

New pleading rules for patent infringement cases

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The barrier to entry for patent infringement litigation became a little higher on December 1 2015 when amendments to the Federal Rules of Civil Procedure took effect. The amount of detail that a patent owner must include in its complaint when bringing suits is expected to be greater, and will have to be sufficient to demonstrate that the infringement claim is plausible on its face. While there will be an initial period of uncertainty as the new standard is implemented in various jurisdictions, it is hoped that over time the change will lead to more clarity and the earlier resolution of patent infringement cases.

Before the amendments, a plaintiff could file a minimal 'bare bones' complaint following the Form 18 pleading for patent infringement contained in the appendix of form pleadings in the Federal Rules of Civil Procedure. This form was consistent with an older notice pleading standard, but was not changed when the Supreme Court changed the pleading standard in *Twombly* (2007) and *Iqbal* (2009). Under the new standard, a complaint must allege "sufficient factual matter, accepted as true, to state a claim that is plausible on its face". The complaint must be sufficiently detailed to allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged".

The continuing existence of Form 18 caused the US Court of Appeals for the Federal Circuit to hold that direct infringement claims were not subject to the new standard in *Twombly* and *Iqbal*. Subsequently, the form complaint appendix and the rule enabling plaintiffs to rely on the form complaints were eliminated in a proposed revision to the rules. This proposed change went into effect on December 1 2015.

There will be a substantial period of adjustment as the new standard is litigated in various courts. A wave of motions to dismiss challenging the sufficiency of infringement allegations is likely. The changes are expected to put a damper on the practice of bringing suit against numerous defendants using form complaints containing little detail about the alleged infringements. However, there are no specific guidelines for what is required for a patent infringement complaint under the new standard, and there will likely be some variability in implementation among judges, including whether the change will apply to already pending suits.

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