

Latham Pulls off Triple Play for Volvo, Mallinckrodt

By Lisa Shuchman

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It was a good week for IP litigators at Latham & Watkins, who scored back-to-back appellate rulings for Mallinckrodt Pharmaceuticals and capped a patent victory for Volvo Car Corp. with a \$1 million attorney fee award.

The rulings for Mallinckrodt, formerly Cadence Pharmaceuticals Inc., both cemented earlier patent wins for Latham in a multipronged battle with Exela Pharma Sciences.

On March 23, the U.S. Court of Appeals for the Federal Circuit affirmed a 2013 Delaware verdict upholding the validity of two Mallinckrodt patents covering the injectable pain reliever Ofirmev, finding them infringed by Exela and two related entities.

On March 26, a different Federal Circuit panel affirmed a related judgment for Mallinckrodt in the Eastern District of Virginia. In that case, Exela had invoked the Administrative Procedure Act (APA) to challenge the U.S. Patent and Trademark Office's actions related to the patents that Mallinckrodt was asserting against Exela in the Delaware litigation. Exela claimed the PTO acted beyond its statutory authority when it revived a Mallinckrodt patent application.

The district court in Virginia dismissed Exela's APA action in 2013, siding with Mallinckrodt and the PTO. The Federal Circuit affirmed that dismissal, ruling that Congress didn't intend to subject PTO revival rulings to third party collateral challenges.

Federal Circuit Judges Pauline Newman and Timothy Dyk also filed separate concurring opinions on an issue that could have a bearing on similar cases in the future. Dyk suggested that the Federal Circuit improperly decided a 2008 case called *Aristocrat Technologies Australia v. International Game Technology*. In that case, which Exela cited in its argument, the court held that a defendant in an infringement action could not assert improper revival of an abandoned patent application as a defense in that action. Newman disagreed, writing that she believes the case was correctly decided.

For the purposes of the Exela litigation, Dyk wrote that it wasn't necessary to determine whether the 2008 case was correctly decided because PTO revival rulings are not subject to third party review under the Patent Act. But, he wrote, "in the future, *en banc* action to reconsider *Aristocrat* may be appropriate."

Latham & Watkins partner Richard Bress argued the appeal decided



Thursday, assisted by partners Kenneth Schuler and Stephen Swinton and counsel Gabriel Bell. Dennis Barghaan Jr. of the U.S. Attorney's Office for the Eastern District of Virginia argued for the PTO. Matthew Dowd of Wiley Rein argued for Exela.

Latham's Schuler argued for Mallinckrodt in the case decided March 23. Jeffrey Stephen Ward at Merchant & Gould argued for Exela.

The win for Volvo, meanwhile, stemmed from a 2011 case in which Lugus IP alleged that Volvo's integrated booster seats infringed a patent on the automatic retraction of a child safety seat to form a seat for adult use.

U.S. District Judge Joseph Irenas in Camden, New Jersey had granted Volvo summary judgment last June, finding that its seats don't "automatically" retract as specified by the Lugus patent. On March 26, he granted Volvo's motion for attorney fees and ordered Lugus to pay nearly \$1 million, finding that the case was "exceptional" because the infringement claims were not "objectively reasonable," as required by the Patent Act.

Volvo is represented in the Volvo litigation by Latham partners Matthew Moore and Jonathan Link, along with New Jersey counsel at Saiber LLC. Lugus was represented by William Trousdale and Brian English of Tompkins, McGuire, Wachenfeld & Barry, and by John Fuisz and Sudip Kundu of The Fuisz-Kundu Group.