

# PATENT SUIT PLEADING STANDARDS MUST BE CONFORMED TO SUPREME COURT PRECEDENTS

by  
J High

In June, a divided panel of the U.S. Court of Appeals for the Federal Circuit held that the heightened pleading standards of *Twombly* and *Iqbal* do not apply to claims of direct patent infringement.<sup>1</sup> This decision clarified pleading issues for now, but leaves, going forward, incongruent pleading standards that require correction. Because Form 18 in the appendix to the Federal Rules of Civil Procedure is the cause of these disparate standards, it should be modified or eliminated without further delay.

## Supreme Court Pronouncements in *Twombly* and *Iqbal*

The Supreme Court in *Twombly*<sup>2</sup> and *Iqbal*<sup>3</sup> rejected the long-prevailing pleading standard which had allowed in most cases a complaint to survive a motion to dismiss unless there was “no set of facts” a plaintiff could prove to win his case.<sup>4</sup> First, in *Twombly* and then *Iqbal*, the Court raised the minimum standard for stating a claim, requiring a plaintiff to plead not just enough factual information to show that his claim is “plausible,” but rather that his version of events is “probable.”<sup>5</sup>

In the wake of *Twombly* and *Iqbal*, there had been differences of opinion in the district courts as to whether this heightened pleading standard applied to claims for patent infringement. Some district courts took the view that Rule 84, which deems the appendix of forms to the Federal Rules of Civil

---

<sup>1</sup> *In re Bill of Lading Transmission & Processing Sys. Pat. Litig.*, 681 F.3d 1323 (Fed. Cir. 2012).

<sup>2</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>3</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

<sup>4</sup> *Twombly*, 550 U.S. at 563; *Iqbal*, 129 S. Ct. at 1944.

<sup>5</sup> *Twombly*, 550 U.S. at 556-57; *Iqbal*, 129 S. Ct. at 1949.

---

**J High** is an associate with the law firm Sidley Austin LLP. Along with partner Eric Shusmky, Mr. High authored a March 23 WLF LEGAL BACKGROUNDER, [Impact Of The Supreme Court's Twombly & Iqbal Rulings On Patent Litigation](#). The views in this article are his alone, and do not necessarily express the views of Sidley Austin LLP, its partners or its clients. This article has been prepared for informational purposes and does not constitute legal advice; it is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers.

Procedure “sufficient,” authorized minimally informative pleadings modeled on Form 18.<sup>6</sup> Form 18 presents a patent infringement complaint which consists simply of a jurisdictional statement, a prayer for relief, and a mere four sentences of substance regarding infringement allegations. Other district courts saw *Twombly* and *Iqbal* as controlling authority despite Rule 84 and Form 18,<sup>7</sup> or at least read Rule 84 and Form 18 narrowly and applied them only to simple claims of direct, literal infringement, but not any other types of patent claims, such as for indirect infringement or infringement under the doctrine of equivalents.<sup>8</sup>

## Federal Circuit Implementation in *Bill of Lading*

The Federal Circuit, in *In re Bill of Lading Transmission and Processing System Patent Litigation*, held that Rule 84 and Form 18 set the standard for pleading claims of direct infringement, stating that “to the extent . . . that *Twombly* and its progeny conflict with the Forms and create differing pleadings requirements, the Forms control.”<sup>9</sup> The Federal Circuit was fully aware of the low bar it was setting (or felt had already been set), noting that “a plaintiff need not even identify [in its complaint] which claims it asserts are being infringed.”<sup>10</sup>

However, the Federal Circuit construed Rule 84 and Form 18 narrowly, stating that “[t]he Forms are controlling only for causes of action for which there are sample pleadings.”<sup>11</sup> Thus, claims for inducing infringement or contributory infringement are to be judged according to *Twombly* and *Iqbal*, without reference to Form 18.<sup>12</sup> Presumably, Form 18 is likewise inapplicable for any other patent-related claims, such as willful infringement<sup>13</sup> or importing a product made abroad by a patent process.<sup>14</sup>

Judge Newman penned a partial dissent, arguing that the majority in *Bill of Lading* was ignoring the Supreme Court’s directive that “*Twombly* expounded the pleading standard for all civil actions.”<sup>15</sup> Judge Newman pointed out that Form 18 is largely unchanged from 1938, when “patents, technology, and litigation were generally less complex.”<sup>16</sup> She also noted that the Civil Rules Advisory Committee had been discussing its concerns with Form 18 since October 2009, and that the chief judge of the

---

<sup>6</sup> See, e.g., *Inmotion Imagery Techs., LLC v. JVC Ams., Corp.*, 2011 WL 4591940, \*1 (E.D. Tex. Sept. 12, 2011) (“A patent complaint that complies with Form 18 will suffice to state a claim that is plausible on its face for direct infringement.”).

