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## *Ashcroft v. Iqbal*:

# The Sleeper 2009 Supreme Court Decision for Patent Litigators? By Kenneth R. O'Rourke, Mark S. Davies, and Chris Hagale\*

The Supreme Court's latest articulation of the standards by which a federal complaint should be evaluated for sufficiency diverges significantly from the Federal Circuit's standard by which a patent complaint should be evaluated. Under *Ashcroft v. Iqbal*,<sup>1</sup> a complaint that does nothing more than recite the elements of a cause of action and does not allege facts giving rise to a claim that is facially plausible should be dismissed.<sup>2</sup> But, under *McZeal v. Sprint Nextel Corp.*,<sup>3</sup> a complaint that does nothing more than recite the elements of a patent infringement action and does not specify facts explaining how the accused product infringes is deemed sufficient.<sup>4</sup> This article explains the origins of this dichotomy and suggests how the tension may resolve in the future.

## *Conley* and Form 18

Federal Rule of Civil Procedure 8(a) provides that a "pleading shall contain ... a short and plain statement of the claim showing that the pleader is entitled to relief." When a defendant believes that the plaintiff's complaint does not satisfy this requirement, the defendant may move to dismiss the complaint for failure to state a claim upon which relief can be granted.<sup>5</sup>

For 50 years, the standard for dismissing a complaint for failure to comply with Rule 8(a) at the pleading stage was the "no-set-of-facts" standard of *Conley v. Gibson*.<sup>6</sup> In *Conley*, the complaint alleged that a railroad employee union had failed to give the African-American plaintiffs the same protection as white employees in violation of the Railway Labor Act.<sup>7</sup> The Supreme Court found that this "notice" form of pleading was sufficient and stated 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."<sup>8</sup>

Consistent with the notice-pleading regime of *Conley*, the Federal Rules of Civil Procedure have long contained a form describing an adequate patent complaint. Under Rule 84, the "forms contained in the Appendix of Forms are sufficient under the rules and intended to indicate the simplicity and brevity of statement which the rules contemplate." Form 18, entitled Complaint for Infringement of Patent, provides the following example of a sufficient pleading:

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(1) allegation of jurisdiction; (2) On *date*, United States Letters Patent No. \_\_\_\_\_ were issued to the plaintiff for an invention in an *electric motor*. The plaintiff owned the patent throughout the period of the 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.

The form became effective in 1938.

Thus, a patent plaintiff relying on Form 18 may file a complaint that does little more than recite the relevant patent and allegedly infringing product. Form 18 does not, for example, include any specifics about which patent claims are allegedly infringed or which features of the allegedly infringing product violate those claims. Nevertheless, under Rule 84, the Form 18 allegations are deemed adequate to meet Rule 8's requirement of a "short and plain" statement of relief.

### ***Twombly and McZeal***

In 2007, the Supreme Court revamped the standards for evaluating the sufficiency of a complaint. In *Bell Atlantic Corp. v. Twombly*,<sup>9</sup> the lengthy complaint alleged that the Regional Bell Operating Companies had conspired not to compete to provide long distance and high-speed Internet services outside of the traditional territories.<sup>10</sup> The Supreme Court ruled that the complaint should have been dismissed because it did not contain sufficient facts to "suggest that an agreement was made."<sup>11</sup> A complaint must show a "plausible" entitlement to relief; a mere "possibility" of entitlement to relief is not enough. The Court explained:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).<sup>12</sup>

Although the lower court had found the complaint sufficient under *Conley*, the Supreme Court in *Twombly* stated that the *Conley* no-set-of-facts test has "earned its retirement."<sup>13</sup> "The phrase 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."<sup>14</sup> The dissenters argued that Form 9 (negligence claim) in the civil rules illustrated the type of "bare allegation[s]" that are sufficient,<sup>15</sup> but the majority explained that the Form involved only a "simple fact pattern" that, unlike the complaint before it,

