
THE COLUMBIA
SCIENCE & TECHNOLOGY
LAW REVIEW

VOL. XIII

STLR.ORG

SPRING 2012

NOTE

PLEADING PATENT INFRINGEMENT: APPLYING
THE STANDARD ESTABLISHED BY *TWOMBLY* AND
IQBAL TO THE PATENT CONTEXT†

Adam Steinmetz*

Recent landmark Supreme Court decisions established plausibility as the new pleading standard in a civil lawsuit. However, it is not always clear how the facts of an individual case fit into such a standard, particularly in patent infringement litigation. This Note seeks to address this question by conducting a detailed investigation of the pleading requirements in recent patent infringement cases.

First, the Note investigates whether a patent holder must specify the means by which the defendant allegedly infringes at the pleading stage: whether the complaint must identify alleged infringing devices, and whether it must also put forth a theory of infringement.

*Second, the Note investigates Form 18—an example of a sufficiently pled patent complaint that has not been updated in the Federal Rules since the recent *Iqbal* and *Twombly* cases, and finds that judges have used a number of approaches to reconcile Form 18 with the new pleading standard.*

Third, the Note discusses what should be the applicable precedent for evaluating pleading issues in patent cases. Since procedural issues and substantive patent law issues may become intertwined under a plausibility standard, patent pleading issues should be controlled by the Federal Circuit, rather than the regional circuit courts.

Finally, the Note proposes a common line of inquiry that courts should take in resolving patent infringement pleading issues. In ruling on a FRCP 12(b)(6) motion to dismiss, the court should ask whether

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* Columbia Law School, J.D. 2012; Articles Editor, *Columbia Science & Technology Law Review*.

the plaintiff's complaint has guided the course of discovery on the issue. If it has not, the motion to dismiss should be granted.

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INTRODUCTION

The Supreme Court's 2007 decision, *Bell Atlantic v. Twombly*, and 2009 decision, *Ashcroft v. Iqbal*, officially raised the pleading standard under Rule 8 of the Federal Rules of Civil Procedure. Those landmark cases established plausibility as the new standard for pleading a complaint in a civil lawsuit. This standard replaced the traditional notice pleading standard of "no set of facts" that was first articulated in the 1957 decision in *Conley v. Gibson*. The new standard is a fact-based and context-specific inquiry. As a result, it

is not always clear how the facts of an individual case fit into the pleading standard.

In the context of patent infringement litigation, the plaintiff's requirements at the pleading stage are unclear under the new standard. Particularly, there seems to be a requirement that the complaint describe the means by which a defendant allegedly infringes a patent but exactly what that requires has not been clearly defined.

This Note proceeds in three main parts. Part I is an introduction to the general pleading standard and how it has been heightened by the Supreme Court.

Part II, the body of the Note, contains a detailed investigation of the pleading requirements in patent infringement cases. This section investigates what is required to describe the means by which a defendant allegedly infringes. This part also includes a discussion of whether, and how specifically, the complaint must identify alleged infringing devices and whether it must also put forth a theory of infringement.

Part II next investigates Form 18, which represents an example of a sufficiently pled patent complaint, but does not seem to comport with the new pleading standard. This section identifies a number of different approaches that judges have used to reconcile Form 18 with the new pleading standard.

In addition, Part II discusses what should be the applicable precedent for district courts when they evaluate procedural pleading issues. The new standard is fact-based and context-specific. Ultimately, it is possible that in the context of patent infringement litigation, the plausibility standard is interconnected with substantive issues of patent law and should therefore be controlled by the Federal Circuit, rather than the regional circuit courts.

Part III discusses how the patent pleading law should change, first recapping the current state of the law and then proposing that the pleading should need to guide the course of discovery.

I. GENERAL PLEADING STANDARD

“Every civil action begins with the filing of a complaint.”¹ Rule 8 of the Federal Rules of Civil Procedure (“FRCP”) provides the standard for how a complaint must be pled: “A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.”² Rule 8 is understood to indicate the standard of pleading that will withstand a motion to dismiss for “failure to state a claim upon which relief can be granted” under FRCP 12(b)(6).³

From the time of the adoption of the Federal Rules of Civil Procedure in 1938 until 2007, the standard for pleading a complaint, as set out in FRCP 8, was understood to be the “notice pleading” standard. “The goal of the framers was that pleadings would merely put a party on notice and that facts, as well as the specifics of claims, would be fleshed out through the discovery process.”⁴ The leading case recognizing the notice pleading standard was *Conley v. Gibson*,⁵ in which the Supreme Court interpreted Rule 8 to mean that the plaintiff was required to provide a short and plain statement in order to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.”⁶ The following famous language from *Conley* represents the liberal standard of notice pleading:

[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.⁷

However, in 2007, in the landmark case of *Bell Atlantic v. Twombly*, the Supreme Court replaced *Conley*’s notice pleading standard with what has become known as the plausibility standard.⁸ The Supreme Court officially retired *Conley*’s “no set of facts” language,⁹ holding instead that pleading requires “enough facts to state a claim to relief that is plausible on its face.”¹⁰ In explaining its

1. Jonathan L. Moore, *Particularizing Patent Pleading: Pleading Patent Infringement in a Post-Twombly World*, 18 *Tex. Intell. Prop. L.J.* 451, 469 (2010) (citing Fed. R. Civ. P. 3).

2. Fed. R. Civ. P. 8.

3. Fed. R. Civ. P. 12(b)(6).

4. Moore, *supra* note 1, at 472.

5. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), *abrogated by Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561–63 (2007).

6. *Id.* at 47.

7. *Id.* at 45–46.

8. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561–63 (2007).

9. *Id.* at 562–63.

10. *Id.* at 570.

new standard, the court stated that “[f]actual allegations must be enough to raise a right to relief above the speculative level.”¹¹ In famous language, the court proclaimed:

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 ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.¹²

Immediately after *Twombly*, the state of the law was unclear. First, the court in *Twombly* specifically stated that it was not creating a heightened pleading standard.¹³ Second, there was “uncertainty among [the] circuit courts, which split over how broadly to read the decision.”¹⁴ There were strong arguments for limiting *Twombly* to its facts and context rather than viewing it as a general overruling of the *Conley* notice pleading standard.¹⁵ These arguments suggested that *Twombly* came out as it did because it was a complex case that would have potentially involved expensive discovery, and the court was unwilling to allow the plaintiff to subject the defendant to expensive discovery based on the limited facts that had been pleaded. In a non-complex civil case without potentially expensive discovery, however, the notice pleading standard would suffice.

This uncertainty lasted until May 2009, when the Supreme Court decided another landmark case, *Ashcroft v. Iqbal*.¹⁶ *Iqbal* has stood for the proposition that the Supreme Court officially intended the *Twombly* plausibility standard to extend to all federal civil cases in all areas of civil law.¹⁷

As all federal courts begin to adapt to the new pleading standards set forth, it remains to be seen what sort of impact the standard will have. The higher standard for pleading may result in courts granting more motions to dismiss for failure to state a claim under FRCP 12(b)(6).

11. *Id.* at 555.

12. *Id.* at 555 (internal citation omitted).

13. *Id.* at 570.

14. Moore, *supra* note 1, at 475.

15. See generally *Robbins v. Okla.*, 519 F.3d 1242, 1248 (10th Cir. 2008) (noting that *Twombly* involved the potential imposition of the “potentially enormous expense of discovery” on the defendants); *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008) (stating that in *Twombly*, “the Supreme Court never said that it intended a drastic change in the law, and indeed strove to convey the opposite impression”).

16. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

17. See *id.* at 677-80 (deciding the pleading issue in the case “[u]nder *Twombly*’s construction of Rule 8”).

II. PLEADING PATENT INFRINGEMENT

Because a patent infringement suit is merely a specific type of civil litigation,¹⁸ *Iqbal* effectively extended the *Twombly* plausibility standard to patent infringement cases. However, as in many areas of law, it remains unclear how courts will apply the plausibility standard to specific complaints.

Two questions commonly arise in the context of pleading in patent infringement litigation.¹⁹ The first is whether the complaint must specify the particular patent claims that have allegedly been infringed.²⁰ Most courts have held that a plaintiff need not do so.²¹ Recently, however, two district courts have indicated that a plaintiff may be required to specifically identify the infringed claim(s) of the patent:

At the very least, a plaintiff's failure to specify which claims it believes are infringed by a defendant's products places an undue burden on the defendant, who must wade through all the claims in a patent and determine which claims might apply to its products to give a complete response. A plaintiff's failure to specify patent claims hinders the defendant's ability to prepare a defense.²²

No other cases since the 1950s that have taken this approach.²³ Because most courts have not required identification of the particular claims, the issue of identifying the infringed claims of a patent in the complaint will not be discussed further in this Note.

The second question that arises in the context of patent infringement litigation concerns whether a patent holder must specify the *means* by which the defendant allegedly infringes at the pleading stage.²⁴ This question has been far more divisive. The *Twombly* and *Iqbal* decisions have had a greater impact on this question, and it will therefore be addressed at length in this Note.

18. Moore, *supra* note 1, at 476.

19. *Id.* at 480.

20. *Id.*

21. See, e.g., *Ardente, Inc. v. Shanley*, No. C 07-4479 MHP, 2010 WL 546485, at *5 n.6 (N.D. Cal. Feb. 10, 2010); *Aspex Eyewear, Inc. v. Clarity Eyewear, Inc.*, 531 F. Supp. 2d 620, 622 (S.D.N.Y. 2008); *Rambus, Inc. v. Nvidia Corp.*, No. C 08-3343 SI, 2008 WL 4911165, at *2 (N.D. Cal. Nov. 13, 2008).

22. E.g., *Taurus IP LLC v. Ford Motor Co.*, 539 F. Supp. 2d 1122, 1127 (W.D. Wis. 2008) (citing *Extreme Networks, Inc. v. Enterasys Networks, Inc.*, No. 3:07-cv-00229-bbc, 2007 U.S. Dist. LEXIS 95030, at *5 (W.D. Wis. Dec. 31, 2007)).

23. See, e.g., *J.D. Ferry Co. v. Macbeth Eng'g Corp.*, 11 F.R.D. 75, 76 (M.D. Pa. 1951) ("The general practice in patent infringement suits has been to require the plaintiff to state what claims of a patent he alleges to have been infringed.").