<sup>7</sup> See, e.g., *Winstron Corp. v. Phillip M. Adams & Assocs., LLC*, 2011 WL 4079231, \*3-4 (N.D. Cal. Sept. 12, 2011).

<sup>8</sup> See, e.g., *DR Systems, Inc. v. Avreo, Inc.*, 2011 WL 4850171, \*1 (S.D. Cal. Oct. 12, 2011); *W.L. Gore & Assocs. v. Medtronic, Inc.*, 778 F. Supp. 2d 667, 675 (E.D. Va. 2011) (Form 18 may not represent sufficient pleading of infringement by equivalents).

<sup>9</sup> *Bill of Lading*, 681 F.3d at 1334.

<sup>10</sup> *Id.* at 1335.

<sup>11</sup> *Id.* at 1336.

<sup>12</sup> *Id.* at 1337.

<sup>13</sup> Citing *Bill of Lading*, the Northern District of California ruled that claims for willful infringement indeed must satisfy the higher pleading standard of *Twombly* and *Iqbal*, rather than Form 18. See *Robert Bosch Healthcare Sys. v. Express MD Solutions, LLC*, 2012 WL 2803617, \*4 (N.D. Cal. July 10, 2010).

<sup>14</sup> See 35 U.S.C. § 271(g).

<sup>15</sup> *Bill of Lading*, 681 F.3d at 1347 (quoting *Iqbal*, 556 U.S. at 684).

<sup>16</sup> *Id.* at 1350.

Federal Circuit had gone so far as to call Form 18 “an embarrassment.”<sup>17</sup>

## State of Patent Litigation

Regardless of whether the majority or the dissent in *Bill of Lading* is correct about the interplay between Form 18 and *Twombly* and *Iqbal*,<sup>18</sup> there is no justifiable policy reason to have widely divergent pleading standards for direct infringement and other types of infringement claims. At the heart of any patent dispute is the issue of whether the accused device or method meets all of the limitations of the asserted patent claims. This is true for both ordinary cases involving allegations of direct infringement of a relatively simple product, and for cases involving exceedingly complex technologies or other types of infringement claims (such as inducing infringement, willful infringement, or infringement by equivalents). Early elucidation of the asserted claims and their relationship to the accused instrumentality makes patent litigation more efficient and less costly. Simply identifying a patent, a defendant, and a class of products, which is all that Form 18 requires, does precious little to inform a defendant about the nature of a patentee’s infringement allegations.

This precise failure of the pleading standard was one of the problems that lead to the adoption, first by the Northern District of California, and subsequently by over a dozen other districts, of local patent rules.<sup>19</sup> A primary feature of these local rules is the patentee providing, at an early stage of proceedings, a claim chart “identifying specifically where each limitation of each asserted claim is found within each Accused Instrumentality.”<sup>20</sup> These local patent rules do not require the patentee to provide a claim chart with the complaint, but at some later point once the case<sup>21</sup> and discovery<sup>22</sup> have gotten underway.

## The Civil Rules Advisory Committee

At the November 2011 meeting of the Civil Rules Advisory Committee, the Committee acknowledged a proposal to replace Form 18 with “a more detailed substitute,” and referred it to the Rule 84 Subcommittee.<sup>23</sup> The primary change for direct infringement under this proposed substitute would be a requirement that a claim chart be attached to the complaint.<sup>24</sup> For claims of inducing

---

<sup>17</sup> *Id.* (quoting Civil Rules Advisory Committee, Minutes (Oct. 2009)). Minutes of the Civil Rules Advisory Committee meetings are available at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Minutes.aspx>.

