

Developments in Post-Form 18 Pleading Standards

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Chris Mammen & Bijal Vakil | December 8, 2016

Introduction

- One year since abrogation of Rule 84 put an end to bare-bones Form 18 patent infringement pleadings
- Recent district court decisions shed light on how the new standard will be applied to direct infringement claims
 - (Indirect infringement was already subject to *Twombly/Iqbal*)

Old and New Pleading Standards

Old Pleading Standard

- Form 18 set forth generic template for patent complaint
 - Only 5 basic factual allegations: jurisdiction, plaintiff owns the patent, defendant infringed, whether patentee gave notice, and injunction demand
- Federal Circuit held Form 18 was sufficient for a direct infringement claim to survive a motion to dismiss, despite the Supreme Court's plausibility standard established in *Twombly* and *Iqbal*¹

¹ *R+L Carriers, Inc. v. DriverTech LLC (In re Bill of Lading Transmission & Processing Sys. Patent Litig.)*, 681 F.3d 1323 (Fed. Cir. 2012).

New Pleading Standard

- Rule 84 and Form 18 abrogated Dec 1, 2015
- Plausibility standard of *Twombly* and *Iqbal* now applies to direct infringement claims
 - Complaint must plead sufficient facts to demonstrate a claim is plausible, accepting factual allegations as true and ignoring legal conclusions

District Court Applications of the New Pleading Standard

General District Court Trends

- After Dec. 1, 2015, motions to dismiss for failure to state a claim and motions for a more definite statement for direct infringement complaints win **almost half** (44%) of the time ²
- Courts are dismissing complaints for failure to plausibly allege that the accused product infringes **each element** of at least one claim
 - Absence of a single claim element may render allegations insufficient
 - Merely reciting claim language is insufficient
 - Focus is on how closely plaintiff matches elements of at least one claim with features of the accused product

² *Patent Infringement Complaints After the Change in Rules*, Anthony Volpe and Joseph Mathew, The Legal Intelligencer (Nov. 1, 2016), <http://www.thelegalintelligencer.com/id=1202771311692/Patent-Infringement-Complaints-After-the-Change-in-Rules>.

Range of Standards Applied by District Courts

- Application of the new standard varies widely across districts and judges
- Districts court decisions reveal a continuum of what courts believe is required by the new standard
 - Lower bound is threadbare Form 18 pleading
 - Upper bound is requiring the same disclosures called for by patent local rules on infringement contentions
- No Federal Circuit decision yet

Examples: District Courts
Applying Higher Standards

Atlas IP, LLC v. Exelon Corp.

2016 U.S. Dist. LEXIS 64571 (N.D. Ill. May 17, 2016)

- Plaintiff provided a claim chart, but left gaps for 3 limitations of Claim 1
- Plaintiff's infringement theory depended on a claim construction that was wrong as a matter of law, hence any amendment would be futile
 - If the accused products were configured in such a way that they necessarily practice Claim 1, they would no longer be covered by Claim 1 AND it would contradict the complaint
- Action dismissed because amendment would not be allowed to contradict facts on which plaintiff had repeatedly grounded its claim for relief
- Complaint **dismissed**

Atlas IP Second Amended Complaint

- Patented Method: Medium access control protocol for a wireless network
- Asserted Claims: Claim chart for Claim 1 provided
- Accused Products: “ComEd had, before January 2013, installed among its customer base a **network of smart meters** supplied by General Electric. Such smart meters communicate to an access point over a neighborhood area network (“NAN”) using a communication module supplied by Silver Spring Networks, Inc. (“Silver Spring”).”
- Infringement Analysis: Element-by-element claim chart
- **N.D. III. Held: Insufficient**

RainDance Techs. v. 10x Genomics

2016 U.S. Dist. LEXIS 33875 (D. Del. Mar. 4, 2016)

- 35-page Complaint ran 35 pages identified asserted claims, accused product, and information from defendant's promotional materials
- Complaint "makes no attempt to relate any [of] their factual assertions with any of the asserted claims"
- Judge Andrews suggested that plaintiff had not purchased the accused product to see how it works, instead relying on secondary sources such as promotional materials
- Complaint **dismissed**

RainDance Techs. Amended Complaint

- Patented Methods: Conducting autocatalytic reaction in a microfluidic system
- Asserted Claims: “At least Claim 1.”
- Accused Products: “10X is now marketing the **commercial genetic analysis tool** as the ‘**GemCode Platform**.’ The GemCode Platform is 10X’s sole product, and includes three components: (1) the GemCode Instrument, (2) GemCode Reagents, and (3) GemCode Software.”
- Infringement Analysis: “10X described four steps that were part of the reagent delivery system: (1) molecular barcoding in GEMs, (2) Pool, Ligate Right adapter, (3) Sample Indexing PCR, (4) Sequence and Analyze.”
- **D. Del. Held: Insufficient**

