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Patent Litigation Outcomes At ITC Vs. District Courts

Law360, New York (February 25, 2013, 12:31 PM ET) -- The U.S. International Trade Commission has become a favored forum for patent litigation in the United States, in significant part due to the unique remedy that it offers: the exclusion of infringing articles from importation. This remedy sets the ITC apart from U.S. district courts, where plaintiffs have often struggled to obtain injunctive relief since the U.S. Supreme Court's 2009 decision in eBay.

The rapid increase in patent infringement litigation at the ITC since 2009 has been controversial, with some commentators complaining, on the one hand, that the ITC has become the preferred forum for nonpracticing entities, and, on the other, that the ITC is more likely than U.S. district courts to invalidate patents. In other words, the ITC is at once said to be too complainant-friendly, leading to litigation abuse by NPEs, and a hostile forum for complainants, invalidating patents at a high rate.

A closer look at the outcomes of patent litigation at the ITC versus U.S. district courts, however, clearly shows that both assumptions are incorrect: NPEs are much less likely to prevail at the ITC than in U.S. district courts, and the ITC is far less likely than U.S. district courts to invalidate patents.

In its "2011 Patent Litigation Study," PriceWaterhouseCoopers examined trends in patent litigation in U.S. district courts. PWC found that, in cases decided on the merits, NPEs prevailed about 23 percent of the time (including motions for summary judgment), compared to a 33-percent success rate for practicing entities. At trial, the success rate for NPEs and practicing entities was almost identical: Plaintiffs were successful about two-thirds of the time (with a success rate in bench trials in recent years averaging between 60 and 65 percent, compared to an approximately 80-percent success rate before juries).

Compared to U.S. district court, NPE success rates at the ITC have been much, much lower. There were 47 investigations brought by NPEs at the ITC between the eBay decision and the first quarter of 2012 (See "Facts and Trends Regarding USITC Section 337 Investigations" (USITC) (June 18, 2012) at 2-3). Of the 34 NPE investigations completed during that period, 16 settled and 18 were completed. Out of the 18 completed investigations, only three resulted in a finding of violation and exclusion orders, in Investigation Nos. 337-TA-605, 337-TA-661, and 337-TA-679. The "success rate" of NPEs at the ITC is therefore approximately 17 percent, much lower than the 60- to 65-percent NPE success rate in U.S.

district courts.

Significantly, of the three ITC findings of violation involving NPEs, only one involved a pure patent-assertion entity. Of the other two successful NPE complainants, one was the technology transfer office of the University of Nebraska, and the other was a product company. It is perhaps not coincidental that the number of new complaints filed by NPEs at the ITC dropped significantly in 2012, to the lowest level in many years. These data strongly refute any suggestion that the ITC has become a magnet for successful NPE patent litigation in comparison to U.S. district court.

Overall, however, the ITC remains a relatively attractive venue for complainants, which are successful in approximately 50 percent of patent litigations that go to trial, similar to the rate achieved by plaintiffs in U.S. district court bench trials. In addition, approximately 30 percent of ITC cases settle, generally on terms favorable to the complainant.

Where the ITC really stands out compared to U.S. district courts, from the IPR owner's perspective, is the relatively low rate at which the commission invalidates patents. According to the 2012 "United States Patent Invalidity Study" — conducted by Morgan Lewis LLP — of 48 district court cases in 2011 involving patent validity that reached a decision, at least one patent claim in 45 cases was invalidated, a per-case invalidation rate of 94 percent. The study further reports that from 2007 through 2011 there were a total of 283 cases involving patent validity, with only 39 cases upholding all the asserted patent claims as valid (14 percent), and 243 cases holding a patent claim invalid (86 percent).

In contrast to the district court, of the 26 ITC investigations concluded over the past 24 months on the merits, the commission found a patent claim invalid in only 11 (42 percent), an invalidation rate approximately half that of U.S. district court. On a patent by patent basis, of the 91 patents asserted in the 26 ITC investigations, only 19 (21 percent) had one or more claims ruled invalid. This suggests that patent invalidity was rarely the primary basis for the commission reaching a finding of no violation, given that most ITC cases involve multiple patents and multiple claims. Given that ITC patent decisions are not binding on U.S. district courts, the commission is therefore a particularly low risk venue for an IPR owner to test the strength of a patent in litigation.

Taken together, the data shows that the ITC remains a very friendly forum for IPR-owning product companies to bring complaints against imports of foreign goods that infringe a valid and enforceable U.S. patent. Complainants have a good chance of prevailing on the merits and are relatively unlikely to have asserted patents invalidated. That said, the ITC has been relatively restrained when it comes to finding violations for NPE complainants, which are considerably less likely to prevail at the ITC than in U.S. district courts.

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