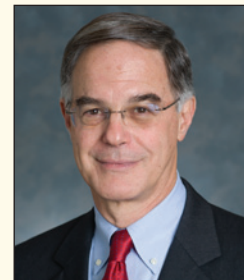


Litigator of the Week: Gregory Diskant of Patterson Belknap Webb & Tyler

By Jan Wolfe
April 11, 2013



Patent fights between basement inventors and big corporations tend to be emotional affairs. Dr. Bruce Saffran's infringement lawsuit against Johnson & Johnson Inc. and its Cordis subsidiary, which climaxed in a \$593 million loss for J&J in 2011, was no exception. It's pretty apparent from court filings that the case slipped away from defense counsel at Patterson Belknap Webb & Tyler at trial. Saffran, a Philadelphia-area radiologist who obtained medical device patents as a young resident in the 1990s, won the jury's sympathy, and J&J's lawyers were unable to stop him.

J&J's appeal to the U.S. Court of Appeals for the Federal Circuit has been a totally different ballgame. Instead of emotionally charged testimony, there was enough technical jargon flying around at oral argument to make your head hurt. And, this time around, J&J's lawyers at Patterson Belknap, led by Gregory Diskant, came out firmly on top.

As we reported, a Federal Circuit panel ruled 3-0 on April 4 that J&J drug-eluting cardiac stents don't infringe Saffran's patent. The court determined that the U.S. district judge who oversaw the case adopted a faulty claim construction. Under the proper claim construction, no reasonable jury could find that J&J infringed, the Federal Circuit concluded.

Barring further appeals, Saffran's six-year old battle with J&J has come to an abrupt end. And the ruling almost certainly signals the end to a parallel infringement case Saffran brought against Abbott Laboratories Inc.

Before you feel too bad for Saffran, recall that he secured a \$50 million settlement with Boston Scientific Corporation in 2009. Like J&J, Boston Scientific lost a \$501 million jury verdict to Saffran in 2008. Saffran probably settled because he feared that the megaverdict wouldn't hold up on appeal.

The April 4 ruling is a vindication for Diskant, since he represented J&J at trial along with his partner Scott Howard. "We're enormously grateful to our client for standing by throughout this long process," Diskant said on Thursday. "Even for a company like Johnson & Johnson, \$600 million is a lot of money."

The 2011 trial was clearly a frustrating one for Diskant.

Before trial, he moved for summary judgment on the key question of whether J&J's alleged infringement was willful. He worried that if the claim went to the jury, Saffran would be able to offer inflammatory testimony about how J&J stole his ideas. The trial judge refused to grant J&J summary judgment on willfulness. But, in an odd twist, the judge ended up siding with J&J on the willfulness question after the evidence came in.

By that point, the damage had already been done, Diskant argued in an unsuccessful motion for a new trial. "The trial was hijacked by an emotional issue, instead of remaining what it should have been, an unemotional analysis of the scientific merits of the claims," he wrote.

There were lots of issues J&J could have appealed, including validity and inequitable conduct, but Diskant opted to focus on three claim construction terms. The claim construction arguments are very technical but, Diskant told us, a simple theme runs through all of them: "Saffran's patent does one thing, and our products do something entirely different."

"When our scientists took a look at Saffron's patent, they saw nothing that relates to [J&J's] products," Diskant added. "Reactions in the medical device industry to Saffran's lawsuits "ranged from befuddlement to anger."

Like Boston Scientific, J&J probably could have played it safe and settled rather than wait for the Federal Circuit to weigh in. While Diskant declined to comment on settlement talks, he did say that, from his perspective, it's rewarding that J&J stayed the course. "The wonderful thing about an outcome like this is that it makes it much harder for the plaintiff to assert these patents against others," he said.

Diskant said he has no hard feelings toward Bruce Saffran, who was represented by David Frederick of Kellogg Huber Hansen Todd Evans & Figel at the Federal Circuit. Saffran contributed some useful ideas to the medical device industry, Diskant said.

"To be clear, Bruce Saffran is not a troll. He's an inventor. But I do think that he was twisting his invention to cover as many products as possible," Diskant said. "I'm very pleased with the outcome, which I think was the right one."