IP Alert: Revised Federal Rules of Civil Procedure Abrogate Rule 84 and Eliminate Appendix of Forms

REVISED FEDERAL RULES OF CIVIL PROCEDURE ABROGATE RULE 84 AND ELIMINATE APPENDIX OF FORMS

By Saranya Raghavan

The revised Federal Rules of Civil Procedure contain changes that may impact patent litigation at the district court level. The revised rules went into effect on December 1, 2015. The revised rules were approved by the United States Supreme Court in April 2015, following an approval by the Judicial Conference Advisory Committee in September 2014.

Of particular importance to patent litigators, the revised rules abrogate Rule 84 and thereby eliminate the Appendix of Forms. Form 18 in the Appendix of Forms provided a barebones sample complaint for alleging a claim of direct patent infringement, and Rule 84 provided that the "forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate." *See McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1360 (Fed. Cir. 2007). Specifically, Form 18 simply required the following: (1) a statement of jurisdiction; (2) a statement that patents for the invention were issued to the plaintiff and owned by the plaintiff; (3) a statement that the defendant has infringed the patent by making, selling, and using the invention covered by the patents; (4) a statement that the plaintiff has complied with the statutory requirement of placing a notice on all of the products it manufactures and sells and has given the defendant written notice of the infringement; and (5) a statement that the plaintiff demands a preliminary and final injunction against continuing infringement, an accounting for accounts, interests, and costs. *See id.*

Judge David G. Campbell, the Chair of the Advisory Committee on the Federal Rules of Civil

Procedure, in his Memorandum to Judge Jeffrey Sutton, the Chair of the Standing Committee on the Rules of Practice and Procedure, justified the abrogation by stating that "[m]any of the forms are out of date," and that "[a]mendment of the civil forms is cumbersome." AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, H.R. DOC. NO. 114-33, 114 (1st Sess. 2015). Further, Judge Campbell recognized that "the increased complexity of most modern cases have resulted in a detailed level of pleading that is far beyond that illustrated in the forms." *Id.* at 114.

By abrogating Rule 84, the United States Supreme Court has subjected complaints alleging direct infringement to the higher pleading standards established by the Court in *Twombly* and *Iqbal*. *Id*. at 81 (1st Sess. 2015) ("The abrogation of Rule 84 does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8."). In *Twombly*, the United States Supreme Court held that an antitrust complaint satisfies Rule 8 only where the plaintiff pleads "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly* , 550 U.S. 544, 570 (2007). As such, the Court provided that "[w]hile 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." *Id.* at 555 (internal quotation marks omitted). Further, the Court in *Iqbal* extended these tenets beyond the context of antitrust. *Ashcroft v. Iqbal* , 556 U.S. 662, 684 (2009) ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions.'").

It remains to be seen how the courts will interpret the revised rules and what constitutes sufficient notice under *Twombly*, *Iqbal*, and Rule 8. For instance, it is unclear whether it is sufficient for plaintiffs to identify at least one claim that is infringed, whether plaintiffs must identify exactly which claims are infringed, or whether plaintiffs need to provide an element-by-element infringement analysis short of claim charts provided as part of infringement contentions. Thus, until the heightened pleading standards are clarified by Congress, patent litigators should closely monitor courts' rulings on motions to dismiss for failure to state a claim under Rule 12(b)(6) and motions for a more definite statement under Rule 12(e).

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