24. Moore, *supra* note 1, at 481.

There are two crucial aspects to this “means” question. The first is whether the plaintiff must identify the specific devices that allegedly infringe the plaintiff’s patent. This is an issue that the courts have paid a significant amount of attention both before and after *Twombly* and *Iqbal*. The courts have struggled with the issues of whether particular devices need to be identified and, if so, how specifically.

A second aspect of the “means” question is whether a plaintiff must put forth a theory of infringement at the pleading stage. This question has been addressed far less frequently by the courts. It is important to note that the pleading stage happens before anything else in the lawsuit (i.e. discovery, *Markman* hearing, etc.), and therefore, a requirement that the plaintiff set forth a theory of infringement this early could have drastic consequences for patent pleading. It is also easy to see that if a plaintiff is required to put forth specific theories of infringement, then courts will also need to decide how closely a plaintiff will be held to the pleaded theory of infringement and whether a plaintiff will be locked into a certain claim construction at an early stage in the trial.

To answer these questions, it is necessary to see how the courts have treated the issue of pleading in patent cases during three distinct periods of time; (1) pre-*Twombly*, (2) between *Twombly* and *Iqbal*, and (3) post-*Iqbal*. Before *Twombly*, the general pleading standard was notice pleading and this applied to patent cases as well. In the two years between *Twombly* and *Iqbal*, the same general confusion that existed in general civil litigation existed in the patent context. After *Iqbal*, the Supreme Court has made it clear that the plausibility standard applies across the board and therefore lower courts must apply this standard in patent cases.

Further complicating the issue is Form 18 in the Appendix of the Federal Rules of Civil Procedure which provides a specific example of how to plead patent infringement.²⁵ According to FRCP 84, “[t]he forms in the Appendix suffice under th[e] rules and illustrate the simplicity and brevity that th[e] rules contemplate.”²⁶ Because the substance of Form 18 was developed under the notice pleading regime and the wording has not been changed since the rulings of *Twombly* and *Iqbal*, there is a potential contradiction between the standard set forth by the Supreme Court and the standard set forth by the Federal Rules themselves. The courts have struggled with this question as they have attempted to apply the plausibility standard.

Finally, another issue that courts have had to address is whether patent pleading issues are controlled by the Federal Circuit or the

25. Fed. R. Civ. P. Form 18.

26. Fed. R. Civ. P. 84.

regional Circuit Courts of Appeal. The Federal Circuit has exclusive jurisdiction over all cases arising under the patent statute. However, pleading issues arise under the Federal Rules of Civil Procedure, rather than under the patent statute. Under the notice pleading regime, there was little variation in how the circuit courts applied the rules to the specifics of each case because the inquiry was not as factual- and context-specific. As such, the choice of law question was not as important as it is now and was mainly restricted to the question of the level of deference that appellate courts would give to the district courts' decisions to grant or deny the motion to dismiss.²⁷ However, as the pleading question has become more context-specific under the plausibility standard, courts must decide which jurisdiction's precedent controls. Currently, the regional circuit courts' precedent is controlling rather than the Federal Circuit's. However, whether this is the correct way to approach the issue has yet to be answered.

*A. The Need to Describe The Means By Which the Defendants
Allegedly Infringe*

1. Identifying Infringing Devices

a. Cases that Addressed the Issue Before Twombly

Prior to *Twombly*, the notice pleading standard of *Conley* was applied in patent infringement suits. The Federal Circuit applied the notice pleading standard in February 2000, in *Phonometrics, Inc. v. Hospitality Franchise Systems, Inc.*²⁸ Reviewing the District Court for the Southern District of Florida's granting of the motion to dismiss, the Federal Circuit found that the complaint met the liberal notice pleading standard.²⁹ In crucial language that is often cited by

27. See, e.g., *Pupols v. U.S. Patent & Trademark Office*, 413 F. App'x 232, 234. (Fed. Cir. 2011), *cert. denied*, 131 S. Ct. 3009 (2011) ("The Seventh Circuit reviews *de novo* dismissals for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)."); *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356 (Fed. Cir. 2007) ("In the Fifth Circuit, a decision under Fed.R.Civ.P. 12(b)(6) to dismiss a complaint for failure to state a claim is reviewed *de novo*."); *C&F Packing Co. v. IBP, Inc.*, 224 F.3d 1296, 1306 (Fed. Cir. 2000) ("The United States Court of Appeals for the Seventh Circuit reviews dismissals under Rule 12(b)(6) *de novo*."); *Phonometrics, Inc. v. Hospitality Franchise Sys., Inc.*, 203 F.3d 790, 793 (Fed. Cir. 2000) ("The United States Court of Appeals for the Eleventh Circuit reviews dismissals under Rule 12(b)(6) *de novo*.").

28. *Phonometrics*, 203 F.3d at 794.

29. *Id.* ("[A] patentee need only plead facts sufficient to place the alleged infringer on notice.").

district courts,³⁰ the Federal Circuit laid out a five-part reason why the pleading was sufficient, saying that it

allege[d] ownership of the asserted patent, name[d] each individual defendant, cite[d] the patent that [wa]s allegedly infringed, describe[d] the means by which the defendants allegedly infringe[d], and point[ed] to the specific sections of the patent law invoked. Thus, Phonometrics' complaint contain[ed] enough detail to allow the defendants to answer. Rule 12(b)(6) requires no more.³¹

Importantly, while the Federal Circuit clearly stated that the five things pleaded were sufficient rather than necessary, many courts have focused on these five aspects as a test for meeting the pleading standard.³² The crucial language is the fourth element in the court's list because it is the only part that is subject to interpretation. While it is simple to understand what it means to allege ownership of the patent, name the defendants, cite the patent number, and point to the sections of the patent statute, it is certainly not as clear what the court meant by "describ[ing] the means by which the defendants allegedly infringe[d]."³³

As an illustration of the different ways in which the courts have interpreted the pleading standard in patent cases, even before *Twombly*, in consecutive years, the Northern District of Illinois granted a motion to dismiss in one case and denied a motion to dismiss in another.³⁴ In *One World Technologies, LTD. v. Robert Bosch Tool Corp.*, Judge Zagel denied the defendant's motion to dismiss.³⁵ Citing the Federal Circuit's *Phonometrics* decision, the court determined that the complaint adequately described the means by which the defendants allegedly infringed because the complaint said:

Defendants have infringed and are now directly infringing, inducing infringement by others, and/or contributorily infringing one or more claims of the '976 patent within this

30. See, e.g., *Mesh Comm, LLC v. EKA Sys., Inc.*, No. 8:09-cv-1064-T-33TGW, 2010 WL 750337, at *2 (M.D. Fla. Mar. 4, 2010).

31. *Phonometrics*, 203 F.3d at 794.

32. See, e.g., *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1357 (Fed. Cir. 2007) (noting the ways in which the complaint satisfied the elements of the *Phonometrics* test); *Mesh Comm*, 2010 WL 750337, at *2 (specifically citing *Phonometrics* for the test); *Taltwell, LLC v. Zonet USA Corp.*, No. 3:07cv543, 2007 WL 4562874, at *14 (E.D. Va. Dec. 20, 2007) (citing *McZeal* but listing the five elements of the *Phonometrics* test); *One World Techs., Ltd. v. Robert Bosch Tool Corp.*, No. 04 C 0833, 2004 WL 1576696, at *2 (N.D. Ill. July 13, 2004) (stating that the plaintiff's complaint alleged the same things that the *Phonometrics* complaint alleged).

33. *Phonometrics*, 203 F.3d at 794.

34. See generally *Windy City Innovations, LLC v. Am. Online, Inc.*, 227 F.R.D. 278 (N.D. Ill. 2005); *One World Techs.*, 2004 WL 1576696.

35. *One World Techs.*, 2004 WL 1576696, at *3 (denying motion to dismiss).

District or elsewhere within the United States by making, using, selling, and/or offering to sell products falling within the scope of such claims, all without authority or license from Plaintiffs.³⁶

The defendants in the case argued that no specific facts were provided by the plaintiffs in the complaint, but the court found that “no such specificity is required.”³⁷ This case seems to stand for the proposition that to satisfy the means “requirement,” a plaintiff needs merely to recite the language of 35 U.S.C. § 271(a)³⁸ with regard to “products falling within the scope of [the] claims.”³⁹ For example, a plaintiff could survive a motion to dismiss by simply reciting the words “makes, uses, offers to sell, or sells”.⁴⁰

Less than a year later, in *Windy City Innovations, LLC v. America Online, Inc.*, without citing *Phonometrics* or the *One World* decision from the same jurisdiction, District Judge Der-Yeghiayan granted in part the defendant’s motion to dismiss because the complaint’s reference to “other unnamed products and services” was too vague and failed to “provide the operative facts in relation to the alleged infringement by those other unnamed products or services.”⁴¹ The court therefore held that the notice pleading standard had not been satisfied with regard to those “other” products.⁴²

This example from the Northern District of Illinois demonstrates that even before *Twombly* and *Iqbal* changed the pleading standard, there was significant uncertainty as to what constituted a sufficiently pled patent complaint. It also demonstrates that even within a single jurisdiction, there was a great potential for disagreement as to how to apply the controlling law. Different judges ruled very differently on these pleading issues.

*b. Cases That Addressed the Issue in the Years Between Twombly
And Iqbal*

i. The Federal Circuit

Four months after *Twombly* was decided by the Supreme Court, the Federal Circuit was presented with its first opportunity to

36. *Id.* at *2.

37. *Id.*

38. 35 U.S.C. § 271(a) (2006).

39. *One World Techs.*, 2004 WL 1576696, at *2.

40. 35 U.S.C. § 271(a).

41. *Windy City Innovations, LLC v. Am. Online, Inc.*, 227 F.R.D. 278, 283 (N.D. Ill. 2005).