would put the defendants on notice of how to answer the complaint.<sup>16</sup>

Shortly after *Twombly*, the Federal Circuit considered the sufficiency of a patent complaint. In *McZeal v. Sprint Nextel Corp.*,<sup>17</sup> the patent owner filed a lengthy complaint alleging that Sprint Nextel's use of a Motorola i930 cellular telephone infringed one of its patents.<sup>18</sup> A divided panel of the Federal Circuit found the complaint sufficient.<sup>19</sup> The majority recited the any-set-of-facts test and noted the sample Form 18 (then Form 16).<sup>20</sup> The majority stated that "a plaintiff in a patent infringement suit is not required to specifically include each element of the claims of the asserted patent."<sup>21</sup> "Here," the majority emphasized the patent owner had described the "means" by which the defendant violated the patent: "[T]he defendant's [device] physically have [ ] perform[ed] all of the basic elements contained in the patent claims of the plaintiff."<sup>22</sup> The majority also noted that the patent owner was proceeding *pro se* and that therefore the bar was lower for surviving a motion to dismiss.<sup>23</sup>

Judge Dyk dissented, arguing that the majority's decision "is inconsistent with the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*."<sup>24</sup> Judge Dyk noted that the complaint did not specify which of the 12 patent claims were allegedly infringed.<sup>25</sup> In his view, the "bare allegation of literal infringement using the form is inadequate to provide sufficient notice to an accused infringer under a theory of literal infringement."<sup>26</sup> Judge Dyk stated that Form 18 would allow such a complaint, but hoped 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."

As to the patent claim in *McZeal*, however, Judge Dyk would have held Form 18 inapplicable because the patentee's theory of infringement was based on the doctrine of equivalents rather than on the theory of literal infringement set out in Form 18.<sup>27</sup> Judge Dyk cited *Twombly*'s discussion of the negligence form for the proposition that "the forms should not be interpreted as going beyond the fact situation described in the form."<sup>28</sup> Because the patent owner had alleged a theory of infringement based on the doctrine of equivalents, Judge Dyk argued that Form 18 was inapplicable because it described a complaint based on the more straightforward theory of literal patent infringement.<sup>29</sup> In his view, *Twombly* requires the patent owner "to supply some specificity" in alleging a doctrine of equivalents claims.<sup>30</sup> Judge Dyk also argued that the patent owner was a "serial litigator who has frequently brought unmeritorious cases" and thus the low bar for *pro se* plaintiffs should not be invoked.<sup>31</sup>

After *McZeal*, numerous district courts have considered a motion to dismiss a patent claim based on *Twombly*. As a technical matter, the Federal Circuit in *McZeal* applied Fifth Circuit law since the pleading standards are procedural issues.<sup>32</sup> But as a practical matter, the Federal Circuit's guidance on the standards for dismissal of patent-related cases have great impact on all patent cases. Thus, for the most part, the courts have allowed plaintiffs to proceed with complaints that satisfy the requirements of Form 18. As one commentator found:

[C]ourts are adopting the Federal Circuit's *McZeal* reasoning, often citing Federal Rule of Civil Procedure Form 18, and holding that a plaintiff is only required to plead sufficient interest in the

patent, the defendant's identity, and that a particular product or service, or category of products or services, infringes the patent.<sup>33</sup>

### *Iqbal*

In the recent *Ashcroft v. Iqbal*<sup>34</sup> decision, the Supreme Court explained further how to evaluate the sufficiency of a complaint. In *Iqbal*, a Pakistani Muslim who had been arrested on criminal charges after the September 11, 2001, attacks sued, among others, the Director of the FBI and the US Attorney General claiming that he had been subjected to restrictive conditions because of his race, religion, or national origin.<sup>35</sup> In evaluating the complaint in response to a motion to dismiss, the Supreme Court explained that “[t]wo working principles underlie our decision in *Twombly*.”<sup>36</sup> First, “recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”<sup>37</sup> Thus, the Court ignored, for example, the complaint’s allegations that the Attorney General condoned an invidious policy because the allegations were “bare assertions, much like the pleading of conspiracy in *Twombly*.”<sup>38</sup>

Second, “only a complaint that states a plausible claim for relief survives a motion to dismiss.”<sup>39</sup> This second step, the Court noted, is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”<sup>40</sup> “[W]here 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.’”<sup>41</sup> In the Court’s view, the complaint did “not contain any factual allegation sufficient to plausibly suggest [defendant’s] discriminatory state of mind.”<sup>42</sup>

