. P., Form 18

The Federal Rules of Civil Procedure contain an Appendix of Forms. Under Rule 84, “The forms contained in the Appendix of Forms are **sufficient under the rules** and are intended to indicate the simplicity and brevity of statement which the rules contemplate.”⁴³

Importantly, the forms cannot be judicially abandoned or modified.⁴⁴ Approved Form 18 (formerly Form 16), provides a template for a complaint alleging infringement of a patent. Of note, Form 18 relates to claims for direct infringement only, and not to claims of indirect infringement (either inducing or contributory).⁴⁵

Scant Federal Circuit Case Law Helps Only a Little

To date, just a few Federal Circuit opinions have dealt with the adequacy of pleadings for relief. Four are relevant here:

Phonometrics, Inc. v. Hospitality Franchise Systems, Inc.⁴⁶ is the first Federal Circuit case to discuss a pleading’s adequacy. Decided in 2000, it predates *Twombly* and the demise of the *Conley* “no set of facts” standard, and has to be understood in that context.

In *Phonometrics*, the district court dismissed patent infringement claims based on Fed.R.Civ.P. 12(b)(6).⁴⁷ The Federal Circuit reversed and remanded, holding that the “complaint met the liberal pleading requirements of Rule 12(b)(6).”⁴⁸

Addressing the issue before it, the Federal Circuit acknowledged that, when reviewing a purely procedural question not pertaining to patent law, such as whether a Rule 12(b)(6) motion was properly granted, it applies the regional circuit’s rule.⁴⁹

Relying on applicable Eleventh Circuit precedent, the Federal Circuit noted, “the dismissal standard is extraordinary, and one not to be taken lightly.”⁵⁰ Looking at *Conley*, the Federal Circuit concluded, “The Supreme Court’s and Eleventh Circuit’s high standards for dismissal under Rule 12(b)(6) are clearly not met by the facts of this case.”⁵¹ The Federal Circuit then provided its views on the standard for pleading infringement:

The Rule 12(b)(6) pleading requirements for a complaint of infringement cannot be extended to require a plaintiff to specifically include each element of the claims of the asserted patent. Such requirements do not require a patentee to amend its claims to include specific allegations about each limitation once a court has construed the claims of the patent. To impose such requirements would contravene the notice pleading standard, and would add needless steps to the already complex process of patent litigation. Instead, a patentee need only plead facts sufficient to place the alleged infringer on notice. This requirement ensures that an accused infringer has sufficient knowledge of the facts alleged to enable it to answer the complaint and defend itself.⁵²

43 (emphasis added).

44 See *Twombly*, 550 U.S. at 569 n.14 (acknowledging that altering the Federal Rules of Civil Procedure cannot be accomplished by judicial interpretation); *Realtime Data, LLC v. Stanley*, 2010 WL 2403876 (E.D. Tex., May 7, 2010).

45 *Halton Co. v. Streivor, Inc.*, 2010 WL 20077203, *3 (N.D. Cal., May 21, 2010).

46 203 F.3d 790 (Fed. Cir. 2000).

47 *Id.* at 792.

48 *Id.*

49 *Id.* at 793 (In *Phonometrics*, the law of the Eleventh Circuit applied.).

50 *Id.* at 793.

51 *Id.* at 794.

52 *Id.*

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Oddly, in setting out the applicable pleading standard, the Federal Circuit also relied on language lifted from *Twombly* that directly cited to *Conley* only a few lines before the passage that resulted in the Court overturning *Conley*.

A review of the opinion suggests that more might have been at play than merely the pleading rules.