42. *Id.*

address the pleading standard issue.⁴³ Like many other courts, however, the Federal Circuit in *McZeal v. Sprint Nextel Corp.* passed on the chance to apply the plausibility standard to a patent complaint because the court read *Twombly* as being limited to its facts.⁴⁴ The Federal Circuit therefore held that the *pro se* plaintiff's "complaint contain[ed] enough detail to allow the defendants to answer and thus me[t] the notice pleading required to survive a 12(b)(6) motion. Nothing more is required."⁴⁵ The court also highlighted how the plaintiff's complaint satisfied the five parts of the *Phonometrics* test.⁴⁶ Importantly, the Federal Circuit made specific note that the structure in Form 18 is consistent with notice pleading. "It logically follows that a patentee need only plead facts sufficient to place the alleged infringer on notice as to what he must defend."⁴⁷

Judge Dyk, however, seemed to have foreseen the way that the Supreme Court was moving the law in his dissent in *McZeal*, where he foreshadowed the change in the law that would be cemented by *Iqbal* two years later. Judge Dyk presented the argument that *Twombly* should not be limited to its facts, stating that "[p]lainly [*Twombly*] applies outside the antitrust context and the requirements of [*Twombly*] apply here."⁴⁸ Particularly noteworthy is Judge Dyk's treatment of Form 18, upon which the majority relied heavily for its conclusion that notice pleading remained the proper standard. Judge Dyk was able to escape the confines of Form 18 in this particular case by arguing that this was a doctrine of equivalents case, to which the form does not apply.⁴⁹ However, Judge Dyk emphasized that Form 18 is inconsistent with the new plausibility standard and stated that "[o]ne can only hope that the rulemaking process will eventually result in eliminating the form, or at least in revising it to require allegations specifying . . . the features of the accused device that correspond to the claim limitations."⁵⁰

There are many cases that consider *McZeal* to be inapplicable today for two specific reasons. First, the plaintiff in *McZeal* was a *pro se* plaintiff, to whom the court acknowledged it would be more lenient.⁵¹ There are many cases that consider the holding in *McZeal* to be limited to the *pro se* plaintiff context.⁵² Second, and more

43. *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007) (appealing a dismissal for failure to state a claim).

44. *Id.* at 1356 n.4.

45. *Id.* at 1357 (citation omitted).

46. *Id.*

47. *Id.*

48. *Id.* at 1362 (Dyk, J., dissenting).

49. *Id.* at 1361.

50. *Id.* at 1360.

51. *Id.* at 1356.

52. See, e.g., *Koninklijke Philips Elecs. N.V. v. The ADS Group*, 694 F. Supp. 2d 246,

importantly, *McZeal* was decided before *Iqbal* and is therefore considered by many cases to have been abrogated by the Supreme Court's *Iqbal* decision.⁵³

However, the *McZeal* decision is an important one. Even though the *McZeal* majority and dissent were in disagreement over the issue of whether *Twombly*'s plausibility holding extends to the patent context—a question that would be expressly answered by the Supreme Court in *Iqbal*—an understanding of the split between *McZeal*'s majority and the dissent is crucial. It allows for an analysis of the legal framework during the time between *Twombly* and *Iqbal*, which heavily impacted the district courts' approach to the pleading issue.

McZeal was a procedural case decided by the Federal Circuit, to which many district courts looked for guidance on the pleading issue. It is therefore a beginning of the analysis of the question of how *Iqbal* will be applied in the patent context today.

ii. The District Courts

After the Federal Circuit in *McZeal* gave its interpretation of what *Twombly* did or did not do to the pleading standard for patent infringement, district courts around the country were left to draw on different precedent and reasoning in attempting to determine what was required to plead patent infringement. It is clear that the various district courts were left without guidance and, as a result, the state of the law seems to have been in upheaval.

The District of Delaware

In the District of Delaware, the court ruled on two 12(b)(6) motions in patent cases during 2009, denying the motion to dismiss in one and granting the motion to dismiss in the other.⁵⁴ In February of 2009, District Judge Robinson wrote the opinion in *S.O.I. Tec Silicon on Insulator Technologies v. MEMC Electronic Materials, Inc.*, hold-

252 n.8 (S.D.N.Y. 2010) (“The decision in *McZeal*, however, was motivated by a (perhaps) misplaced indulgence of the pleadings of a pro se plaintiff.”).

53. See, e.g., *id.* (“Of greater relevance, *McZeal* was decided before the *Iqbal* decision made clear that *Twombly*'s heightened pleading standard applied in all cases, not merely those like *Twombly* that assert antitrust violations.”).

54. Compare *Fifth Mkt., Inc. v. CME Group, Inc.*, No. 08-520 GMS, 2009 WL 5966836, at *4 (D. Del. May 14, 2009) (denying a motion to dismiss when the complaint mentioned the specific technology area) (emphasis added), with *S.O.I. Tec Silicon On Insulator Techs., S.A. v. MEMC Elec. Materials, Inc.*, No. 08-292-SLR, 2009 WL 423989, at *2 (D. Del. Feb. 20, 2009) (granting a motion to dismiss granted when the complaint referred only to “products and methods covered by the claims of the asserted patents”).

ing that a complaint satisfied the pleading standards because it specified that the defendant “makes, sells, and/or offers for sale *silicon on insulator wafers and other engineered semiconductor substrates . . .*”⁵⁵ Three months later, Chief Judge Sleet held in *Fifth Market, Inc. v. CME Group, Inc.* that a complaint did not satisfy the pleading standard when it alleged that the defendants infringed by “making, using, selling, and/or offering for sale products and methods covered by the claims of the asserted patents.”⁵⁶ In both cases, the Delaware District Court explicitly discussed the standard using the language of *Twombly*.⁵⁷ In both cases, the court discussed Form 18.⁵⁸ And in both cases the court cited the Federal Circuit’s *McZeal* opinion.⁵⁹

While the facts of these two Delaware cases are distinguishable in that one specifies a type of product and the other does not, it is crucial to see that Delaware seems to have been extremely uncertain as to what the law was. The approach of the judges seems to have been to cite all of the possible controlling law and arriving at a solution without parsing it out. Each of these two judges relied heavily on the language of *Twombly* in his opinion,⁶⁰ suggesting that each of the judges understood *Twombly* to be applicable controlling precedent in a patent infringement case. As established above, however, *McZeal* held that the Supreme Court’s *Twombly* decision should be limited to its facts and that Form 18 is sufficient, despite its contradiction with *Twombly*.⁶¹ It therefore seems counterintuitive to cite all three of these authorities.

Furthermore, in distinguishing these two cases, the only reachable conclusion is that, to the extent that the District of Delaware interpreted *Twombly* as having changed the standard for pleading in patent cases, the change merely requires the specification of some broad area of technology like “silicon on insulator wafers and other engineered semiconductor substrates.”⁶² It is a difficult argument to make that the specification of broad categories like those mentioned in the *SOITec* complaint is enough to meet a plausibility

55. *S.O.I. Tec*, 2009 WL 423989, at *1 (emphasis added).

56. *Fifth Mkt.*, 2009 WL 5966836, at *1.

57. *Fifth Mkt.*, 2009 WL 5966836, at *1; *S.O.I. Tec*, 2009 WL 423989, at *1.

58. *Fifth Mkt.*, 2009 WL 5966836, at *1; *S.O.I. Tec*, 2009 WL 423989, at *2.

59. *Fifth Mkt.*, 2009 WL 5966836, at *2; *S.O.I. Tec*, 2009 WL 423989, at *2.

60. *Fifth Mkt.*, 2009 WL 5966836, at *1 (quoting from *Twombly* that “[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint’s allegations are true.”); *S.O.I. Tec*, 2009 WL 423989, at *2 (quoting from *Twombly* that “[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint’s allegations are true.”).

61. *Supra*, Section (II)(A)(b)(i).

62. *S.O.I. Tec*, 2009 WL 423989, at *1.

standard but “products and methods covered by the claims of the asserted patents” is not.⁶³

Two Cases with the Same Facts Decided Differently

Further illustrating the district courts’ uncertainty as to what the law was and which precedent to follow, two other jurisdictions, hearing cases with strikingly similar facts in the period between *Twombly* and *Iqbal*, decided them quite differently.⁶⁴ In December of 2007, the Eastern District of Virginia decided *Taltwell, LLC v. Zonet USA Corp.*, beginning its discussion of the 12(b)(6) motion by specifically referring to the *Twombly*’s plausibility language as setting forth the pleading standard.⁶⁵ However, because the Fourth Circuit had not yet determined *Twombly*’s applicability, the court relied on the Federal Circuit’s reasoning from *McZeal*.⁶⁶ Applying a slight variation to the five-part *Phonometrics* test that *McZeal* had affirmed, the court determined that the complaint was sufficiently pled because it alleged that the defendant had infringed by “making, using, offering for sale, and/or selling the *communication devices . . . that are within the scope of the claims . . .*”⁶⁷ Importantly, the court found that this was enough to satisfy the fourth part of the *Phonometrics* test, under which the court required the complainant to describe “*in general terms, the means by which the patent was infringed.*”⁶⁸ In effect, the court read the words “in general terms” into the test, leading the court to conclude that the plaintiff’s inclusion of “communication devices” in the complaint satisfied the plausibility standard.

Presented with almost identical facts to those in *Taltwell*, the District Court for the District of Columbia granted a motion to dismiss in *In re Papst Licensing GMBH & Co. KG Litigation*.⁶⁹ Rather than citing *McZeal*, the court cited to D.C. Circuit precedent in *Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans, Inc.*⁷⁰ for the proposition

63. See *Fifth Mkt.*, 2009 WL 5966836, at *1.

64. Compare *In re Papst Licensing GMBH & Co. KG Litig.*, 585 F. Supp. 2d 32, 36 (D.D.C. 2008) (granting a motion to dismiss because the complaint did not sufficiently identify “circumstances, occurrences, and events” giving rise to the claim even though it mentioned “digital cameras”), with *Taltwell, LLC v. Zonet USA Corp.*, No. 3:07cv543, 2007 WL 4562874, at *13 (E.D. Va. Dec. 20, 2007) (denying a motion to dismiss because “communication devices” sufficiently described means of infringement).

65. *Taltwell*, 2007 WL 4562874, at *13.

66. *Id.*

67. *Id.* at *14 (emphasis added).

68. *Id.* (emphasis added).

69. *In re Papst Licensing*, 585 F. Supp. 2d at 36.

70. *Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans, Inc.*, 525 F.3d 8, 16 n.4 (D.C. Cir. 2008) (noting that a complaint has always had to meet the general pleading

that the *Twombly* plausibility standard applies outside of the antitrust context and that “a complaint must include some information about the circumstances giving rise to the claims.”⁷¹ The court then proceeded to dismiss the claim despite the complaint’s allegation that the defendant had “made, used, sold or offered to sell . . . digital cameras.”⁷² In deciding to follow D.C. Circuit rather than Federal Circuit precedent, the District of Columbia found that “digital cameras” did not meet the plausibility standard only one year after the Eastern District of Virginia had determined that “communication devices” did.

