

I. RECENT SUPREME COURT DECISIONS

The Supreme Court did not issue many decisions during the 2008-2009 term that were directly related to patent law. Two decisions, however, will have an impact on patent litigation practice. The Court's opinion in *Aschcroft v. Iqbal* clarifies the pleading standard in Rule 8 of the Federal Rules of Civil Procedure and makes it applicable to all civil actions. The holding could have a profound impact on the early stages of patent litigation for plaintiffs and defendants alike.

A. *Aschcroft v. Iqbal* – Extending *Twombly* to All Civil Actions

Although *Aschcroft v. Iqbal*² concerned issues unrelated to patent law, the case is noteworthy because the Supreme Court revisited its decision regarding the pleading standards of Rule 8 of the Federal Rules of Civil Procedure in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and provided a two-part test for determining whether a complaint is well pled.

Before announcing the two-part test, the Court recounted several of the key holdings in *Twombly*. First, the Court noted that, in order to survive a motion to dismiss, a complaint must contain facts sufficient to prove that the claim for relief is “plausible on its face”³ or to permit the court to “draw the reasonable inference” that the defendant is liable.⁴ The Court, however, cautioned that the plausibility standard is distinct from the “probability requirement” and still requires more than a “sheer possibility.”⁵ Moreover, the Court stated that a complaint pleading facts that are “merely consistent with” a party’s liability “stops short of the line between possibility and plausibility of entitlement to relief.”⁶

The Court made note of two principles underlying the *Twombly* decision: (i) the general rule that a court considering a motion to dismiss accepts as true all of the allegations in a complaint is not

2. 129 S. Ct. 1937 (2009).

3. *Id.* at 1949 (citing *Twombly*, 550 U.S. at 570).

4. *Id.* (citing *Twombly*, 550 U.S. at 556).

5. *Id.*

6. *Id.* (internal punctuation omitted).

applicable to legal conclusions; and (ii) “only a complaint that states a plausible claim for relief survives a motion to dismiss.”⁷

Employing these two principles, the Court adopted a two-part test for determining whether a complaint can survive a motion to dismiss: a court must (i) separate the allegations in the complaint that are entitled to an assumption of truth (*i.e.*, factual allegations) from those that are not (*i.e.*, legal conclusions); and then (ii) consider those allegations to determine “if they plausibly suggest an entitlement to relief.”⁸

Before applying this test to the complaint at issue, the Court clarified that *Twombly* and *Iqbal* set forth the “pleading standard for ‘all civil actions.’”⁹ Therefore, the pleading standard is applicable to claims of patent infringement.¹⁰ The Court, however, noted that the application of this test will be a “context-specific task,” and held that the complaint at issue failed to state a claim upon which relief could be granted because it did not include sufficient factual allegations to plausibly show purposeful discrimination.¹¹

Justice Souter filed a dissent, which was joined by Justices Stevens, Ginsburg, and Breyer, contending that, although the plausibility standard announced in *Twombly* and *Iqbal* is proper, the majority’s analysis of each factual allegation in the *Iqbal* complaint, in isolation from the other allegations in the complaint, was improper.¹² Justice Souter argued that the majority should have instead analyzed the allegations in the context of the complaint as a whole, and not individually.¹³ Justice Breyer joined Souter’s dissent, but also filed his own, disputing the majority’s reluctance to permit alternative case-management tools before assessing whether the sufficiency of the allegations in the complaint was improper.¹⁴

Despite these dissents, the combination of *Twombly* and *Iqbal* may spur an increase in the number of Rule 12(b)(6) motions to dismiss for failure to state a claim filed by defendants. As of this date, almost 500 opinions have already issued that cite *Iqbal* and

7. *Id.* at 1950 (citing *Twombly*, 550 U.S. at 556).

8. *Id.* at 1951.

9. *Id.* at 1953.

10. *Id.*

11. *Id.* at 1950, 1954.

12. *Id.* at 1960-61.

13. *Id.*

14. *Id.* at 1961-62.

Rule 12(b)(6).¹⁵ Despite this increase, defendants should weigh the benefits of such a motion, as courts could allow a plaintiff to replead or amend their pleadings to cure *Iqbal* and *Twombly* issues.

B. *Carlsbad Technology, Inc. v. HIF Bio, Inc.* – Clarifying Scope of Federal Circuit’s Appellate Jurisdiction over Supplemental Claims

In *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, the Supreme Court addressed the scope of the Federal Circuit’s appellate jurisdiction.¹⁶

The case originated in California state court when HIF Bio, Inc. (“HIF”) accused Carlsbad Technology, Inc. (“Carlsbad”) of violating state and federal law in connection with a patent dispute.¹⁷ The case was removed to the United States District Court for the Central District of California under 28 U.S.C. § 1441(c), but the district court quickly dismissed the sole federal claim, which arose under the Racketeer Influenced and Corrupt Organizations Act, and remanded the case to state court for resolution of the remaining state law claims.¹⁸

Carlsbad appealed to the Federal Circuit, arguing that the district court should have retained the case by exercising its supplemental jurisdiction over the state-law claims because those claims implicated federal rights.¹⁹ The Federal Circuit dismissed the appeal and held that the remand order was not reviewable under 28 U.S.C. §§ 1447(c)

15. Of these cases, at least four involve motions to dismiss in patent litigation, and all of which denied the motion without substantive discussion of *Iqbal*. See, e.g., *Swingless Golf Club Corp. v. Taylor*, No. C 08-05574, 2009 WL 2031768 (N.D. Cal. July 7, 2009); *Tesco Corp. v. Weatherford Int’l, Inc.* No. H-08-2531, 2009 WL 2001032 (S.D. Tex. July 1, 2009); *Dicar, Inc. v. Stafford Corrugated Prods., Inc.*, No. 2:05-cv-5426, 2009 WL 1796053 (D.N.J. June 22, 2009); *Iguana, LLC v. Lanham*, No. 7:08-cv-09, 2009 WL1620586 (M.D. Ga. June 9, 2009).

16. 129 S. Ct. 1862, 1865 (2009).

17. *Id.*

18. *Id.*

19. *Id.*