



*Pleading Patent Infringement—  
A Higher Standard?*

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# Disclaimer

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# Patent Complaints

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS

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## How Detailed Must a Patent Infringement Complaint Be?

Defendants. )

### COMPLAINT

Plaintiff, Atlas IP, LLC ("Atlas") hereby alleges by way of  
Exelon Corporation, ("Exelon"), and Commonwealth Edison Cor

#### THE PLAINTIFF AND THE PATENT

1. Atlas is a Florida LLC with a principal place of business at 1200, Miami, Florida 33131.
2. Atlas is the owner by assignment of U.S. Patent Nos. 7,812,123 and 7,812,124, both entitled Medium access control protocol for wireless network communications, and U.S. Patent No. 7,812,125, entitled Method and apparatus for a reliable medium access control (MAC) protocol for wireless network communications.
3. The invention of the '734 patent, the application of which is directed to "a reliable medium access control (MAC) protocol for wireless network communications over a radio frequency (RF), LAN-type network communications among a plurality of resources, such as (a) a battery powered portable computers." '734 Patent, col. 5, lines 10-14.

LOGITECH INC.,

Plaintiff,

Defendant.

COMPLAINT FOR PATENT INFRINGEMENT  
Plaintiff Iron Gate Security, Inc. ("Iron Gate") files this Complaint against Logitech Inc. ("Logitech") for patent infringement of U.S. Patent No. 6,288,641 and hereby alleges as follows:

#### NATURE OF THE ACTION

1. This is an action for patent infringement arising under the patent laws of the United States, 35 U.S.C. §§ 1 et seq.

# Topics

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- Why Are Pleading Requirements Important?
- The Federal Rules of Civil Procedure
- Supreme Court Speaks
- Federal Circuit Reacts
- Recent Changes to the Federal Rules
- Impact
- Practical Considerations

# Why Important?

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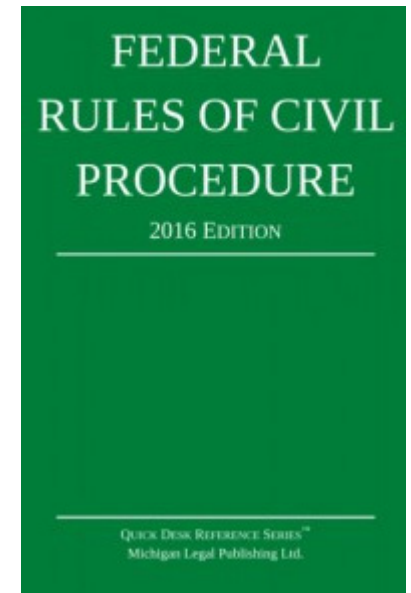
- More Detail Required ...
  - Greater Understanding of the Alleged Infringement
  - More Pre-Suit Investigation, Greater Time & Cost
  - Help Prevent Frivolous Patent Lawsuits and Claims
  - But May Require Plaintiff to Reveal Case Positions to Adversary
  - More Vulnerable to a Motion to Dismiss
  
- Less Detail Required...
  - Can Bring Lawsuit Faster
  - Consistent with longstanding idea of “Notice Pleading”
  - Permits Development of Case/Strategy Through Fact Discovery
  - But may permit a Plaintiff “Hold Back” Strategy
  - NPE Problem/”Cut and Paste”

# Federal Rules of Civil Proc. (FRCP) – Rule 8

## Rule 8. General Rules of Pleading

(a) Claim for Relief. A pleading that states a claim for relief must contain:

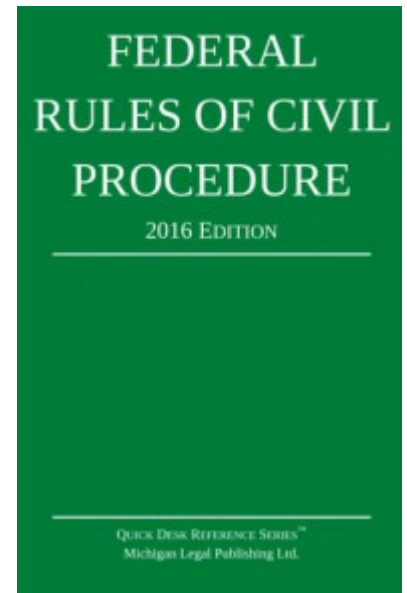
- (1) a short and plain statement of the grounds for the court's jurisdiction...;
- (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
- (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.