*12(e) Motions for a More Definite Statement*⁷³

Although a Rule 12(e) motion for a more definite statement is not governed by *Conley*, *Twombly*, or *Iqbal*, which are limited to 12(b) (6) motions, a court’s ruling on a motion for a more definite statement is intricately tied to its determination of what is required at the pleading stage. In the period between *Twombly* and *Iqbal*, two district courts ruled on 12(e) motions in patent cases.⁷⁴ In February 2008, the Western District of Wisconsin in *Taurus IP, LLC v. Ford Motor Co.* granted a 12(e) motion on a complaint that listed websites on which the infringing products were sold.⁷⁵ In so doing, the court held that the plaintiff “must do more than give clues.”⁷⁶ Later in 2008, the District of New Jersey, in *Digital Technology Licensing LLC v. Sprint Nextel Corp.*, denied a motion for a more definite statement on a complaint that alleged that the defendant had infringed “by selling and offering to sell products . . . that come within the scope of claim 20 of the ‘799 patent.”⁷⁷ The court went on to emphasize that Form 18 does not require the specification of product names or model numbers.⁷⁸ The court distinguished *Taurus IP* because the categories of products were not as broad as those contemplated by the *Taurus IP* websites.⁷⁹ The court specifically noted that there was no authority for the proposition that FRCP 8 requires specification

standard articulated in *Twombly*).

71. *Papst*, 585 F. Supp. 2d at 35 (internal quotation omitted).

72. *Id.* at 33 (emphasis added).

73. Fed. R. Civ. P. 12(e) (2006).

74. *Digital Tech. Licensing LLC v. Sprint Nextel Corp.*, No. 07-5432 (SRC)(MAS), 2008 WL 4068930 (D.N.J. Aug. 27, 2008); *Taurus IP, LLC v. Ford Motor Co.*, 539 F. Supp. 2d 1122 (W.D. Wis. 2008).

75. *Taurus IP*, 539 F. Supp. 2d at 1127.

76. *Id.*

77. *Digital Tech. Licensing*, 2008 WL 4068930, at *1.

78. *Id.* at *2.

79. *Id.* at *4.

of products with the level of precision that the defendants were seeking.⁸⁰

While these cases address FRCP 12(e) rather than FRCP 12(b)(6) motions, they are illustrative of what two district courts considered to be sufficient pleading in 2008. Their diverging conclusions further highlight that district courts were left with little guidance as to the proper pleading standard.

Analogy to Pleading Patent Invalidity

A case that came before the Eastern District of Texas in March 2009 further highlights the confused state of the law that persisted between *Twombly* and *Iqbal*. In *Teirstein v. AGA Medical Corp.*, a plaintiff moved to strike the defendant's counterclaims for invalidity.⁸¹ The court spoke extensively about the specificity with which claims must be pled in patent cases, although because the issue was invalidity, the court's discussion of infringement claims is dicta. However, the court attempted to draw precedent from infringement cases,⁸² compared infringement to invalidity,⁸³ and specifically stated that "[the] pleading standards [for infringement and invalidity] are identical."⁸⁴

Beginning with a discussion of the standard for a motion to dismiss and citing *McZeal* for the proposition that *Twombly* had not changed the pleading standard,⁸⁵ the court cited the language of *Twombly* that specifically cited *Conley*.⁸⁶ In its comparison of the pleading standards for invalidity and infringement claims, the court stated that "a plaintiff in a patent infringement suit is not required to delineate . . . how the accused device infringes each [claim] limitation,"⁸⁷ reflecting the court's belief that a complaint must include an accused device in order to meet the pleading standard for infringement in the period between *Twombly* and *Iqbal*.

What this case really demonstrates, however, is that the district courts had no guidance on what was required at the pleading stage in any patent case. The Eastern District of Texas seems to have been operating under the notice pleading standard, and yet the court felt comfortable making direct analogies between infringement and invalidity. These comparisons might be unfounded given

80. *Id.*

81. *Teirstein v. AGA Med. Corp.*, No. 6:08cv14, 2009 WL 704138 (E.D. Tex. Mar. 16, 2009).

82. *Id.* at *3.

83. *Id.*

84. *Id.* at *5.

85. *Id.* at *3.

86. *Id.* at *4.

87. *Id.* at *3.

that a plaintiff pleading infringement must put the defendant on notice as to the allegedly infringed patent, while a defendant counterclaiming invalidity should not have to alert the plaintiff to the strengths and weaknesses of the plaintiff's own patent. Presumably, the plaintiff prosecuted the patent, or at least researched the prosecution of the patent prior to licensing it, and should therefore be aware of its strengths and weaknesses. To hold that the standard for pleading infringement against an unaware defendant is the same as the standard for counterclaiming invalidity against the patent-holding plaintiff seems misguided, and yet this is what the Eastern District of Texas did in *Teirstein* amid the confusion surrounding *Twombly* and the pleading standard,

c. Cases That Have Addressed the Issue in the Time after Iqbal

When the Supreme Court announced its *Iqbal* decision, it clarified the confusion about whether the *Twombly* plausibility standard extended beyond the specific circumstances and facts of *Twombly*. The Supreme Court made it clear in *Iqbal* that the *Twombly* pleading standard was higher than traditional notice pleading and did extend to all civil complaints.⁸⁸ Unfortunately, while *Iqbal* clarified the confusion as to whether the plausibility standard applied generally, the question of how plausibility is to be decided is an impossible one for the Supreme Court to address. Plausibility is a much more context-specific and fact-based standard than notice pleading, and so the court's announcement of the new plausibility standard opened the door to many new questions that would need to be addressed by the lower courts. The patent context is no different than any other area of the law in this regard: determining how the new pleading standard applies to the specific facts and circumstances of a patent infringement case was left to the lower courts. The *Iqbal* decision thus marked a continuation of courts' struggles with *Twombly*'s language and its application to patent infringement cases, which would also include, after *Iqbal*, attempts to determine how the facts in individual cases fit into the plausibility question.

Indeed, some courts noted these difficulties explicitly. A few months after *Iqbal* was announced, the Northern District of California, in *Elan Microelectronics Corp. v. Apple, Inc.*,⁸⁹ observed that the plausibility standard creates a "context-specific task that requires the reviewing court to draw on its judicial experience and common

88. *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' . . .").

89. *Elan Microelectronics Corp. v. Apple, Inc.*, No. C 09-01531 RS, 2009 WL 2972374 (N.D. Cal. Sept. 14, 2009).

sense.”⁹⁰ The court also pointed out that the “line between facts and legal conclusions is not always easy to draw,”⁹¹ referencing the intricateness of the inquiry required of the court.

The court in *Elan* also highlighted the “[i]mpact of *McZeal* and Form 18,”⁹² which only contributed to the difficulty now faced by the courts. *McZeal* has never been explicitly overruled and yet, as the court noted, it is difficult to reconcile *McZeal* with *Twombly* and *Iqbal*.⁹³ Furthermore the court emphasized that

[Form 18], which provides an example of alleging *direct* patent infringement, requires essentially nothing more than conclusory statements. It is not easy to reconcile Form 18 with the guidance of the Supreme Court in *Twombly* and *Iqbal*; while the form undoubtedly provides a “short and plain statement,” it offers little to “show” that the pleader is entitled to relief.⁹⁴

Interestingly, the court made reference to Judge Dyk’s dissent in *McZeal*, perhaps suggesting that the court believed that in light of *Iqbal*, Judge Dyk’s dissent in *McZeal*⁹⁵ carries the day with regard to what should be done with Form 18.⁹⁶

i. Four Cases That Granted and One That Denied the Motion to Dismiss

Four Cases That Granted the Motion to Dismiss

Beginning in 2009 and continuing through 2010, the Northern District of California was again faced with the patent pleading issue in a series of cases brought by a plaintiff named Gregory Bender against a number of different defendants.⁹⁷ The court addressed the issue in two related cases: *Bender v. Motorola*⁹⁸ and *Bender v. LG Electronics U.S.A., Inc.*⁹⁹

90. *Id.* at *1 (quoting *Iqbal*, 556 U.S. at 679).

91. *Id.* at *2.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at n.3.

96. Although not on point for this discussion, the court also attempted to limit Form 18 to cases of direct infringement rather than all manners of patent infringement. *Id.* at *2.

97. See generally *Bender v. LG Elecs. U.S.A., Inc.*, No. C 09-02114 JF (PVT), 2010 WL 889541, at *1 n.1 (N.D. Cal. Mar. 11, 2010) (listing all the suits brought by Bender in 2009).

98. *Bender v. Motorola, Inc.*, No. C 09-1245 SBA, 2010 WL 726739 (N.D. Cal. Feb. 26, 2010).

99. *Bender v. LG*, 2010 WL 889541.

In *Bender v. Motorola*, after acknowledging that it would have liked to have been able to follow Federal Circuit precedent but could not because *McZeal* was decided before *Iqbal* and was therefore inapplicable, the court decided that the complaint was “too conclusory” because “[n]owhere in the Amended Complaint does the Plaintiff identify, with the requisite level of factual detail, the particular product or line of products, that allegedly infringe the ‘188 Patent.”¹⁰⁰ In the complaint, the plaintiff had laid out what the court called a “laundry list of electronic devices.”¹⁰¹ The court found that even though that list included many specific categories of electronic devices, the length of the list and the fact that the complaint stated that it was “without limitation” made it nothing more than “ cursory allegations [that] are insufficient to give the Defendant fair notice of the claims being alleged against it.”¹⁰² Additionally, the court addressed the Form 18 problem, seemingly standing behind the continuing applicability of Form 18 but determining that the complaint at bar had not satisfied the requirements of that form:

[Form 18] contemplates that the pleader identify the accused device *with some semblance of specificity* to alert the alleged infringer which device is at issue. It does not contemplate that the accused device or devices be described in terms of a multiplicity of generically-described product lines.¹⁰³

Two weeks later, in *Bender v. LG Electronics USA*, the district court in the Northern District of California seemed to go even further than it had in *Bender v. Motorola*. Addressing the defendants’ contentions that the list of products was non-specific because no product was identified by name or number and that the complaint therefore “lack[ed] sufficient factual context, such as the ‘means by which’ infringement is alleged,”¹⁰⁴ the court agreed and said that “[c]ommon sense requires more specific identification of the products . . . that are allegedly infringing.”¹⁰⁵ It is crucial to note that this contention by the defendants and the seeming agreement with it by the court is an uncited reference to the Federal Circuit’s *Phonometrics* decision from 2000, which has been kept alive and is now interpreted by the courts in light of *Twombly* and *Iqbal*.