Asghari-Kamrani v. United Servs. Auto. Ass'n

2016 U.S. Dist. LEXIS 48012 (E.D. Va. Mar. 22, 2016)

- Plaintiff alleged that 4 accused features of the defendant's website infringed "at least claims 1-13, 16-42 and 45-55"
- Defects
 - No identification of features of website that correspond to particular elements identified in the patent
 - No explanation of *how* each feature of the website infringe the patent
 - No explanation of infringement theory other than for claim 1
- Complaint **dismissed**

Asghari-Kamrani Amended Complaint

- Patented System and Method: User authentication in e-commerce, performed by a Central-Entity, a User, and an External-Entity
- Asserted Claims: “At least claims 1-13, 16-42, and 45-55.”
- Accused Instrumentality: “Defendant made and used its accused products and/or systems to authenticate a user's identity through the use of an **authentication system**.” “Including, by way of example and not limitation, a **log-on service** and a **pin number reset service**.”
 - The technology “replaces the user/customers PIN with an extra security measure. The user/customer will log on with their standard online identification and password. However, instead of entering a PIN, the user/customer will be sent a unique code . . . by text message.”
- **E.D. Va. Held: Insufficient**

Example: District Courts
Applying Lower Standards

InCom v. Walt Disney Co.

2016 U.S. Dist. LEXIS 71319 (C.D. Cal. Feb. 4, 2016)

- Allegations sufficient to plead direct infringement under the new pleading standard
- Plaintiff identified specific accused products, including Disney's attendance tracking device MagicBand and attendance monitoring system MyMagic+
 - Plaintiff described unique function of the patented system and named specific Disney products that also perform that function
- Plaintiff **not** required to identify exemplary asserted claims or provide element-by-element analysis of a claim
- Complaint **Not Dismissed**

InCom Complaint

- Patented System: “In Com developed the three patents in suit to implement an **Attendance Tracking System**.” “A principal inventive concept is the use of **Radio Frequency Identification** (‘RFID’) to recognize human beings and keep track of their attendance through the use of RFID in conjunction with other apparatus.”
- Accused products: “an **attendance tracking system**, including an attendance tracking device known as the ‘**MagicBand**’ The MagicBand is incorporated as a part of Disney's and Disney Parks' infringing system known as ‘**MyMagic+**.’”
- Infringement Analysis: The system is used “to authorize admission,” “to track attendance on a system known as ‘FastPass,’ to monitor a record of attendees,” “to maintain a record of those utilizing FastPass, to track attendance at one or more restaurants, and to maintain a record of purchases made,” “all using elements which infringe the 705 patent.”
- **C.D. Cal. Held: Sufficient**