<sup>18</sup> On August 8, 2012, the Federal Circuit denied a petition for rehearing *en banc* in *Bill of Lading*. As is typical, no reason was given for the denial. However, it is possible that many judges on the court did not see *Bill of Lading* as a good vehicle for consideration *en banc*, as Judge Newman stated that even under the more stringent pleading standards of *Twombly* and *Iqbal*, the complaints under consideration were sufficient. *Bill of Lading*, 681 F.3d at 1351.

<sup>19</sup> James Ware & Brian Davy, “The History, Content, Application and Influence of the Northern District of California’s Patent Local Rules,” 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 965, 983-84, 1015 (2009).

<sup>20</sup> *See, e.g.*, Patent L.R. 3-1(c) (N.D. Cal.).

<sup>21</sup> *See, e.g., id.* at 3-1 (requiring claim chart “Not later than 14 days after the Initial Case Management Conference”).

<sup>22</sup> *See, e.g., id.* at 2-5 (generally disallowing objections to the timing of discovery based on local patent rules).

<sup>23</sup> Civil Rules Advisory Committee, Minutes (Nov. 2009) at 38; *see also id.* (“This proposal echoes the common lament that the Form 18 model of a complaint for patent infringement is woefully inadequate.”). This proposal was denominated “10-CV-G” by the Committee. *Id.*

<sup>24</sup> *See letter to Secretary of the Committee on Rules of Practice and Procedure from David Swetnam-Burland and Stacy O. Stitham* (Jan. 13, 2011) at 4.

infringement, contributory infringement, or joint infringement, this proposed substitute form would require additional information, such as the identity of any third parties induced to infringe or participating in the acts constituting joint infringement.<sup>25</sup> Presumably, courts could extrapolate these examples to cover additional situations, as appropriate, such as willful infringement or importing a product made abroad by a patented process.

Including claim charts, as would be required under the proposed form, seems efficient and a helpful aid to patent litigation. Several districts have adopted local patent rules that require claim charts,<sup>26</sup> making them a known quantity to patent litigators. No district has yet required claim charts be included with the complaint—instead, claim charts always come some weeks or months after the complaint.<sup>27</sup> However, the Supreme Court has stated that subsequent discovery management cannot cure shortcomings in pleadings.<sup>28</sup> Requiring claim charts to be included with the complaint, although accelerating the schedule currently set by local patent rules, would use a familiar tool to bring patent infringement complaints in line with *Twombly* and *Iqbal*.

If, for whatever reason, the Committee cannot act expeditiously to adopt the proposed modification to Form 18, it should delete Form 18 altogether. The Committee has been well aware for years now of the inadequacies of the present form of Form 18, and there should be no further delay in eliminating the current version of Form 18, regardless of whether a replacement form is adopted. District courts and litigants would be better off without the hindrance of Form 18.<sup>29</sup> If need be, litigants and the courts (particularly district courts with local patent rules or that are participating in the Patent Pilot Program,<sup>30</sup> along with the Federal Circuit) can work through the details of applying *Twombly* and *Iqbal* to patent infringement cases. Deleting Form 18 would give them the freedom to do so.

---

<sup>25</sup> *Id.* at 5-6.

<sup>26</sup> *See, e.g.*, Patent L.R. 3-1 (N.D. Cal.); Patent L.R. 4.1 (N.D. Ga.); Local Patent R. 3-1(a) (E.D. Mo.).

<sup>27</sup> *See, e.g.*, Patent L.R. 3-1 (N.D. Cal.) (requiring service of claim charts “[n]ot later than 14 days after the Initial Case Management Conference”); Patent L.R. 4.4(a) (N.D. Ga.) (requiring service of claim charts “within thirty (30) days after filing of the Joint Preliminary Report and Discovery Plan”); Local Patent R. 3-1(a) (E.D. Mo.) (requiring service of claim charts “[n]ot later than 21 days after the initial Rule 16 Scheduling Conference”).

<sup>28</sup> *Iqbal*, 129 S. Ct. at 1953 (“[T]he question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process.”).

<sup>29</sup> *See, e.g., Bill of Lading*, 681 F.3d at 1350 (Newman, J., dissenting) (“The Form 18 complaint for patent infringement has created particular difficulties for lower courts.”) (quoting Civil Rules Advisory Committee, Minutes (Dec. 2011) at 15).

<sup>30</sup> *See* Pub. L. No. 111-349.