# FRCR—Rule 84 and Appendix of Forms

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- Appendix of Forms
- Rule 84:
  - Forms “serve as guides in pleading”
  - Illustrative and sufficient
  - Since 1938
- Form 18—Complaint for Patent Infringement



# FRCP—Form 18

## Form 18. Complaint for Patent Infringement.

(Caption – See Form 1.)

1. (Statement of Jurisdiction — See Form 7.)
2. On     date    , United States Letters Patent No.            were issued to the plaintiff for an invention in an electric motor. The plaintiff owned the patent throughout the period of the defendant's infringing acts and still owns the patent.
3. The defendant has infringed and is still infringing the Letters Patent by making, selling, and using electric motors that embody the patented invention, and the defendant will continue to do so unless enjoined by this court.
4. The plaintiff has complied with the statutory requirement of placing a notice of the Letters Patent on all electric motors it manufactures and sells and has given the defendant written notice of the infringement.

Therefore, the plaintiff demands:

- (a) a preliminary and final injunction against the continuing infringement;
- (b) an accounting for damages; and
- (c) interest and costs.

(Date and sign – See Form 2.)



# Supreme Court Speaks: *Twombly/Iqbal*

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- *Bell Atlantic Corp. v. Twombly* (2007)
  - “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”
  - “Factual allegations must be enough to raise a right to relief above the speculative level ... .’[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action’ on the assumption that all the allegations in the complaint are true.”
- *Ashcroft v. Iqbal* (2007)
  - *Twombly* generally applicable (not limited to antitrust)
  - “When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”

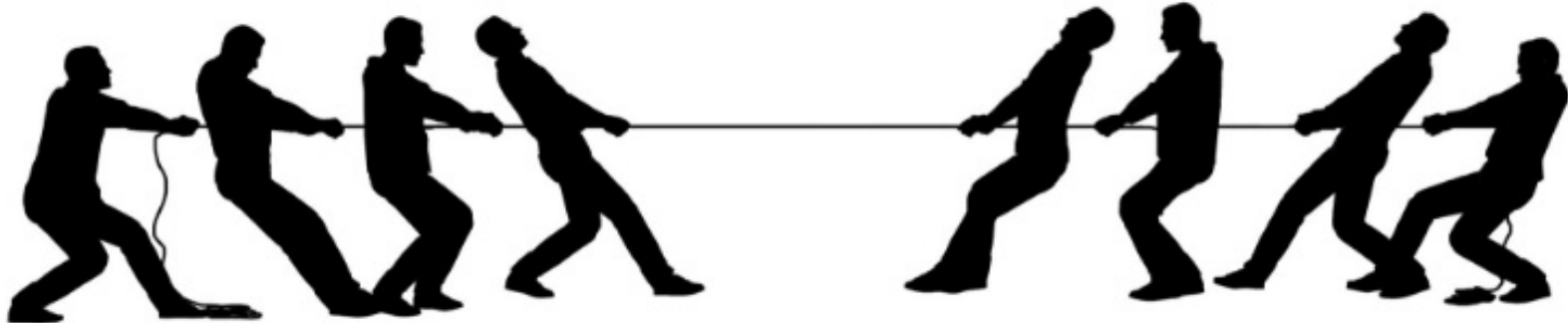
# How Detailed Must a Patent Infringement Complaint Be?