100. *Bender v. Motorola*, 2010 WL 726739, at *3.

101. *Id.*

102. *Id.*

103. *Id.* (emphasis added).

104. *Bender v. LG*, 2010 WL 889541, at *2.

105. *Id.* at *3.

As it did in *Bender v. Motorola*, the court in *Bender v. LG* addressed the *McZeal* problem, holding that *McZeal* is inapplicable because it was decided before *Iqbal*.¹⁰⁶ But the court went further, saying that the *McZeal* court was “addressing how much legal analysis had to be set forth in the complaint, not the amount of factual detail necessary to describe the means of the alleged infringement.”¹⁰⁷ With regard to the Form 18 problem, the court made an important reference to *Hewlett Packard v. Intergraph*, for the proposition that Form 18 is limited to infringement cases involving a single type of product and is inapplicable in cases “involving a multitude of allegedly infringing products.”¹⁰⁸

Perhaps most importantly, the court specifically “recognize[d] the lack of complete uniformity in recent district court authority.”¹⁰⁹ Ultimately the court concluded that the plaintiff “must do more than allege conclusorily the means by which Defendants are infringing.”¹¹⁰

The Central District of California¹¹¹ and the Northern District of Georgia¹¹² also granted motions to dismiss patent infringement cases in late 2009 and early 2010, respectively. In *Li Ming Tseng v. Marukai Corp. U.S.A.*, the Central District of California dismissed the complaint which alleged that “defendants were selling goods that infringe upon Plaintiff’s . . . patent.”¹¹³ The court determined that the “allegations are all too conclusory to support a claim under *Twombly* and *Iqbal*.”¹¹⁴

Likewise, in *Ware v. Circuit City Stores, Inc.*, The Northern District of Georgia dismissed a complaint that had

merely paraphrase[d] 35 U.S.C. 271(a), pleading in a sweeping and conclusory way that . . . Defendant . . . has infringed the ’592 patent by making, using, importing, offering for sale, and/or selling apparatuses covered by one or more claims of the ’592 patent, including, but not limited to, its use of financial card transaction systems that infringe one or more claims of the ’592 patent.¹¹⁵

106. *Id.*

107. *Id.*

108. *Id.* at *5.

109. *Id.*

110. *Id.* at *6.

111. *Li Ming Tseng v. Marukai Corp. U.S.A.*, No. SACV 09-0968 AG (RNBx), 2009 WL 3841933, at *2 (C.D. Cal. Nov. 13, 2009).

112. *Ware v. Circuit City Stores, Inc.*, No. 4:05-CV-0156-RLV, 2010 WL 767094, at *2 (N.D. Ga. Jan. 5, 2010).

113. *Li Ming Tseng*, 2009 WL 3841933, at *1.

114. *Id.*

115. *Ware*, 2010 WL 767094, at *1.

The court determined that plaintiffs must “at the very least put defendants on notice of what the defendants have done to infringe the patent in question.”¹¹⁶ In the context of the case, vagueness seemed to have been a big issue for the court, specifically vagueness of the term “apparatuses.”¹¹⁷ While in the context of the overall plea, the term apparatuses and the reference to the financial card transaction systems are more specific than the complaint in *Li Ming Tseng*, the court was clearly looking for more specificity with regard to alleged infringing products. However, like in *Bender v. Motorola*, *Bender v. LG*, and *Li Ming Tseng v. Marukai Corp. U.S.A.*, the court failed to articulate a coherent rule for what would satisfy the specificity for which it was looking.

One Case That Denied the Motion to Dismiss

In March 2010, the Middle District of Florida denied a motion to dismiss in *Mesh Comm, LLC v. EKA Systems, Inc.*¹¹⁸ The court specifically cited the Federal Circuit’s *Phonometrics* decision from 2000 for its five-part test. With regard to describing the means by which the defendants allegedly infringe, the court observed that “Plaintiff alleges that Defendants have infringed the patent by making, using, importing, providing, offering to sell, advertising and/or selling . . . wireless communication enabled meters and networks.”¹¹⁹ Ultimately, the court held that the complaint was sufficiently pled. This holding, that recitation of the elements of 35 U.S.C. 271(a) followed by the term “wireless communication enabled meters and networks” is enough to satisfy the pleading requirement seems to be in direct conflict with the holdings of *Bender v. Motorola*, *Bender v. LG*, and *Ware v. Circuit City Stores*, discussed above.

What these cases illustrate is that even after *Iqbal* clarified that *Twombly* applies outside of the specific antitrust context and is applicable in all civil cases, it is still extremely unclear how the facts of a specific case need to be applied to the plausibility standard. In the patent context, different district courts are still applying precedent from before *Twombly* and *Iqbal* in order to deal with the issue of how specifically a patent infringement plaintiff must specify what devices allegedly infringe the patent.

ii. The District of Delaware Takes a Unique Approach

116. *Id.* at *2.

117. *Id.*

118. *Mesh Comm, LLC v. EKA Sys., Inc.*, No. 8:09-cv-1064-T-33TGW, 2010 WL 750337 (M.D. Fla. Mar. 4, 2010).

119. *Id.* at *2 (internal quotation omitted).

In February 2010, the District of Delaware got another opportunity to rule on the patent pleading issue.¹²⁰ Confronted with a case in which plaintiffs “generally assert[ed] that defendants’ communication system products and/or methodologies me[t] each and every limitation of at least one claim of each patent,” but where “[n]o specific products or methodologies [we]re named in the complaint,” the court granted the motion to dismiss for failure to state a claim.¹²¹ The court stated that “plaintiffs were obligated to specify, at a minimum, a general class of products or a general identification of the alleged infringing methods.”¹²² Not surprisingly, the court relied on *McZeal* and Form 18 and cited its *Fifth Market* decision from the year before, but it did not cite its *S.O.I. Tec* opinion.¹²³

What was surprising, however, was the addition of two new factors to determine whether the pleading standard has been met. In evaluating the complaint, the court noted that there was no “explanation of the technology at issue” in the complaint itself.¹²⁴ Additionally, the court seemed to have been heavily influenced by the fact that the “[p]laintiffs have not guided the course of discovery in this action.”¹²⁵ The Delaware court seemingly set out two factors to be considered in determining whether the complaint is pled with the requisite specificity: the plaintiff’s (1) adequate explanation of the technology at issue, and (2) effectively guiding the course of discovery through that pleading. The source of those factors, however, remains unclear.

d. Conclusions about Specifying Infringing Devices

From the evolution of the case law throughout the three discussed time periods, it is clear that many questions remain. In 2010, a court still cited a Federal Circuit decision from 2000 and concluded that recitation of the elements of the patent act followed by the term “wireless communication enabled meters and networks” was enough to satisfy the pleading standard.¹²⁶ The district courts since *Twombly*, both before and after *Iqbal*, have struggled to determine what exactly the application of the plausibility standard is in the patent context.

120. *Eidos Commc’ns, LLC v. Skype Techs. SA*, 686 F. Supp. 2d 465 (D. Del. 2010).

121. *Id.* at 466 (internal quotations omitted).

122. *Id.* at 467.

123. *Id.* at 467–68.

124. *Id.*

125. *Id.* at 469.

126. See *Mesh Comm, LLC v. EKA Sys., Inc.*, No. 8:09-cv-1064-T-33TGW, 2010 WL 750337, at *2 (M.D. Fla. Mar. 4, 2010).

While it is clear that more courts are granting motions to dismiss in all types of civil cases since *Twombly* and even more since *Iqbal*,¹²⁷ no court has articulated a coherent justification for this in the patent context. There is much language in the district court opinions that focuses on the specificity with which the alleged infringing devices are identified. Courts attempt to distinguish between broad genres of infringing technologies, which would probably be too vague to meet the plausibility standard, and different categories of infringing products, which might well be specific enough. Ultimately, it seems that the district courts understand that when the Supreme Court heightened the pleading standard, it inherently meant for there to be more dismissals under 12(b)(6), and close cases that may have been allowed before *Twombly* or *Iqbal* (depending on the specific court's interpretation of *Twombly*) should now be dismissed.

Unfortunately, a system where the courts spit back a series of quotes from *Twombly*, *Iqbal*, *McZeal*, Form 18, *Phonometrics*, and any precedent from their own individual regional circuit courts does not provide a workable system in which a plaintiff pleading patent infringement has any measure of certainty. The message for a plaintiff to take from this detailed, albeit short, history of patent pleading is that the complaint probably needs to identify an allegedly infringing product but it is very difficult to know what level of specificity and precision is required. Ultimately, a plaintiff needs to satisfy to the court that the complaint specifies a category of infringing products rather than a genre of technologies, a laundry list of possibly infringing products, or a website on which infringing products can be found, etc.

2. Identifying a Theory of Infringement

As mentioned above, the second aspect of the question of what it means for a plaintiff to identify the means by which the defendants allegedly infringe is the question of whether the plaintiff must put forth a theory of infringement. Very few courts have addressed this issue and those that have addressed it have not done so in the clearest language. However, in reading two specific cases, this seems to be an issue that district courts may entertain more and more in the post-*Iqbal* patent pleading era and courts may continue to come out differently on the issue.

127. Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 Fed. Cts. L. Rev. 1, 11 ("The study found that there was an increase in the number of orders granting dismissal in the post-*Iqbal* period, both with and without prejudice to amend, both overall and in every case category examined.").

*a. Case Law**i. Northern District of California*

In *Bender v. LG* in March 2010, the District Court in the Northern District of California stated that “[s]ufficient allegations would include, at a minimum, a brief description of what the patent at issue does, and an allegation that certain named and specifically identified products or product components also do what the patent does.”¹²⁸ This language represents a situation where the court seemed to require not just that the complaint specify infringing devices, as discussed at length above, but also that the complaint specify what the patented invention does and that the plaintiff put forth some sort of comparison between what the patented invention does and what the allegedly infringing devices do.

