



PATENT, TRADEMARK & COPYRIGHT



JOURNAL

Reproduced with permission from BNA's Patent, Trademark & Copyright Journal, 78 PTCJ 169, 6/5/09, 06/05/2009. Copyright © 2009 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

LITIGATION

The author outlines the new pleading standards recently announced by the Supreme Court and speculates about their impact on patent litigators.

Recent Supreme Court Decision Heightens Pleading Standards, Holds Out Hope for Reducing Discovery Costs

By LYNN C. TYLER

Anyone with even a passing familiarity with U.S. litigation knows that the lion's share of the expense of litigation is incurred in connection with discovery—the process of reviewing and producing documents, taking depositions, drafting and answering interrogatories, and related tasks. This expense multiplied by an order of magnitude or more with the advent of e-mail and other types of electronic document storage.

A recent decision of the U.S. Supreme Court, however, heightens the standards for adequately alleging a claim and thus at least offers the potential of reducing this expense by raising the bar for plaintiffs to obtain access to discovery.

Stiffer Standard for Stating Claim.

The case, *Ashcroft v. Iqbal*, No. 07-1015, 2009 U.S. Lexis 3472 (May 18, 2009), arose out of the events of

Tyler is an intellectual property lawyer with Barnes & Thornburg, Indianapolis.

September 11 and the subsequent investigation. The plaintiff, Iqbal, was a citizen of Pakistan and a Muslim. He alleged that the defendants, including John Ashcroft, the then-attorney general of the United States, and Robert Mueller, the director of the FBI, deprived him of his constitutional rights by having him held at a maximum security prison and physically abused based on his race, religion or national origin.

One of the issues before the Supreme Court was whether Iqbal's complaint was adequate to state a claim against Ashcroft and Mueller. Under earlier law, a complaint was adequate to state a claim, and the plaintiff could proceed to discovery, as long as there was some set of facts under which the defendant could be liable.

Continuing a trend begun in its decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), an antitrust case, the Supreme Court in *Iqbal* heightened this standard. According to the court, in deciding the adequacy of a complaint the first step is now to identify any conclusory allegations. These can be ignored because "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." A court need not accept as true mere legal conclusions.

The second step is to determine whether the remaining, specific and factual allegations state a plausible claim. A plausible claim is one that describes conduct that is more likely to be illegal than legal.

Further, to the extent there may have been any confusion after *Twombly*, the court made clear that these standards apply in all civil cases, including patent and other intellectual property cases. Thus, the court appears to have heightened the standards for stating a valid claim; as a corollary, the prospects for a successful motion to dismiss have increased.

Possible Money-Saver.

From the expense perspective, one important statement in the court's decision is that the applicable Federal Rule of Civil Procedure, Rule 8, "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." Under prior practice, nearly all complaints included almost nothing more than conclusions, and yet discovery was always available, almost always at great expense.

If district courts follow *Iqbal* strictly, the decision could well be an important step in reducing the amount of frivolous litigation in the future. Defendants will almost certainly begin filing motions to dismiss complaints, before discovery proceeds, to test how *Iqbal* will be applied.

To the extent these motions are successful, and the plaintiff cannot successfully amend its complaint to add sufficient specific factual allegations, then tens of thousands to millions of dollars often spent on discovery will be saved. In the past, defendants were often reluctant to file motions to dismiss because they were rarely granted and simply served to add to the expense of litigation and to educate the other side about potential weaknesses in its case.

Implications for Patent Litigators.

Even under prior law, on occasion issues arose over the adequacy of a complaint to state a claim for patent infringement. Defendants have argued with varying results that a complaint for patent infringement must identify one or more of (1) the asserted claims, (2) the accused products, and (3) the type of infringement (direct, contributory, or inducement). See, e.g., *Applera Corp. v. Thermo Electron Corp.*, 2005 WL 524589 (D. Del. 2005) (denying motion to dismiss complaint for failure to name accused products even though defendant had 16 product lines and 93 different products in the same general technology as the patent); *Ondeo Nalco Co. v. EKA Chemicals Inc.*, 2002 WL 1458853 (D.

Del. 2002) (granting motion to dismiss for failure to identify accused products); *Home & Nature Inc. v. Sherman Specialty Co.*, 322 F. Supp. 2d 260, 265-66 (E.D.N.Y. 2004) (denying motion to dismiss complaint similar to Form 18); *Interdigital Technology Corp. v. OKI America Inc.*, 845 F. Supp. 276, 32 USPQ2d 1850 (E.D. Pa. 1994) (denying motion to dismiss because although accused products were not identified by name they were "sufficiently identified in some way," namely, by reference to a technology standard); and, *J.D. Ferry Co. v. Macbeth Engineering Corp.*, 11 F.R.D. 75, 76 (M.D. Pa. 1951) (patent plaintiff is generally required to identify the asserted claims).

After *Iqbal*, patent defendants are likely to raise these issues with renewed fervor in the hopes of avoiding the expense of discovery and of forcing the plaintiff to commit early to claim construction positions and infringement theories.

Patent Complaint Form: Would It Fail the Test?

Although potentially a major step in litigation reform, the *Iqbal* decision is curious from at least one perspective. The Federal Rules of Civil Procedure include a number of form complaints at the end. Several of these forms, such as Form 18 "Complaint for Patent Infringement," would seemingly fail the *Iqbal* test for adequacy because they include little to nothing more than legal conclusions and a request for relief.

Form 18 includes no substantive allegations of consequence other than that the plaintiff owns a patent on electric motors and the defendant infringes the patent by making, using and selling electric motors covered by the patent. Further, Fed. R. Civ. P. 84 states that the forms "suffice under these rules."

It is difficult to reconcile *Iqbal's* interpretation of Rule 8, on the one hand, with Rule 84 and Form 18, on the other hand. If the "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" in Form 18 are ignored, there is almost nothing left.

When defendants file motions to dismiss citing *Iqbal*, the plaintiff is likely to respond by citing Rule 84 and Form 18. For this reason, the implementation of *Iqbal* by the district and the Federal Circuit will be important, as it often is with the Supreme Court's decisions.

The key should be whether general allegations like those in Form 18 will continue to be sufficient or will be ignored as too conclusory. At the moment, however, there is at least some hope that the expense of patent litigation will be curbed in the future, particularly in marginal cases.