*Form 18*

**Less!**

*Twombly/Iqbal*

**More!**



# Federal Circuit Reacts

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- *McZeal v. Sprint Nextel Corp.* (Fed. Cir. 2007) -- Form 18 satisfies the minimal pleading requirements for direct infringement.
- *K-Tech Telecommunications, Inc. v. Time Warner Cable, Inc.* (Fed. Cir. 2013)
  - Despite *Iqbal/Twombly*, the proper use of Form 18 still “effectively immunizes a claimant from attack regarding the sufficiency of the pleading.”
  - “To the extent any conflict exists between *Twombly* (and its progeny [*Iqbal*]) and the forms regarding pleadings requirements, the forms control.”

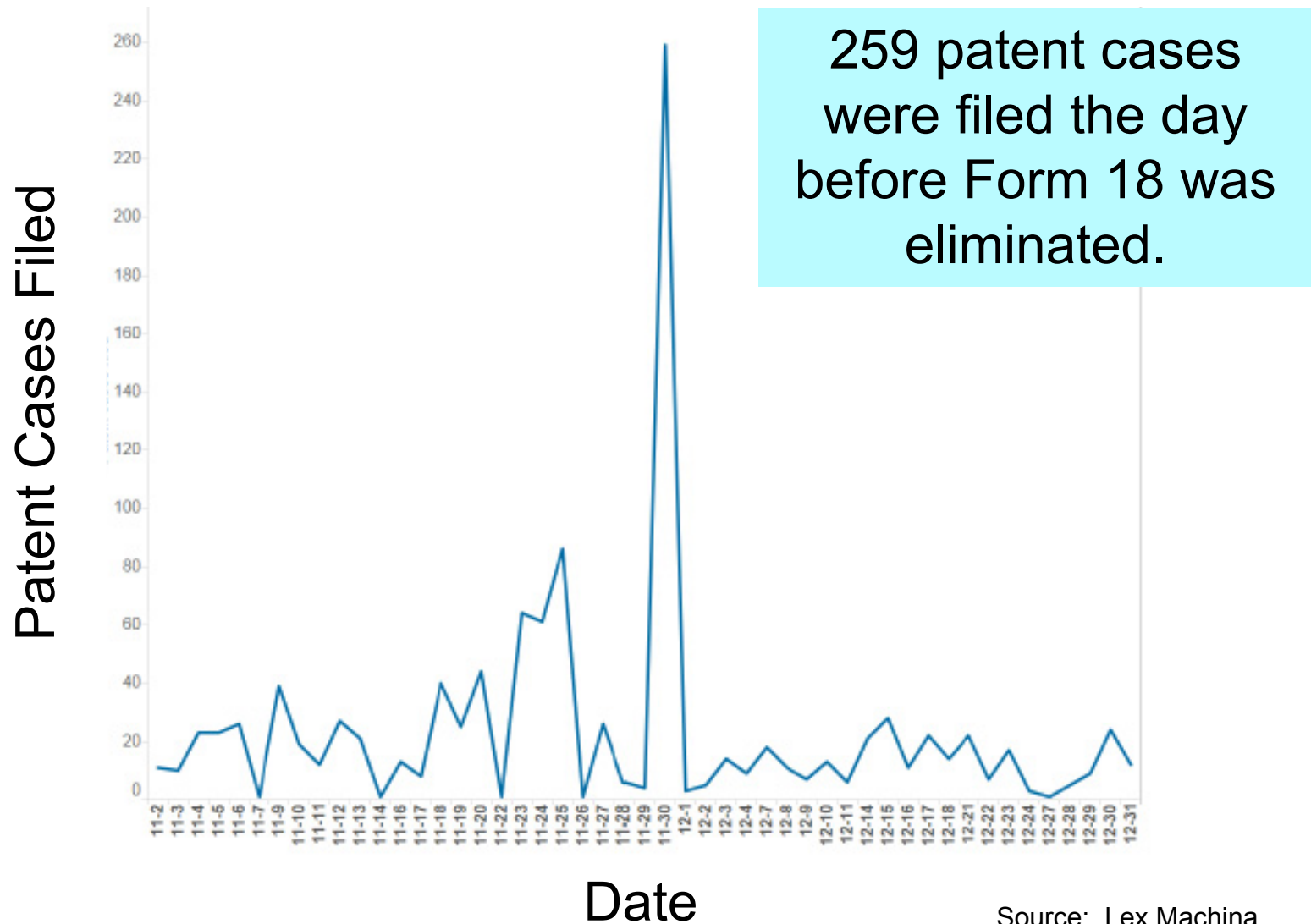
## Form 18 Eliminated

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- Effective December 1, 2015
- The Appendix of Forms “illustrate[d] a simplicity of pleading that has not been used in many years.... [T]he increased complexity of most modern cases have resulted in a detailed level of pleading that is far beyond that illustrated in the forms.”
- But ... “[T]he abrogation of Rule 84 [Form 18] does not alter the existing pleading standards ... .”

(Advisory Committee on the Federal Rules)

# Preparing for Form 18 Elimination



# Form 18 Elimination—Practical Impact

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- Patent infringement complaints—more detail:

In 148 Eastern District of Texas patent lawsuits from December 2015 to January 27, 2016:

- 133 identified—at least one accused instrumentality identified,
- 132 complaints—at least one asserted patent claim identified
- 100 complaints—details on the infringement
- 9 complaints—even included claim charts

See *Mackenzie Martin and Yon Chae*, Drafting Complaints Under the Heightened Pleading Standard for Patent Lawsuits, *Texas Lawyer* (Mar. 10, 2016), <http://www.texaslawyer.com/id=1202751875114/Drafting-Complaints-Under-the-Heightened-Pleading-Standard-for-Patent-Lawsuits?slreturn=20160628104749>.

# Post Form 18 Cases—Dismissal Granted

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*RainDance Techs. v. 10x Genomics* (D. Del. Mar. 4, 2016)

- 35 page complaint; 7 asserted patents, Plaintiffs identified a representative infringed claim, an accused product—a microfluidic DNA and RNA analysis platform—and specific implicated components
- Judge Andrews: Despite the complaint’s length, the “essential factual allegations d[id] not take up much space.”