In a very indirect way, the District Court in the Northern District of California was setting a requirement that the complaint put forth some form of a theory of infringement. The language is far from clear but by requiring “at a minimum” a “brief description of what the patent does” and an allegation that defendants’ products “also do what the patent does,”¹²⁹ the court is requiring the plaintiff at the pleading stage to get involved in the type of arguments and analysis that has traditionally been reserved for the Markman hearing stage, after the parties have had an opportunity for some discovery.

The purpose of a Markman hearing is to determine the meaning of the claim language and what the claims do and do not encompass.¹³⁰ A determination of what the claims encompass is essentially a ruling on what the patent does and has traditionally been reserved for the judge.¹³¹ By requiring the plaintiff to assert what the patent does, the court might be limiting the potential arguments that the plaintiff could make if and when the claims are being construed. More dangerously, a judge who is ruling on what the claim language means may be inclined to rule based on what

128. *Bender v. LG Elecs. U.S.A., Inc.*, No. C 09-02114 JF (PVT), 2010 WL 889541, at *6 (N.D. Cal. Mar. 11, 2010).

129. *Id.*

130. See generally E. Robert Yoches, *Use of Demonstrative Exhibits, Expert, and Other Evidence in Markman Hearings*, 976 PLI/Pat 127, 129 (2009) (“In *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 384 (1996), the Supreme Court assigned the issue of claim interpretation to the judge rather than the jury because the claim interpretation was a question of law. Courts have responded to this case in various ways, and most provide for some type of hearing (known as a ‘Markman hearing’).”).

131. *Id.*

the plaintiff asserted in the complaint rather than allowing the plaintiff to subsequently argue for a larger scope.

ii. Eastern District of Texas

In February 2010, the Eastern District of Texas denied a motion to dismiss for failure to state a claim in *Actus, LLC v. Bank of America Corp.*¹³² In denying the motion to dismiss, the court was adamant that it was unwilling to require that a plaintiff allege a theory of infringement at the pleading stage, placing heavy emphasis on the fact that at the pleading stage the claims “have not yet been construed” and the timing of pleading being “before the completion of claim construction discovery and without the benefit of thorough claim construction briefing.”¹³³ Ultimately, the court said that “Defendants would have Plaintiff allege with specificity a theory of infringement for each element of the asserted claims. The Court does not require that plaintiffs in a patent infringement lawsuit attach fully-developed infringement contentions to its complaint.”¹³⁴ In *Teirstein v. AGA Medical Corp.*, another Eastern District of Texas case that predates *Iqbal*, the court had also determined that “a plaintiff in a patent infringement suit is not required to delineate each claim limitation of the asserted patent and how the accused device infringes each limitation.”¹³⁵

b. *Conclusions about Specifying a Theory of Infringement*

From the two cases discussed above, it seems that the question of whether a theory of infringement must be specifically identified in the complaint remains uncertain. It is noteworthy that the Eastern District of Texas, a historically pro-plaintiff patent district and the leader in the number of patent suits filed,¹³⁶ is unwilling to require a plaintiff to put forth a theory of infringement at the pleading stage. However, the Northern District of California, another district that has heavy patent volume, may interpret *Iqbal* to require a more fully-developed theory of infringement than was traditionally thought to be required.

132. *Actus, LLC v. Bank of Am. Corp.*, No. 2-09-cv-102-TJW, 2010 WL 547183 (E.D. Tex. Feb. 10, 2010).

133. *Id.* at *2.

134. *Id.*

135. *Teirstein v. AGA Med. Corp.*, No. 6:08cv14, 2009 WL 704138, at *3 (E.D. Tex. Mar. 16, 2009).

136. Leon Carter and Dan Venglarik, Patent Case Venue, Smart Business, Jan. 30, 2008, <http://www.sbnonline.com/2008/01/patent-case-venue-how-the-eastern-district-of-texas-fits-into-current-patent-suits/>.

As previously mentioned, if the Northern District of California or any other district were to require that a plaintiff put forth a theory of infringement in the complaint, it would open the door to many more questions that the courts have yet to entertain. It remains to be seen whether *Bender v. LG* will be interpreted by the future courts in the Northern District of California to mean that a plaintiff is bound to the theory of infringement put forth in the complaint, whether the plaintiff must lock in a claim construction at the pleading stage, or whether the Markman hearing takes on a reduced role, etc.

3. Conclusions about the Need to Identify the Means of Infringement

The pleading stage is the first stage of the lawsuit. The tension between allowing plaintiffs to get into court without too much difficulty and protecting defendants from being brought into court too easily is precisely the issue addressed by the pleading standard. It was this tension that the Supreme Court addressed in *Twombly* and *Iqbal*.

Unlike other types of lawsuits, a patent infringement lawsuit always operates with the backdrop of an underlying patent. The patent contains a detailed description of the invention¹³⁷ and it contains claims that “particularly poin[t] out and distinctly clai[m] the subject matter which the applicant regards as his invention or discovery.”¹³⁸ Once the patent has been obtained, it exists to delineate the line between the subject matter to which the patentee does and does not have exclusive rights. One of the purposes of a patent’s claims is to define the invention so that each member of the public is aware of what it is that he cannot make, use, import, sell, or offer to sell without the authority of the patent owner.¹³⁹ In other words, patent claims serve a notice function, which is necessarily an ex ante function.

Only after the patent exists, does the commencement of a patent infringement lawsuit begin with the filing of a complaint. What this means is that the above analysis about the specificity with which a patent holder must identify the means of infringement in the pleading is inherently tied to the ex ante purpose of patent claims. In other words, if the purpose of a patent claim is to serve an ex ante notice function, should it be a cause for concern that courts seem to be very willing to allow both pleaded complaints and patent claims to be open-ended and therefore malleable? Would it not be more in line with the notice aspect of patent claims to require a patent infringement plaintiff to adhere

137. 35 U.S.C. § 112 (2006).

138. 37 C.F.R. § 1.75 (2011).

139. 3-8 Donald S. Chisum, *Chisum on Patents* § 8.01 (Matthew Bender).

rather strictly to the claim language in pleading the complaint by identifying a theory of infringement and the specific products that allegedly infringe?

What does seem to be clear is that in many of the cases discussed above, if a judge were to have called plaintiff's lawyer into chambers immediately after the pleading of the complaint and asked the lawyer to explain the complaint, it is likely that in many instances the plaintiff's lawyer would be unable to provide a substantive answer. The answer would most likely have been that the plaintiff knows the defendant is infringing the patent but discovery is needed to obtain the evidence to prove it. It is certain that this problem of the plaintiffs' inability to articulate a wrong and attempt to use the court system as a fishing expedition is not specific to the patent infringement context as many big companies get sued thousands of times per year.¹⁴⁰ It is this problem that the Supreme Court attempted to limit in *Twombly* and *Iqbal*.

In the patent context, a requirement that the plaintiffs put forth at least a theory of infringement (how strictly the plaintiff would be held to that theory later in the trial being a separate issue) would be consistent with the notice function of the claims as well as the clear trend of the Supreme Court in *Twombly* and *Iqbal*. A requirement for more specificity in identifying infringing products would also achieve these goals, and while courts have seemingly understood this, the difficulty seems to be in articulating a coherent standard to distinguish between complaints that do plead specifically enough and those that do not.

Essentially, the Supreme Court signaled a change with its *Twombly* and *Iqbal* decisions. The district courts are in the process of responding to that change. The Supreme Court has required something more than traditional notice pleading. Articulating the standard as to how much more is required is where there remains uncertainty.

B. *The Future Role of Form 18*

Having determined that the pleading rules are uncertain but that most courts seem to believe that *Iqbal* changed something, the law still must deal with the continued existence of Form 18 as a valid form of pleading. As discussed above, the Federal Circuit and the district courts have struggled with the question of how to deal with the apparent contradiction between the interpretation of FRCP 8 and FRCP 12(b)(6) by *Twombly* and *Iqbal* and the statement by FRCP 84 that Form 18 represents a sufficient way to plead

140. Elizabeth MacDonald, The Most Sued Companies in America, FOX Business, Jan. 19, 2009, <http://www.foxbusiness.com/markets/2011/01/18/sued-companies-america/>.

patent infringement.¹⁴¹ A number of approaches have been put forth by the courts for dealing with Form 18 and some of them suggest what the future potentially holds for this form.

The boldest approach was presented by Judge Dyk in his dissent in *McZeal*. Essentially, Judge Dyk suggested that Form 18 is inapplicable because it was put in place prior to *Twombly* and when *Twombly* changed the standard for FRCP 8 and FRCP 12(b)(6), it changed the standard for everything else that was contingent on the meaning of those rules, including Form 18.¹⁴² In explicit and direct language, Judge Dyk proclaimed:

One can only hope 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.¹⁴³

In October 2009, in a design patent infringement case, *Colida v. Nokia, Inc.*, the Federal Circuit entertained the possibility of doing precisely what Judge Dyk had suggested in *McZeal*.¹⁴⁴ In a footnote in the case, the Federal Circuit stated that “Form 18 is a sample pleading for patent infringement, but . . . was last updated before the Supreme Court’s *Iqbal* decision.”¹⁴⁵ While the Federal Circuit has not addressed the pleading standard in a utility patent infringement case since *Iqbal*, this footnote may indicate that, in light of *Iqbal*, the Federal Circuit has adopted Judge Dyk’s suggestion that Form 18 should no longer be applicable.

The district courts have not been so bold as to suggest that Form 18 is obsolete but rather have attempted to explain away the supposed contradiction. These explanations can be generally characterized as passive and active. The passive approach, taken by some courts, simply suggests that the language of Form 18 can be read to require more specificity than once thought and that, in light of *Twombly* and *Iqbal*, it should now be interpreted that way. The active approach, taken by other courts, has been to limit Form 18 to particular types of patent infringement cases.

The Northern District of California took a very passive approach in *Bender v. Motorola*.¹⁴⁶ The court stood behind Form 18 as a valid way of pleading patent infringement but suggested that, in

141. See *supra* Part II.A.1.c.

142. *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1362 (Fed. Cir. 2007) (Dyk, J., dissenting).

143. *Id.* at 1360.

144. *Colida v. Nokia, Inc.*, 347 Fed. App’x. 568, 571 (Fed. Cir. 2009).