Effect of New Standard on Patent Litigation Activity

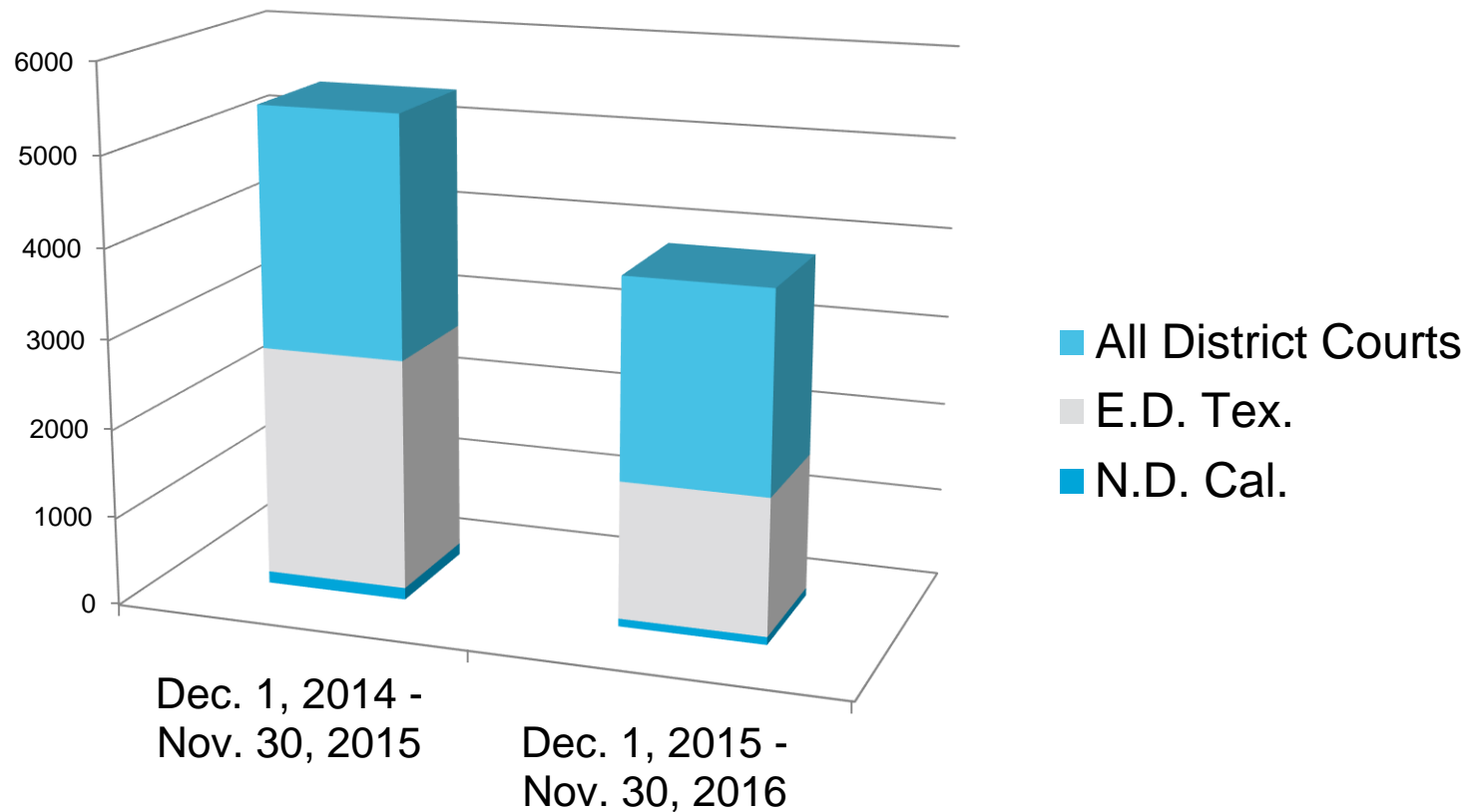
Effect on Patent Litigation Activity

- In the year after FRCP amendments took effect, filing of new patent cases nationally **fell 26%** year-over-year
- E.D. Tex. cases fell 39%
 - E.D. Tex. cases fell 8% as a share of all cases (from 44% to 36%)
- N.D. Cal. cases fell 30%

Patent Cases Filed

	All District Courts	E.D. Tex.	N.D. Cal.
Dec. 1, 2014 – Nov. 30, 2015	5984	2611	242
Dec. 1, 2015 – Nov. 30, 2016	4397	1587	170
% Change	-26%	-39%	-30%

Patent Cases Filed



Consequences for Litigants

Effect on Litigants

- Plaintiffs must include more detail in complaints, matching up features of the accused product with elements of asserted claim
 - Dec. 1, 2015 – Jan. 27, 2016: ~90% of ED Tex complaints identified an accused instrumentality and at least one asserted claim.⁴
 - Pre-filing investigations more important
 - Trade-off: avoiding dismissal vs closing off alternate theories
- Defendants now have a better chance of extinguishing poorly pled direct infringement claims on a Rule 12(b)(6) motion to dismiss

⁴ *Drafting Complaints Under the Heightened Pleading Standard for Patent Lawsuits*, Mackenzie Martin and Yoon Chae,, Texas Lawyer (Mar. 10, 2016), <http://www.texaslawyer.com/id=1202751875114/Drafting-Complaints-Under-the-Heightened-Pleading-Standard-for-Patent-Lawsuits?slreturn=20161028133720>.

Effect on Litigants

- If plaintiffs develop infringement contentions earlier to satisfy the pleading standard, this could accelerate pre-trial proceedings and ultimately lead to faster trials
- Patent local rules regarding amendment of infringement contentions may affect the level of detail plaintiffs put into pleading accused products and infringement analysis
 - N.D. Cal. allows amendment “only by order of the Court upon a timely showing of good cause,” which requires a showing of diligence

Other Civil Procedure Factors to Watch

- Wide range of standards applied by district courts makes forum selection even more important
- Plaintiffs' choice of venue may be restricted if Supreme Court takes up *TC Heartland* or if Congress enacts a patent venue statute
- Scope of discovery—Rule 26 amended to delete “reasonably calculated to lead to the discovery of admissible evidence”

Pleading Standards for Affirmative Defenses

Effect of Abrogation of Rule 84 on Affirmative Defense Pleading Standards

- FRCP Amendments also eliminated Form 30, a generic answer template including affirmative defenses
- Before abrogation of Rule 84, courts were split on whether the plausibility standard of *Twombly* and *Iqbal* applied to defenses
 - At a minimum, pleading of defenses had to provide “fair notice”
- Current trend: courts reluctant to apply plausibility standard⁵

⁵ Justin Rand, *Tightening Twiqbal: Why Plausibility Must Be Confined to the Complaint*, 9 FED. CTS. L. REV. 79, 90 (2016) (Majority of federal district courts now decline to apply the plausibility standard to affirmative defenses, instead applying the “fair notice” standard). ²⁷