  - Plaintiff relied on promotional materials, not purchase of actual product
  - Filed “less than a month” after first learning about product
  - Appeared to want factual allegations tying each asserted claim limitation to the accused products

# Post Form 18 Cases—Dismissal Granted

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*Ruby Sands v. Am. Nat'l Bank of Texas* (E.D. Tex. June 28, 2016)

- *Judge Gilstrap*: “Form 18 no longer provides a safe harbor for direct infringement.”
- Plaintiff made no factual allegations that “even remotely” suggest the defendant performed any alleged infringing activity.
- “Cut and Paste” Not Good. Plaintiff inadvertently included language in the complaint that was from a pleading in a different case



# Post Form 18 Cases—Dismissal Denied

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*Hologram USA, Inc. v. Pulse Evolution Corp.* (D. NV, January 2016)

- Chief Judge Navarro’s interpretation of the law: “*Twombly* and its progeny ‘address[ed] the civil pleading standards in a variety of civil contexts,’ none of which ‘address[ed] the sufficiency of a complaint alleging patent infringement or causes of action for which there is a sample complaint in the Appendix of Forms’”
- Invoked the Advisory Committee note to hold that the standards created by Form 18 were still in effect.

*InCom Corp. v. The Walt Disney Co.* (C.D. Cal. February 2016).

- InCom had done enough “by specifically identifying Defendants’ products and alleging that they perform the same unique function as Plaintiff’s patented system.”

# Considerations

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- Law developing
- Application may vary across districts/individual judges
- Will it curb frivolous Non-Practicing Entity (NPE) suits?
  
- For Patent Owners/Plaintiffs
  - Can't rely on Form 18
  - Thorough pre-filing investigation important
  - At minimum, in complaint:
    - Identify at least one infringed claim
    - Identify at least one infringing product
    - Describe how the product infringes the identified claim
  
- For Accused Infringers
  - A new effective defense tool?
    - Rule 12(b)(6) motion may force Plaintiff to reveal more substance, and may lead to case dismissal
    - “With Prejudice?”
    - Time to evaluate case, settlement leverage

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Questions?

# Thank You!

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