145. *Id.* at n.2.

146. *Bender v. Motorola, Inc.*, No. C 09-1245 SBA, 2010 WL 726739, at *3 (N.D. Cal. Feb. 26, 2010).

light of *Twombly* and *Iqbal*, Form 18 now requires more specificity than it traditionally did: “[Form 18] contemplates that the pleader identify the accused device with some semblance of specificity.”¹⁴⁷ This was a similar approach to the one taken by the District of Delaware in *Eidos Communications, LLC v. Skype Technologies SA*, which said that Form 18 contemplates genres of products rather than “large technology areas.”¹⁴⁸

In *Bender v. LG*, the Northern District of California took an active approach, citing *Hewlett Packard v. Intergraph*¹⁴⁹ for the idea that “Form 18 is limited to a single ‘type’ of product and simply does not address a factual scenario involving a multitude of allegedly infringing products.”¹⁵⁰ This approach seems similar to the Northern District of California’s suggestion in *Elan Microelectronics v. Apple, Inc.*, that Form 18 “only provides an example of how direct patent infringement may be alleged.”¹⁵¹ This active approach to distinguishing Form 18 appears to implicitly originate from the fundamental premise that patent law has changed and is now much more complex than it once was. Form 18 is limited to extremely simple patent infringement cases that are unlikely to be brought into the world of twenty first century patent law. For example, it is unlikely that a plaintiff will spend the money to bring an infringement suit against a single defendant for only directly infringing on a patent with one product. Far more likely is the situation that frequently occurs today, in which a plaintiff sues a defendant for directly, indirectly, and contributorily infringing a patent or patents by way of a multitude of devices.

However the courts choose to address it, it seems that Form 18 does not present the obstacle that its language suggests it would. Courts have found ways of distinguishing the facts of their cases from facts to which Form 18 would be applicable. Whether the Rules Committee will take the advice of Judge Dyk and eliminate the rule remains to be seen.

147. *Id.*

148. *Eidos Commc’ns, LLC v. Skype Techs. SA*, 686 F. Supp. 2d 465, 468 (D. Del. 2010).

149. *Hewlett-Packard Co. v. Intergraph Corp.*, No. C 03-2517 MJJ, 2003 WL 23884794, at *1 (N.D. Cal. Sept. 6, 2003).

150. *Bender v. LG Elecs. U.S.A., Inc.*, No. C 09-02114 JF (PVT), 2010 WL 889541, at *5 (N.D. Cal. Mar. 11, 2010).

151. *Elan Microelectronics Corp. v. Apple, Inc.*, No. C 09-01531 RS, 2009 WL 2972374, at *2 (N.D. Cal. Sept. 14, 2009).

C. The Choice of Law Question

1. The Current State of the Law

The Federal Circuit has exclusive jurisdiction over all cases arising under the patent act.¹⁵² However, pleading is a procedural issue that arises under the Federal Rules of Civil Procedure rather than under the Patent Act. Therefore, it is unclear what precedent controls the issue of patent pleading. One common theme that seems to run throughout the case law is a lack of consistency in the precedent to which the courts adhere and by which the courts are persuaded. Ultimately, the approach often taken by the courts is to cite *Twombly*, *Iqbal*, the Federal Circuit's *McZeal* and/or *Phonometrics* decisions, Form 18, and precedent from its own circuit and to come up with a solution based on some mixing and matching of all of it.

From the explicit proclamations of the Federal Circuit in a number of cases, it seems clear that, officially, the law of the regional circuit courts control on the issue of patent pleading because it is a procedural issue.¹⁵³ Additionally, the reasoning of many of the district courts indicates that they agree that patent pleading is a procedural issue and, when possible, will follow the law of their own regional circuit courts.¹⁵⁴

This approach has been taken by the Federal Circuit in all procedural issues, not just patent pleading. It has been referred to as the Federal Circuit's "Rule of Deference" and it "defines a dual appellate review scheme adopted by the Federal Circuit that looks

152. 28 U.S.C. §§ 1295, 1338 (2006).

153. See, e.g., *Pupols v. U.S. Patent & Trademark Office*, No. 2010-1245, 413 F. App'x 232, 234 (Fed. Cir. 2011), cert. denied, 131 S. Ct. 3009 (2011) ("A motion to dismiss for failure to state a claim upon which relief can be granted is a purely procedural question, which we review under regional circuit law."); *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1355-56 (Fed. Cir. 2007) ("A motion to dismiss for failure to state a claim upon which relief can be granted is a purely procedural question not pertaining to patent law. Thus, on review, we apply the law of the regional circuit."); *C&F Packing Co., Inc. v. IBP, Inc.*, 224 F.3d 1296, 1306 (Fed. Cir. 2000) ("The question of whether a Rule 12(b)(6) motion was properly granted is purely a procedural question not pertaining to patent law, to which the court applies the rule of the regional . . . circuit."); *Phonometrics, Inc. v. Hospitality Franchise Sys., Inc.*, 203 F.3d 790, 793 (Fed. Cir. 2000) ("To review a purely procedural question not pertaining to patent law, such as whether a Rule 12(b)(6) motion was properly granted, this court again applies the rule of the regional circuit . . .").

154. See, e.g., *In re Papst Licensing GMBH & Co. KG Litig.*, 585 F. Supp. 2d 32, 34 (D.D.C. 2008) (following D.C. Circuit precedent for an interpretation of *Twombly*); *Taltwell, LLC v. Zonet USA Corp.*, No. 3:07cv543, 2007 WL 4562874, at *13 (E.D. Va. Dec. 20, 2007) (following Federal Circuit precedent only because the Fourth Circuit had not addressed the issue.).

to whether the legal issue under review is substantive or procedural.”¹⁵⁵ The Federal Circuit applies the law of the regional circuit to matters of procedure unless they pertain to or are unique to patent law, but it applies its own law to substantive and procedural issues that are “intimately involved in the substance of enforcement of the patent right.”¹⁵⁶

2. Problems Created By the Current State of the Law

As mentioned above, prior to *Twombly* the question of what precedent to follow was not as important because there was little difference in the way the courts applied the notice pleading standard.¹⁵⁷ However, because the application of *Twombly* and *Iqbal*'s plausibility standard is such a factual and context-specific one, the question of which precedent is controlling has become more important.

As such, three major problems emerge from having regional circuit law control, all of which are interconnected. The first major problem is that because the plausibility standard has made the procedural pleading question more factual and context-specific, the procedural patent pleading question has become intricately tied up with substantive patent issues. Therefore, it is the Federal Circuit, rather than the regional circuit courts, that is most qualified to decide this issue. However, the Federal Circuit has chosen to follow precedent from the other circuit courts.

The second major problem is the problem of circularity that was laid out (in 2007 before *Iqbal*) by the District Court for the Northern District of Georgia in *CBT Flint Partners, LLC v. Goodmail Systems, Inc.*:

The Eleventh Circuit has not decided whether *Twombly* has altered pleading standards in the patent context. And it is not likely to do so. See 28 U.S.C. 1295(a)(1) (“The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from a final decision of a district court of the United States, . . .” in patent cases.). Interestingly, the Federal Circuit’s practice is to decide motions to dismiss by drawing upon the law of the regional circuit from which the case arises.¹⁵⁸

155. Peter J. Karol, *Who's at the Helm? The Federal Circuit's Rule of Deference and the Systematic Absence of Controlling Precedent in Matters of Patent Litigation Procedure*, 37 AIPLA Q.J. 1, 3 (2009).

156. *O2 Micro Int'l. Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1364 (Fed. Cir. 2006).

157. See *supra* Part II.A.1.a.

The problem that the court recognized is that the Federal Circuit treats the pleading standard as a procedural issue and therefore draws on the precedent from the regional circuit court. However, no patent case will ever be appealed to any appellate court other than the Federal Circuit. Therefore, the Federal Circuit will be unable to find any precedent that is specific to patent pleading and instead will only be able to draw on, and attempt to apply, precedent from the regional circuit courts that is applicable to the general pleading standard. As a result of this circularity, neither the Federal Circuit nor any regional circuit court will ever do a detailed analysis of the patent pleading question.

Finally, the third major problem, which stems from the other two, is that once it is determined that neither the Federal Circuit nor the regional circuit courts will ever do a detailed analysis of the patent pleading question, the district courts are left to attempt to do it themselves. This creates the potential for individual district courts to differ drastically over the application of the plausibility standard to the facts of patent infringement complaints, as can be seen from the case law above. Additionally, to the extent that district courts will attempt to follow the non-patent precedent from their own regional circuit courts, there is a potential for circuit splits on how plausibility is applied generally and therefore how it will be analogized by the district courts to patent cases. Forum shopping already happens in patent litigation, and large differences in pleading requirements will only exacerbate the problem, because two district courts with similar facts might decide a motion to dismiss very differently. Because the Federal Circuit was created with the specific purpose of promoting uniformity in patent law, it is undesirable that two district courts could have cases with the same facts and one could dismiss the case while the other could allow it to proceed to discovery.¹⁵⁹ The outcome of a patent suit, and certainly the question of whether it even gets to trial, should not depend on where it is pled. Even if it does in reality, the law should not sanction this result.

The combination of these three problems, in turn, means that there is no settled standard for the district courts to follow. The Federal Circuit's Rule of Deference in all procedural issues "perpetuates large systematic gaps in precedent relating to patent litiga-

158. *CBT Flint Partners, LLC v. Goodmail Sys., Inc.*, 529 F. Supp. 2d 1376, 1379 (N.D. Ga. 2007).

159. *Compare, e.g., In re Papst Licensing*, 585 F. Supp. 2d 32, 34 (following D.C. Circuit precedent for an interpretation of *Twombly.*), *with Taltwell*, 2007 WL 4562874, at *13 (following Federal Circuit precedent only because the Fourth Circuit had not addressed the issue.).

tion procedure.”¹⁶⁰ This is specifically a problem in patent pleading, which has become even more related to patent substance since *Twombly* and *Iqbal*.

In some cases, the lack of precedent has led to a district court deciding a case based on a demonstrated deficient understanding of patent law. For example, in *Teirstein*, the district court was satisfied that the defendant had adequately pled invalidity by identifying the four specific provisions of the patent statute that established invalidity.¹⁶¹ But the four provisions that the defendant had identified were 35 U.S.C. §§ 101, 102, 103, and 112, which are four provisions that could have been identified by any patent law student without having even seen the case. Without an established standard to follow, district courts are left to make those types of determinations on their own.

