CUOZZO CASE: WEAK PATENTS SUFFER A BLOW

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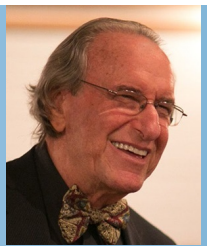

The US Supreme Court has delivered what many believe is a significant win for parties seeking to weed out weak or defective US patents. Siding with the US Patent and Trademark Office (USPTO), the court on June 20 upheld an America Invents Act (AIA) provision facilitating the institution of *inter partes* review of the validity of patents at the USPTO, under 35 USC section 314(d). Justice Stephen Breyer authored the court's opinion in the case, *Cuozzo Speed Technologies v Lee*.

For some time now, parties who are the targets of patent infringement claims or who believe that they are potential targets have been limited in developing successful strategies for fighting such claims. Many find themselves to be defendants in US district court patent infringement actions in less than favourable venues. The patent owner plaintiffs in litigation may assert more than a single patent, with the total number of patent claims in dispute numbering in the dozens or hundreds.

Most patent cases are tried before a jury numbering at least six, and typically with two or more alternates who, in addition to hearing all of the evidence, will participate in deliberations and have a full and equal vote resulting in a jury verdict.

Defendants battling the validity of these patent claims, in the absence of the court granting summary judgment, carry the burden of obtaining a unanimous jury verdict of invalidity, based upon the evidentiary standard of clear and convincing evidence. This represents a formidable challenge to defendants and their counsel. Furthermore, the median legal fees associated with litigating a typical uncomplicated patent litigation may run to $5 million for each party exclusive of potential court costs, expert fees, court reporter charges, and other disbursements.

On March 16, 2013, AIA 35 USC 102 and 103 took effect. The act is the result of a 2011 US congressional effort to overhaul the nation's patent system. Those who argued in favour of the AIA believed that there were far too many patents of questionable validity, and that court challenges were far too costly and time-consuming. The AIA applies to any patent application that contains or contained at any time a claim to an invention that has an effective filing date that is on or after this AIA effective date.

Pharma protests

The AIA has faced opposition from segments of the pharmaceutical and biotechnology industries, who have historically argued in favour of strong patent protection. We have seen big pharma develop questionable tactics such as entering into so-called pay-for-delay agreements, which represent an attempt to stifle competition from lower-cost generic medicines by paying generics not to bring lower-cost alternatives to market. This results in what may be billions of dollars in higher annual drug costs. On the other side of the arguments, high tech companies such as Google and Apple have favoured the ability to more easily and economically challenge the validity of patents that they deem to include weak claims to inventions.

While the Supreme Court acknowledged that the USPTO rules depart somewhat from those used in court proceedings, it ruled that the USPTO has taken a reasonable approach in deciding the issue of patent claim validity and protecting the public. After all, permitting invalid and weak patents to stand results in monopoly rights that fly in the face of encouraging innovation and lawful patent protection.

"PERMITTING INVALID AND WEAK PATENTS TO STAND RESULTS IN MONOPOLY RIGHTS THAT FLY IN THE FACE OF ENCOURAGING INNOVATION AND LAWFUL PATENT PROTECTION."

The June 21 edition of *The Wall Street Journal* reports that: "According to recent government data, trials completed so far in front of a Patent Office board have resulted in the cancellation of some or all of a patent over 80% of the time." This is a remarkable statistic and gives rise to the justification of concern on the part of those who oppose the AIA. That said, tech companies who are the targets of litigation by what are referred to as patent trolls strongly favour the AIA. Such plaintiffs will now face AIA trials by targets who will enjoy a less costly and less time-consuming process.

The *Cuozzo* case before the Supreme Court involved a patent covering a GPS-based invention for alerting drivers when they are speeding. Established GPS technology company Garmin brought the successful challenge via the USPTO, as opposed to a court. ■

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