*McZeal v. Sprint Nextel Corp.*⁵³ was decided after *Twombly*, but before *Iqbal*. In *McZeal*, the *pro se* plaintiff appealed the district court's dismissal of his patent infringement complaint for failure to state a claim.⁵⁴ Holding that plaintiff had met the minimal pleading requirements for his patent and trademark infringement claims, the Federal Circuit vacated the district court's dismissal of his complaint and remanded the case.⁵⁵

Applying the law of the regional circuit and citing U.S. Supreme Court precedent, the Federal Circuit first noted that the reviewing court may grant the *pro se* litigant leeway on procedural matters, such as pleading requirements.⁵⁶

The Court identified *Twombly* as the U.S. Supreme Court's explanation of what is necessary for a claimant to state a claim.⁵⁷ Oddly, in setting out the applicable pleading standard, the Federal Circuit also relied on language lifted from *Twombly* that directly cited to *Conley* only a few lines before the passage that resulted in the Court overturning *Conley*.⁵⁸

Only in a footnote does the Federal Circuit acknowledge that, "Later in its *Bell Atlantic* opinion, the Court discusses and clarifies a phrase from its earlier opinion in *Conley v. Gibson*."⁵⁹ But in that same note, the Federal Circuit concluded, "This does not suggest that *Bell Atlantic* changed the pleading requirement of Federal Rule of Civil Procedure 8 as articulated in *Conley*. In fact, as illustrated above, *Bell Atlantic* favorably quoted *Conley*."⁶⁰

The court also referred specifically to Fed.R.Civ.P. Form 16 (2006) (now Form 18).⁶¹ Based on the *Twombly* precedent and the approved form, the court stated, "It logically follows that a patentee need only plead facts sufficient to place the alleged infringer on notice as to what he must defend."⁶² Given *Iqbal's* subsequent refining of the *Twombly* opinion, one is left to ponder whether this is a completely accurate statement of current law.

The Federal Circuit then analyzed the complaint's adequacy. First, it noted, "At this stage in the litigation, all *McZeal* has access to is [the defendant's] public statements and advertisements. From this information he has fashioned his complaint. In this case, the specifics of how [the] purportedly infringing device works is something to be determined through discovery."⁶³ The court then concluded that plaintiff had met the "low bar" for *pro se* litigants to avoid dismissal and that, while it was appropriate for the district court to deny plaintiff's request for injunctive relief, the district court should not have dismissed the complaint.⁶⁴

*Colida v. Nokia, Inc.*⁶⁵ involved a challenge to a design patent. The Federal Circuit affirmed an order dismissing a *pro se* plaintiff's \$1 billion infringement complaint relating to design patents for cell phones.⁶⁶ A review of the opinion suggests that more might have been at play than merely the pleading rules. The court observed, "Colida is no stranger to patent litigation: he has appealed many times to this court, and we have affirmed judgments of noninfringement against him at least

53 501 F.3d 1354 (Fed. Cir. 2007).

54 *Id.* at 1355.

55 *Id.*

56 *Id.* at 1356 ("Indeed, the Supreme Court has recognized this less demanding standard. In *Hughes v. Rowe*, 449 U.S. 5, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980), the Court concluded that the pleadings of *pro se* litigants should be held to a lesser standard than those drafted by lawyers when determining whether the complaint should be dismissed for failure to state a claim, because "[a]n unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claims.").

57 *Id.* at 1356.

58 *Id.*

59 *Id.* n.4.

60 *Id.*

61 *Id.* at 1356-57.

62 *Id.* at 1357.

63 *Id.* at 1358.

64 *Id.* at 1358-59.

65 347 Fed. Appx. 568 (Fed. Cir. 2009).

66 *Id.* at 569.

Given the paucity of Federal Circuit case law on the standard for pleading infringement claims, open issues remain.