Permitting a patent complaint that adheres to Form 18 to proceed is hard to reconcile with the analysis of *Iqbal*. Recall that the *McZeal* majority relied on the allegation that the accused device “physically ha[s] perform[ed] all of the basic elements contained in the patent claims of the plaintiff.”<sup>43</sup> Under *Iqbal*, conclusory statements are ignored. The allegation that a product includes all the basic elements of a patent is merely the recitation of the infringement cause of action. This sentence, like the allegations of conspiracy in *Twombly* and allegations of discriminatory intent in *Iqbal*, should arguably be ignored at the motion to dismiss stage as being conclusory. Furthermore, the complaint in *McZeal* appears to have lacked facts that would permit a court to infer a plausible suggestion of infringement. Unless the complaint identifies how particular features of a product infringe specific claims, it is hard to see how a complaint includes sufficient facts to render plausible an infringement claim under *Iqbal*.

### **Next Steps?**

We have elsewhere explained that the Supreme Court has sought to harmonize patent law with other areas of law.<sup>44</sup> Thus, for example, the Supreme Court ruled that the injunctive standards of equity are no different in the patent law context than in other contexts.<sup>45</sup> With this “harmonizing” concern as background, the tension between *Iqbal/Twombly* and *McZeal/Form 18* appears unstable and may well not endure.

One possibility is that Congress will undo the Supreme Court’s recent decisions. *Twombly* and *Iqbal* are controversial decisions. Both *Twombly* and *Iqbal* were decided by one vote, and the author of *Twombly* wrote the dissent in *Iqbal*. Congress has pending before it proposed legislation that would restore notice pleading. The Notice Pleading Restoration Act of

2009 (S. 1504) provides that a “Federal court shall not dismiss a complaint under Rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).”

Assuming that *Iqbal* and *Twombly* remain good law, a second harmonizing possibility is a revision to Form 18. As Judge Dyk noted in *McZeal*, there is a “rulemaking process” that could result in elimination or revision of the form.<sup>46</sup> Possibly, early discussions along these lines have started, but any revision is likely to take time.

A third harmonizing possibility stems from patent local rules. Various jurisdictions have adopted local rules to govern patent cases. Some of these rules require patent plaintiffs to provide early notice of their infringement contentions.<sup>47</sup> For example, the local patent rules in the Eastern District of Texas require plaintiffs to serve detailed infringement claim charts for each accused product and claim within 10 days of the initial case conference. But varied local rules are not a perfect substitute for national federal standards.

A fourth harmonizing possibility centers on the role of the Federal Circuit. As the Supreme Court stated in *Iqbal*, the pleading standards are “context specific” and rely on the “judicial experience” and “common sense” of the reviewing court.<sup>48</sup> As the sole appellate court reviewing patent matters, the Federal Circuit is uniquely and ideally placed to identify the appropriate factual content for a sufficient patent complaint. If the Federal Circuit were inclined to revisit the question, it could decide to limit *McZeal* to the *pro se* plaintiff context or emphasize that *Iqbal* clarified this area of the law. The court could also limit Form 18 to the simple fact pattern of literal infringement by one product of one product patent. In this fashion, the Federal Circuit could find itself still free to harmonize patent law pleading standards with the standards set out in *Iqbal* and *Twombly*.

In the absence of any steps down a harmonization avenue, the Supreme Court itself could review the sufficiency of a patent complaint. Unlike other recent Supreme Court terms, the 2008–2009 term did not include any patent law cases. Nevertheless, patent lawyers may find that *Ashcroft v. Iqbal* renders the recent term of considerable consequence for patent litigation.

