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If High Court Reverses Teva, Litigation Costs May Increase

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In recent years, the U.S. Supreme Court has shown an increasing willingness to review and, more often than not, reverse, patent law decisions from the Federal Circuit. As others have observed, the Supreme Court's growing interest in patent law seems to be motivated by policy concerns about the scope and costs of the patent system. Unfortunately, our analysis suggests that the policy arguments presented to the court in its latest patent law case, Teva Pharmaceuticals USA Inc. v. Sandoz Inc., which was argued Wednesday, are off-base.

Teva challenges the Federal Circuit's practice of reviewing all claim construction issues, including expert testimony and other evidence "extrinsic" to the patent and its prosecution history, de novo — that is, without deference to the lower courts' initial determinations. Teva — along with the U.S. Solicitor General's Office, which argued in partial support of the petition — focuses on the apparent contradiction between the Federal Circuit's approach and the language of Federal Rule of Civil Procedure 52(a), which requires factual findings to be reviewed with deference (for "clear error"). Sandoz, for its part, relies primarily on the Supreme Court's 1996 decision in Markman v. Westview Instruments Inc., which held that claim construction should be conducted by judges rather juries. Sandoz argues that Markman "effectively decided" that claim construction must be reviewed de novo on appeal.

At oral argument, the justices struggled to articulate the precise role of fact-finding in claim construction and ultimately seemed divided on the question presented. As Justice John Roberts commented with characteristic understatement, "You know, the difference between questions of law and fact has not always been an easy one for the court to draw."
It is unlikely, however, that the Supreme Court granted certiorari merely to grapple with this abstract question. Notwithstanding its growing appetite for patent law, the Supreme Court usually limits itself to questions it sees as particularly consequential.

Teva and its supporters argue that the standard of review for claim construction is consequential because de novo review results in too many costly reversals and retrials. They contend that deferring to lower court claim construction determinations will lower reversal rates and therefore the costs of patent litigation.

Our research, however, suggests that this argument is not correct. On the contrary, increased deference

to district court factual findings is more likely to increase litigation costs than decrease them.

The high cost of patent litigation is clearly an important issue. The costs of patent cases have soared to an average of $5.5 million in cases where more than $25 million is at stake and $2.6 million for cases with less at stake. So-called “patent trolls” — companies that buy up often dubious patents to sue others rather than make anything of their own — are part of the problem: Suits filed by patent trolls cost $29 billion in 2011. This means less money for innovation and higher prices for consumers.

It is also probably true that one reason costs are high is that patent cases bounce back and forth between the trial court and the Federal Circuit. Even after a case has a verdict, the Federal Circuit often decides that the trial court made a mistake and orders the court to start over. Although the evidence on this is disputed, the Federal Circuit is widely perceived as a “hyperactive” court, reversing trial court decisions more often than other federal courts of appeals.

According to Teva, as well as some amici curiae and Federal Circuit judges, de novo review of claim construction is a significant reason for this costly situation. As Teva argued in its petition, “the Federal Circuit’s wrongheaded rule has imposed billions of dollars in litigation costs on patentees and infringement defendants alike, who must litigate to final judgment in district court, only to be sent back for new proceedings once the Federal Circuit reverses the claim construction based on its own reading of the underlying factual record.” Judge Kathleen O’Malley, dissenting with three other judges in the Federal Circuit’s en banc Lighting Ballast decision, similarly argued that the Federal Circuit’s rule creates “greater incentives for losing parties to appeal, thus discouraging settlements and increasing the length and cost of litigation.” In support of this argument, Teva and others have cited various studies showing significant reversal rates for district court claim construction opinions.

The problem with this argument is that it confuses correlation with causation. While it may be true that claim construction rulings are both reviewed de novo and often reversed, this does not prove that the reversal rates are caused by de novo review. Our research suggests that they are not.

We found a point of comparison in the Federal Circuit’s decisions on another important patent issue — whether a patented invention is obvious. Unlike with claim construction, the Federal Circuit defers to factual findings on obviousness. This allowed us to test whether a trial court is reversed less when the Federal Circuit defers to factual findings.

Although claim construction reversal rates are significant, they are not as high as they used to be. One recent study examined the Federal Circuit’s claim construction decisions from 2005 through 2011 and found that 23 percent of cases were reversed or sent back to the trial court because of a mistake in claim construction. In both 2010 and 2011, the Federal Circuit reversed the construction of about 20 percent of the claim terms they considered.

We examined the Federal Circuit’s obviousness decisions in 2010 and 2011. What we found looked familiar: 22 percent of the cases were reversed or sent back to the trial court for another go.

Even with deference, then, the Federal Circuit reverses trial courts at roughly that same rate as without deference. In other words, a Supreme Court decision that requires deference will not reduce the number of reversals and do-overs.

Not only is a deferential standard of review for claim construction unlikely to reduce litigation costs by lowering reversal rates, it is likely to drive up litigation costs by increasing the use of expensive expert witnesses.

Currently, patent litigants typically do not use expert witnesses to testify about claim construction. This is because the Federal Circuit places little value on evidence from dueling experts in its de novo review of claim construction. As the Federal Circuit has made clear, expert testimony "may only be relied upon if the patent documents, taken as a whole, are insufficient to enable the court to construe disputed claim terms. Such instances will rarely, if ever, occur."

If the Supreme Court requires deference to a trial court's claim construction findings, expert testimony will immediately take on more weight. In virtually every patent case, litigants will feel obliged to engage scientific experts to testify to facts the trial court can use in claim construction in an attempt to shield claim construction rulings from appeal. The fees for these additional procedures, resulting from departure from de novo review, will increase the cost of patent cases.

The Supreme Court reversed or vacated five out of six patent-related cases this year, and this case, despite a seemingly divided court, may well be the sixth. But despite the hopes of many, this change will raise, not reduce, litigation costs.

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