3. A More Satisfactory Solution to the Choice of Law Question Could Settle the Law with Respect to Pleading Patent Infringement

The Federal Circuit has exclusive jurisdiction over patent cases, and is the only court that will see appeals from patent infringement cases that are dismissed at the district court level. Additionally, the Federal Circuit is the court with the most experience in patent cases. This combination of factors will probably present the Federal Circuit with an opportunity at some point to investigate the standard of pleading as it applies in the patent context. Perhaps, if the Federal Circuit takes that opportunity—rather than passing it up under the Rule of Deference and adhering to precedent from the regional circuit courts—the Federal Circuit will recognize that the factual- and context-specific plausibility standard is actually a substantive patent issue rather than a procedural issue when it is addressed in a patent infringement suit. The Federal Circuit will then realize that even if the Rule of Deference remains in place, patent pleading has probably become an issue that comes within the Federal Circuit’s jurisdiction.

The Federal Circuit should therefore take that opportunity and settle the law regarding a plaintiff’s requirements for pleading patent infringement. If the Federal Circuit does an appropriate analysis of how the plausibility standard applies to specific facts in a specific case then it can clarify what is meant for a plaintiff to describe the means by which the defendant allegedly infringes the

160. Karol, *supra* note 155, at 3.

161. *Teirstein v. AGA Med. Corp.*, No. 6:08cv14, 2009 WL 704138, at *5 (E.D. Tex. Mar. 16, 2009).

patent. This could settle the law and provide guidance for district courts to follow.

III. HOW THE PATENT PLEADING LAW SHOULD CHANGE

A. Recap of the Current State of the Law

The evolution of the pleading standard by the Supreme Court has thrown the issue of patent pleading into upheaval. The law is unsettled and the standard is uncertain, leaving district courts to fend for themselves on the intensely context-specific and fact-based question of how *Twombly*'s plausibility standard is to be applied in individual cases. More particularly, the question of what it means to describe "the means" by which the defendant is infringing remains uncertain. Most district courts seem to have reached the conclusion that the complaint must identify alleged infringing devices. However, the required level of specificity remains unclear. Additionally, a few courts have ruled differently on the issue of whether a plaintiff is required to put forth a theory of infringement in the complaint. Ultimately, if a plaintiff is required to present a theory of infringement, it remains to be seen how strictly the plaintiff will be held to that theory later in the case. It is unlikely that plaintiffs will be required to lock themselves into specific claim constructions at the pleading stage, but it is possible that they could be required to suggest alternative constructions that might limit the arguments that they can later make.

Another piece of the patent pleading puzzle is Form 18, which provides an example of a sufficiently pled patent complaint according to FRCP 84. While Form 18 is technically still active and applicable, the Federal Circuit (specifically Judge Dyk) has gone so far as to suggest that it should be eliminated in light of the updated pleading standard set forth in *Twombly* and *Iqbal*. Furthermore, while it is still in force, trial courts have severely limited it and distinguished their own facts from the facts to which Form 18 would apparently be applicable.

Finally, the choice of law question is one to which the courts seem to have provided an answer, albeit one that is unsatisfactory as it creates several additional problems. The Federal Circuit and the district courts seem to agree that pleading is a procedural issue and therefore under the Federal Circuit's Rule of Deference, the regional circuit precedent applies. This creates the problem that there is no controlling precedent for the district courts to follow, leaving them without guidance.

*B. How the Law Should Change to Address the Current State of
Uncertainty*

1. The Federal Circuit Should Determine the Patent
Pleading Standard

An important way in which the law must change is that the Federal Circuit must either abandon its Rule of Deference entirely or under its Rule of Deference recognize that the patent pleading question after *Twombly* and *Iqbal* has become more context-specific and fact-intensive. Therefore, it is tied more intricately to issues of substantive patent law and should be included within the Federal Circuit's exclusive jurisdiction over issues arising under the Patent Act. This would ensure that the Federal Circuit, the entity most qualified to address patent issues, will be the entity that sets the standard for how the new plausibility pleading standard should be applied to patent infringement complaints.

2. A New Patent Pleading Standard for Patent
Infringement

Once the Federal Circuit decides that it is the court that should set the pleading standard, adopting the most appropriate standard will remain a difficult challenge. There is no easy way to make a universal standard that attempts to provide certainty to an inquiry that is inherently context-specific and fact-intensive. However, the approach that should be taken by the Federal Circuit should be in line with the original sentiment that led the Supreme Court to adopt a heightened pleading standard in *Twombly* and *Iqbal*. The Federal Circuit should consider the complexity of patent issues and establish a standard that makes it difficult for patent holders to haul defendants into court, forcing expensive and difficult discovery upon defendants when they have little chance of ultimately prevailing in the suit.

a. Pleading Should Guide the Course of Discovery

In setting the standard for patent pleading under *Twombly* and *Iqbal*, the Federal Circuit should follow an approach that was discussed briefly by the District of Delaware in *Eidos Communications, LLC v. Skype Technologies SA*. When ruling on a FRCP 12(b)(6) motion to dismiss, the district court should ask the question whether the plaintiff's complaint has guided the course of discov-

ery on the issue.¹⁶² If the plaintiff has guided the course of discovery then the complaint would be adequately pled and the motion to dismiss should be denied. If the plaintiff has not guided the course of discovery then the complaint would be inadequately pled and the motion to dismiss should be granted.

This rather simple question of whether the plaintiff's complaint has guided the course of discovery would provide a more structured approach for district courts to take when dealing with the patent pleading question. This approach, while simple on its face, would take into account some of the reasons why the Supreme Court shifted the pleading law in *Twombly* and *Iqbal* to a more demanding standard, and it would account for a level of detail that prevents abuse of the court system while still providing those plaintiffs with legitimate complaints access to court. The fact that a plaintiff is ultimately unsuccessful does not mean that a lawsuit should have been dismissed. It is important that plaintiffs are able to get into court with legitimate complaints, but it is also equally important to limit the ability of plaintiffs to drag defendants into court when the case is frivolous. Furthermore, patent cases often involve detailed technical issues that require expensive, time-consuming, and expert-driven discovery, making it even more problematic if plaintiffs are able to get into court and trigger discovery too easily. Requiring the plaintiff's complaint to guide the course of discovery would assure that patent holders consider the facts carefully prior to pleading and commencing a lawsuit, thereby inherently reducing the number of frivolous lawsuits. It would also narrow the areas into which the defendants need to investigate during discovery, reducing the expense and time-demand of discovery.

b. The New Pleading Standard in Practice

i. Identifying the Patent Claim Allegedly Infringed

This approach would likely mean that the courts could continue to hold that the plaintiff need not specify the specific patent claim that is allegedly infringed. By the rules of restriction requirements,¹⁶³ a patent is limited to one invention so it is unlikely that the claims within a particular patent could be so different from each other that by failing to identify which claim of a patent is infringed, the plaintiff would fail to guide the course of discovery.

162. *Eidos Commc'ns, LLC v. Skype Techs. SA*, 686 F. Supp. 2d 465, 469 (D. Del. 2010)

163. U.S. Patent & Trademark Office, Manual of Patent Examining Procedure § 803 (8th Ed. 8th prtg. 2010).

ii. Identifying the Means by Which the Alleged Infringer
Infringes

Identifying Particular Infringing Devices

As for the need to identify the means by which the plaintiff is allegedly infringing, the courts have thus far struggled to articulate the fine line between sufficient and insufficient detail when identifying alleged infringing devices. This guiding discovery question would be a way for courts to rid themselves of the artificial undefined distinctions under which they currently operate (i.e. the distinction between ‘categories of infringing devices’ and ‘broad genres of infringing technologies’) and to focus on the reality of what the pleading standard seeks to achieve. A complaint that adequately guides the course of discovery will have to identify alleged infringing devices with some measure of detail. If a defendant is unaware of which of its devices it needs to investigate during discovery then the complaint has not been pled with enough detail and should be dismissed.

Putting Forth a Theory of Infringement

With regard to the need for a plaintiff to put forth a theory of infringement, the guiding discovery question would likely require at least a general theory or alternative theories of infringement. The plaintiff should not necessarily be so locked into that theory of infringement that subsequent stages of the patent infringement lawsuit (such as the Markman hearing) become irrelevant, but at least some general theory of infringement should be identified in the complaint. A complaint is not intended to be a weapon for the plaintiff to lay out the bare minimum of detail, thereby hiding the entire litigation strategy from the defendant and gaining a litigation advantage at trial. If the plaintiff has suffered a wrong from the defendant’s alleged infringement, the plaintiff can utilize the court system to attempt to redress that wrong, but it should not be able to cheat the defendant out of being able to adequately prepare for the trial. If a wrong has been suffered then the plaintiff should, upon commencement of a patent infringement lawsuit, be able to specify in some meaningful way how that wrong has been suffered. In order to guide the course of discovery, the plaintiff would have to inform the defendant of what was done to infringe and why that activity infringes.

3. Form 18 Should Be Redrafted to Comply with *Twombly* and *Iqbal's* Pleading Standard

With regard to Form 18, Judge Dyk had it right in his dissent in *McZeal*. The form was drafted under a pleading regime that is no longer in place. The Supreme Court has ruled that notice pleading is no longer the standard and it has been replaced by the plausibility standard of *Twombly* and *Iqbal*. When a Supreme Court decision comes down and changes the law in a procedural area, the Rules Committee should investigate which of the Federal Rules of Civil Procedure are affected by the decision and those rules should be amended so that they are consistent with the Supreme Court's ruling. While courts have attempted to distinguish away the apparent problems caused by the continued existence and validity of Form 18, the bottom line is that a straightforward reading of Form 18 simply does not fit into the new pleading standard articulated by the Supreme Court. Therefore, this form should be amended so that it accurately reflects the current pleading law.

CONCLUSION

Currently, the law with respect to patent pleading is in a transition state. District courts are attempting to apply the Supreme Court's plausibility standard to patent cases without adequate guidance because there is no applicable precedent. The Federal Circuit could solve this problem by taking the lead on this issue and establishing an inquiry that focuses on whether the plaintiff patent holder has guided the course of discovery as the standard for whether a patent infringement complaint satisfies the pleading standard.