## Postscript

After we submitted this article, the Federal Circuit issued two opinions regarding pleading standards in patent cases. In *Exergen Corp. v. Walmart Stores, Inc.*,<sup>49</sup> the Federal Circuit discussed the “heightened pleading requirement” for alleging inequitable conduct by the patentee before the patent office. The Federal Circuit interpreted Federal Rule of Civil Procedure 9(b) to require that the pleading “identify the specific who, what, when, where, and how of the material misrepresentation or omission committed before the PTO.”<sup>50</sup> The inequitable conduct pleading was found lacking because “the pleading fails to identify which claims, and which limitations in those claims, the withheld references are relevant to.”<sup>51</sup>

Finally, in *Colida v. Nokia, Inc.*,<sup>52</sup> the Federal Circuit issued an unpublished decision citing *Twombly*, *Iqbal*, and *McZeal*. In *Colida*, a *pro se* patentee argued that one of Nokia’s cellular phones infringed his design patents. The Federal Circuit rejected the pleading as insufficient, noting that the patentee “does not explain which patents include this design, where it

appears in the accused product, or any other facts relevant to the question of infringement.”<sup>53</sup> In a footnote, the court observed that the patentee had not invoked Form 18. Furthermore, the court wrote: “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.” *Colida* arguably suggests that at least some Federal Circuit judges are inclined to revisit *McZeal*. In any event, *Colida* is unlikely to be the Federal Circuit’s last word regarding the impact on *Iqbal* on the sufficiency of pleadings in patent litigation.

## Notes

1. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).
2. *Id.* at 1949.
3. *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007).
4. *Id.* at 1357–1358.
5. *See* Fed. R. Civ. P. 12(b)(6).
6. *Conley v. Gibson*, 355 U.S. 41, 47 (1957).
7. *Id.* at 41.
8. *Id.* at 45–46.
9. *Bell Atlantic Corp. v. Twombly*, 550 US 544 (2007).
10. *Id.* at 550–551.
11. *Id.* at 556.
12. *Id.* at 555 (internal citations omitted).
13. *Id.* at 562–563.
14. *Id.* at 563.
15. *Id.* at 575–576 (Stevens, J., dissenting).
16. *Id.* at 565 n.10.
17. *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007).
18. *Id.* at 1355.
19. *Id.*
20. *Id.* at 1356, 1360.
21. *Id.* at 1357.
22. *Id.*
23. *Id.* at 1356.
24. *Id.* at 1359.
25. *Id.*
26. *Id.* at 1360.
27. *Id.* at 1361.
28. *Id.*
29. *Id.*
30. *Id.* at 1363.
31. *Id.* at 1360 n.2.
32. *Id.* at 1355–1356.
33. *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 (2008) (citing, e.g., *FotoMedia Techs., LLC v. AOL*, 2008 WL 4135906). *See also* *S.O.I.T.E.C. Silicon on Insulator Technologies v. MEMC Electronic Materials, Inc.*, 2009 US Dist. LEXIS 13155, \*4–5 (D. Del. 2009) (citing *McZeal*, and stating that “[t]he complaint at bar provides the level of detail suggested by Form 18 and, therefore, passes muster); *Iguana*,

- LLC v. Lanham, 2009 U.S. Dist. LEXIS 48199, \*4 (M.D. Ga. 2009) (citing *McZeal* for the proposition that a plaintiff need only plead a bare-bones complaint).
34. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).
  35. *Id.* at 1942.
  36. *Id.* at 1949.
  37. *Id.*
  38. *Id.* at 1951.
  39. *Id.* at 1950.
  40. *Id.*
  41. *Id.*
  42. *Id.* at 1952.
  43. *McZeal*, 501 F.3d at 1357.
  44. See Mark S. Davies, “The Future of Patent Law: Understanding The Supreme Court’s Renewed Interest In Patent Law,” *Intellectual Property Today* (June 2007).
  45. See *eBAY v. MercExchange*, 547 U.S. 388 (2006).
  46. *McZeal*, 501 F.3d at 1360.
  47. See, e.g., *McZeal*, at 1360 n.3 (discussing local rules of Northern District of California).
  48. *Iqbal*, 129 S. Ct. at 1950.
  49. *Exergen Corp. v. Walmart Stores, Inc.*, 575 F.3d 1312 (Fed. Cir. 2009).
  50. *Exergen*, 575 F.3d at 1328.
  51. *Exergen*, 575 F.3d at 1329.
  52. *Colida v. Nokia, Inc.*, No. 2009–1326 (Oct. 6, 2009).
  53. *Colida*, Slip Op., at 4.