“It is not easy to reconcile Form 18 with the guidance of the Supreme Court in *Twombly* and *Iqbal*: while the form undoubtedly provides a ‘short and plain statement,’ it offers little to ‘show’ that the pleader is entitled to relief.”

nine times.”⁶⁷ Concluding that the district court properly granted the motion to dismiss, the Federal Circuit stated, “Colida’s infringement claims were facially implausible and provided the district court with no basis on which to reasonably infer that an ordinary observer would confuse the pleaded patented designs with the accused [cell phone].”⁶⁸

*Yip v. Hugs to Go LLC*⁶⁹ is the most recent Federal Circuit pronouncement on the pleading standard in a patent infringement case. The district court dismissed yet another *pro se* plaintiff’s infringement complaint for failure to meet the standard Rule 8(a)(2) pleading requirements set out in *Twombly*.⁷⁰ Importantly, plaintiff was afforded an opportunity to amend her complaint before the second amended complaint was dismissed.⁷¹

Unlike *McZeal*, the Federal Circuit affirmed the dismissal.⁷² Applying the law of the regional circuit and acknowledging the lower pleading standard for *pro se* plaintiffs, the Federal Circuit noted that, despite having several opportunities to correct the deficiencies in her complaint, plaintiff did not plead facts to establish that defendant existed at the time of the alleged acts or that defendant had engaged in infringing acts.⁷³ Thus, the Federal Circuit agreed with the district court that the complaint still did not meet the pleading requirements of Rule 8(a)(2) as explained in *Twombly*.⁷⁴

Questions Remain

Given the paucity of Federal Circuit case law on the standard for pleading infringement claims, open issues remain. District court opinions give us guidance until there is controlling circuit court precedent.

The Fate of Form 18 – The fate of Form 18 after *Twombly* and *Iqbal* is uncertain at best. In his dissent in the *McZeal* case, Judge Timothy Dyk stated,

I agree that under Rule 84 of the Federal Rules of Civil Procedure, we would be required to find that a bare allegation of literal infringement in accordance with Form 16 [now Form 18] would be sufficient under Rule 8 to state a claim. One can only hope that the rulemaking process will eventually result in eliminating the form, or at least in revising it to require allegations specifying which claims are infringed, and the features of the accused device that correspond to the claim limitations.⁷⁵

District courts have also agreed, “It is not easy to reconcile Form 18 with the guidance of the Supreme Court in *Twombly* and *Iqbal*: while the form undoubtedly provides a ‘short and plain statement,’ it offers little to ‘show’ that the pleader is entitled to relief. Under Rule 84 of the Federal Rules of Civil Procedure, however, a court must accept as sufficient any pleading made in conformance with the forms.”⁷⁶

According to at least one district court, however, the U.S. Supreme Court’s *Twombly* and *Iqbal* decisions have not affected the adequacy of complying with Form 18.⁷⁷ To hold otherwise

⁶⁷ *Id.* (emphasis added).

⁶⁸ *Id.* at 570.

⁶⁹ 2010 WL 2162639 (Fed. Cir., May 28, 2010).

⁷⁰ *Id.* at *1.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at *5.

⁷⁴ *Id.*

⁷⁵ *McZeal v. Sprint Nextel Corp.*, 501 F.3d at 1360 (Dyk, J., concurring in part and dissenting in part) (footnote omitted).

⁷⁶ *Elan Microelectronics Corp. v. Apple, Inc.*, 2009 WL 2972374, at *2 (N.D. Cal. Sept. 14, 2009); *Shara-fabadi v. Pac. Nw. Farmers Coop.*, 2010 WL 234769 *2, n.3 (W.D. Wash., Jan. 14, 2010) (“This court agrees with the sentiment expressed by at least one other district court that it is difficult to reconcile Form 18 with the Supreme Court’s guidance in those decisions.”).

⁷⁷ See *Mark IV Indus. Corp. v. TransCore, LP*, No. 09-418 GMS, 2009 WL 4828661, at *2-4 (D. Del. Dec. 2, 2009).

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would render Rule 84 and Form 18 invalid, which cannot be done by judicial action.⁷⁸

Importantly, it is worth remembering that Form 18 relates to allegations of direct infringement only, and not to claims of indirect infringement.⁷⁹ Thus, at least in the Northern District of California, Form 18 is not available as a shield against a Rule 12(b)(6) motion challenging a complaint for indirect patent infringement.⁸⁰

The Effect of Local Patent Rules – Undeniably, the use of local patent rules can address problems resulting from insufficiently rigorous pleading standards. The Federal Circuit has explicitly noted, given the simplified notice pleading system under the federal rules, some courts have adopted local patent rules to address the problem of discovering particular theories of liability.⁸¹ If the requirements of most local patent rules are followed, concerns about pleading standards are directly addressed.

