The Evolving Standard for Pleading Direct Patent Infringement

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It has been a little more than half a year since the amendments to the Federal Rules of Civil Procedure abrogated Rule 84 and put an end to the Form 18 bare-bones style patent complaint. The question on the minds of many patent litigators has been: What standard would emerge for pleading direct patent infringement in the post-Form 18 world? The contours of the answer to that question have begun to emerge as many district courts are now requiring plaintiffs to allege sufficient facts to permit an inference that an accused product infringes each element of at least one patent claim. Counsel for plaintiffs should take heed of this heightened pleading standard. On the other side, counsel for defendants now have an additional tool in their toolbox for attacking bare-bones style patent complaints.

Form 18 had long been used by plaintiffs in patent cases as a safe harbor to immunize minimalist pleadings of patent infringement from motions to dismiss. Courts recognized a tension between the minimal pleading requirements of Form 18 and the higher “plausibility standard” of pleading as set forth in the Supreme Court in the *Iqbal* and *Twombly* line of cases, but were siding with the requirements of Form 18 in the battle between those sources of authority. Now that Form 18 is officially dead, the plausibility standard as set forth in *Iqbal* and *Twombly* has returned to prominence. To survive a motion to dismiss, therefore, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In other words, a complaint must contain enough “factual content” to allow a court “to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

The meaning of the plausibility standard in the context of allegations of direct patent infringement is being grappled with by the district courts. A recent decision by Judge Philip Gutierrez in the Central District of California addressed the application of *Iqbal* and *Twombly* to the pleading of direct patent infringement. *TeleSign Corp. v. Twilio, Inc.*, No. 2:16-CV-02106 (C.D. Cal. Aug. 3, 2016). In *TeleSign*, the court recognized that “[t]o be liable for direct infringement, a product must practice all elements of a patent claim.” The court then reasoned, therefore, that “in the post-Form 18 world, a plaintiff must include allegations sufficient to ‘permit [the] court to infer that the accused product infringes each element of at least one claim.’” For that pleading standard, the court quoted a decision from the Northern District of Illinois, as well as noted recent decisions that are in accordance with that standard from the Eastern District of Virginia and the Northern District of California. The plaintiff in *TeleSign* argued that requiring it to allege facts about the relationship of the accused products to the claims required a level of granular detail that was not warranted by *Twombly* and *Iqbal*. The court rejected that argument and reiterated that “a plaintiff must still plausibly allege that a defendant’s product or products practice all elements of at least one patent claim” in order to survive a motion to dismiss.

Another recent district court decision addressed the application of *Iqbal* and *Twombly* to the pleading of direct patent infringement for a method claim, and dismissed a claim for direct infringement because it failed to plausibly allege that the defendant performed every step of the claimed method. *Nu-You Technologies, LLC v. Beauty Town International Inc.*, No. 3:15-CV-03433 (N.D. Tex. Jul. 7, 2016). The court dismissed the claim for direct infringement even though the complaint alleged, upon information and belief, that sales representatives of the
defendant had performed each step of the claim. The court reasoned that the complaint was nonetheless devoid of any facts to support the allegations, and refused to accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions. Under that reasoning, patent complaints that merely recite claim language, parrot claim language, or make allegations upon information and belief without stating actual supporting facts are subject to dismissal.

Under the TeleSign and Nu-You pleading standards, pre-filing investigations will gain in importance. Meanwhile, counsel for defendants now have a new tool for attacking the sort of minimalist pleadings long favored by non-practicing entities looking to repurpose the same boiler-plate complaint against a slew of disparate defendants, with the potential to end a case with a minimal expenditure of time and cost.

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