ESSENTIAL CALIFORNIA LEGAL CONTENT | AUGUST 13, 2013 An ALM Publication

THE RECORDER

Federal Circuit Upholds Sanctions for 'Vexatious Litigation Strategy'

SAN FRANCISCO — Companies trying to recoup attorney fees in patent litigation have found little help from trial judges bound by the Patent Act's strict "exceptional case" standard.

But amid clamoring for a more flexible rule, the Federal Circuit showed Tuesday that it will allow fee-shifting when the right case comes around.

The U.S. Court of Appeals for the Federal Circuit refused to let LED lighting provider O2 Micro International off the hook for more than $9 million in attorney fees and costs. In an 18-page order, the three-judge panel affirmed U.S. District Chief Judge Claudia Wilken's decision to award attorney fees to Monolithic Power Systems after finding that O2 Micro had engaged in litigation misconduct and "vexatious litigation strategy" in a decade-long flurry of suits against its competitor.

The order comes as a relief to Monolithic Power Systems, said Latham & Watkins partner Mark Flagel, who represented the San Jose-based company at district court and in the appeal.

Dean Dunlavey
Latham & Watkins

Mark Flagel
Latham & Watkins

"We felt very confident in our position all along," said Flagel, who worked on the appeal with fellow Latham partner Dean Dunlavey and Perkins Coie partner Dan Bagatell, who argued the case earlier this year. "But for anyone who looks at the track record of what happens when a party tries to get fees — particularly a defendant in a patent case — it's hard to be optimistic."

Partner Edward Reines of Weil, Gotshal & Manges, who represented O2 Micro in the appeal but not the underlying litigation, declined to comment.

The order comes as debate over fee-shifting in patent litigation has been intensifying in Silicon Valley and on Capitol Hill, though passions run highest when the plaintiff is seen as a patent troll.

In a Delaware patent case, Reines has found himself arguing a very different side of the coin on behalf of NetApp Inc., a Sunnyvale cloud computing firm.

Seven companies sought permission Tuesday to file an

amicus curiae brief in support of Reines' effort to recoup attorney fees and costs for NetApp from Acacia Research Group, a non-practicing entity. NetApp contends Acacia pursued litigation over patents it had already licensed in a broad deal with the defensive patent consortium RPX Corp.

The coalition, represented by Kilpatrick Townsend & Stockton S.F. partner Steven Moore, includes Citrix Systems Inc. and Safeway Inc., which join a chorus of companies and jurists calling for the courts to use fee-shifting as a tool to stamp out meritless patent litigation. Chief Judge Randall Rader of the Federal Circuit penned an op-ed on the topic in June with law professors Colleen Chien of Santa Clara University and David Hricik of Mercer University.

Section 285 of the Patent Act allows judges to award attorney fees in "exceptional cases," but some IP litigators lament that the standard is nearly impossible to meet. The federal circuit found that O2 Micro's battle with Monolithic fit the bill.

O2 Micro has filed five suits alleging patent infringement against Monolithic in the Northern District. In several instances, O2 Micro sued Monolithic's customers, triggering declaratory judgment actions by Monolithic. To avoid litigating the validity of its patents, O2 Micro later covenanted not to sue. But extensive litigation had already taken place, wasting court resources, Wilken wrote in a 2011 order.

Writing for the panel, Judge Sharon Prost endorsed Wilken's conclusions.

"The district court, with its unparalleled familiarity with and insight into O2 Micro's motivations and repeated resort to these tactics, assessed that this pattern amounted to a vexatious litigation strategy that would support a finding of exceptional case," Prost stated. "We decline to disturb that assessment."

The panel also included Jimmie Reyna and former circuit chief Haldane Mayer.

Wilken also criticized O2 Micro for trying to conceal its proffer of false testimony, which she found amounted to litigation misconduct.

In its appeal, O2 Micro argued that the company should only be sanctioned under §285 if it was found to have brought baseless litigation in bad faith. Siding with Wilken, the Federal Circuit found that litigation misconduct alone could constitute the "exceptional case" described in §285.

Most of the fees awarded to Monolithic were for expenses incurred in a parallel proceeding before the International Trade Commission, a detail that O2 Micro seized on in its appeal. The company argued that the district court did not have the authority to award fees that did not stem directly from the litigation. But the judges were not swayed, noting that the parties agreed that the discovery in question would be for use in both the ITC and district court.

O2 Micro pointed out that an episode of litigation misconduct does not typically trigger a full award of attorney fees. The justices granted O2 Micro that point but found that the company's misbehavior extended far beyond the proffer of false testimony.

"Based on the examples of unprofessional behavior provided by the district court and the many more instances of it we were able to glean from the record, we agree with the district court that O2 Micro's rampant misconduct so severely affected every stage of the litigation that a full award of attorneys' fees was proper here," Prost stated.

In fact, the justices said that the sanctions levied against O2 Micro were something of a bargain. Monolithic's award represented a 10 percent discount on all attorney fees incurred, according to the order.

"I can guarantee you that the expense was far in excess of what [Monolithic] was awarded," Flagel said. Still, Monolithic "really feels vindicated after such a long and winding road of suffering."