Leave to Amend – If a complaint fails to satisfy Rule 8, it “must be dismissed” under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.⁸² But “[i]n the event dismissal is warranted, it is generally without prejudice, unless it is clear the complaint cannot be saved by any amendment.”⁸³

Rule 15(a) of the Federal Rules of Civil Procedure provides that when amendment is available only from the court, “leave shall be freely given when justice so requires.”⁸⁴ As a consequence, many Rule 12(b)(6) challenges to the adequacy of patent infringement complaints result in orders allowing the plaintiff leave to amend.⁸⁵ Thus, the new “plausibility” standard may offer slim defensive benefit except in cases where a pleading party cannot marshal *any* “plausible” facts to support its position.

Attacking Counterclaims – Some enterprising plaintiffs have used the new pleading standard to attack affirmative defenses and counterclaims.⁸⁶ This practice, combined with protection via Form 18, has caused some commentators to cry foul regarding pleading requirements.⁸⁷ The imbalance may be more perceived than real, however. As one court said, “To require anything more of Defendant [than to provide fair notice] at the pleading stage would be to impose a higher burden on Defendant’s claim for invalidity than Plaintiff’s claim for infringement. Yet, these pleading standards are identical.”⁸⁸

78 See *Twombly*, 550 U.S. at 569 n.14 (acknowledging that altering the Federal Rules of Civil Procedure cannot be accomplished by judicial interpretation); *Realtime Data, LLC v. Stanley*, 2010 WL 2403876 (E.D. Tex., May 7, 2010).

79 *Halton Co. v. Streivor, Inc.*, 2010 WL 20077203, *3 (N.D. Cal., May 21, 2010).

80 *Id.*; See also *Bender v. LG Elecs. U.S.A., Inc.*, 2010 WL 889541, *3-4 (N.D. Cal., Mar. 11, 2010) (Form 18 provides an example of how direct patent infringement only may be alleged); *Elan Microelectronics Corp. v. Apple, Inc.*, 2009 WL 2972374, *2 (N.D. Cal. Sept. 14, 2009) (“Both types of indirect infringement include additional elements, none of which Form 18 even purports to address. In the absence of any other form that addresses indirect infringement and is made binding on the courts through Rule 84, the Court must apply the teachings of *Twombly* and *Iqbal*.”).

81 *O2 Micro Int’l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1365-66 (Fed. Cir. 2006); *Teirstein v. AGA Med. Corp.*, 2009 WL 704138, *5 (E.D. Tex., March 16, 2009).

82 See *Bender v. Motorola, Inc.*, 2010 WL 726739, *2 (N.D. Cal., Feb. 26, 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

83 *Bender v. Motorola, Inc.*, 2010 WL 726739, *2 (N.D. Cal., Feb. 26, 2010).

84 *Id.*

85 See, e.g., *Schwendimann v. Arkwright, Inc.*, 2008 WL 2901691, *2 (D. Minn., July 23, 2008);

86 See, e.g., *Elan Microelectronics Corp. v. Apple, Inc.*, 2009 WL 2972374 (N.D. Cal. Sept. 14, 2009); *Teirstein v. AGA Med. Corp.*, 2009 WL 704138 (E.D. Tex., March 16, 2009). But see *Ameristar Fence Prods., Inc. v. Phoenix Fence Co.*, No. 2-10-cv-00299, slip op., (D. Ariz., July 15, 2010) (order denying motion to strike affirmative defenses because Rule 8(b) does not apply).

87 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 (2008-2009).

88 *Teirstein v. AGA Med. Corp.*, 2009 WL 704138, *5 (E.D. Tex., March 16, 2009).