

# ClientAlert

## Intellectual Property

February 2012

### The Price of “Junk Science”: “Exceptional” Fees Awarded for Litigation Misconduct

Defendants should not feel vulnerable and without recourse when faced with fending off infringement claims that lack technical merit. In *MarcTec, LLC v. Johnson & Johnson and Cordis Corp.*, the Federal Circuit sounded a warning note to plaintiffs against overreaching in patent infringement allegations with reliance on questionable expert testimony to support their infringement arguments.<sup>1</sup> Affirming the trial court’s decision, the Federal Circuit held that MarcTec’s disregard for the district court’s claim construction, misrepresentation of case law, and reliance on “untested and untestable” “junk science,” supported a finding of “subjective bad faith” and “objective baselessness,” and affirmed the lower court’s award of approximately US\$4 million in attorneys’ and experts’ fees and costs.

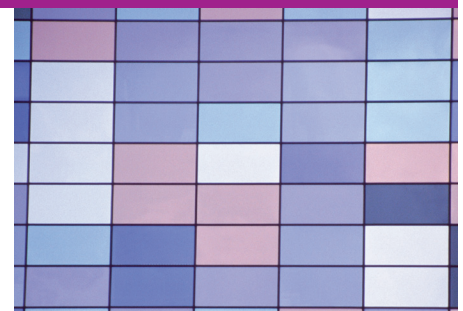
At the same time, the Federal Circuit noted that the “defeat of a litigation position... [did] not warrant an automatic finding that the suit was objectively baseless” and that “exclusion of expert testimony under *Daubert* [did] not automatically trigger a finding of litigation misconduct, and in most cases likely would not do so.” This approach suggests that the Federal Circuit is not intent on setting the bar too high for patent holders seeking to enforce legitimate claims, but it cautions parties intent on pursuing overly aggressive strategies that such actions would not go unnoticed.

#### Litigation Misconduct in Pursuing “Baseless” and “Frivolous” Allegations of Infringement

MarcTec filed suit alleging Cordis’s Cypher stents infringed on their patents directed towards surgical implants heat-bonded to a polymeric material.

The district court construed the term “bonded” to mean bonded by the application of heat and limited the terms “surgical device” and “implant” to exclude stents. The court subsequently granted Cordis’s motion for summary judgment of non-infringement, ruling that Cordis’s products were stents and that the polymer coating was sprayed on and bonded at room temperature. On appeal, the Federal Circuit affirmed.

In response to a motion by Cordis, the district court also found the case exceptional under U.S.C. § 285 and awarded US\$3,873,865.01 in attorneys’ fees and expenses and US\$809,788.02 in experts’ fees and expenses. The district court’s finding of “exceptional” misconduct was premised on several untenable litigation positions adopted by MarcTec. The Federal Circuit affirmed.



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<sup>1</sup> 664 F.3d 907 (Fed. Cir. 2012).

First, the district court found that MarcTec had misrepresented the law on claim construction and ignored evidence that supported a finding of non-infringement in connection with its claims construction and summary judgment briefings. Specifically, the district court found that MarcTec sought to ignore the established case law when it argued that the district court should ignore intrinsic evidence and only look to the plain and ordinary meaning of the claim terms. The Federal Circuit noted that MarcTec's proposed claim construction was "so lacking in any evidentiary support that assertion of this construction was unreasonable and reflect[ed] a lack of good faith."

Further, the district court held that MarcTec pursued a frivolous case "by relying on mischaracterizations of the claim construction" even when the evidence made it clear that Cordis's product did not fall within the scope of the claimed invention.

Finally, the Federal Circuit also took a harsh view of the "junk science" presented by MarcTec's expert who opined that there was heat-bonding because spraying the polymer at speeds "approaching the speed of sound . . . would increase the temperature of the droplets." While the Federal Circuit noted that a *Daubert* exclusion of expert testimony would not automatically trigger a finding of litigation misconduct, the current circumstances were sufficiently egregious to support an award of attorneys' and experts' fees.

## A Lesson in Overreach: When Is the Line Crossed?

Aggressive litigation strategy is par for the course in high-stakes patent infringement matters. However, *MarcTec* highlights the Federal Circuit's impatience where there are multiple instances of litigation overreach, none of which might have been sanctionable on their own. Indeed, the Federal Circuit noted that a standalone mischaracterization of the case law would not have warranted attorneys' fees, but coupled with MarcTec's decision to advance "frivolous and unsupported allegations" in support of infringement, the conduct in totality met the finding of litigation misconduct.

Both the district court and the Federal Circuit highlighted MarcTec's pursuit of an infringement action even after being confronted with contrary evidence and a claim construction that did not support a finding of infringement. The Federal Circuit agreed with the district court that such conduct demonstrated bad faith and objective baselessness sufficient to support the award. Coupled with the use of unreliable expert testimony, the Federal Circuit agreed with the district court that there had been a clear showing of litigation misconduct.

In summary, the Federal Circuit emphasized the risks associated with creative lawyering. Dismissing MarcTec's plea that its arguments were typical in patent litigation cases, the Federal Circuit made it clear that legal strategies based on hyperbolic expert testimony and misrepresentation of facts and law would invite substantial sanctions for the party responsible. Finally, those forced with defending meritless infringement claims against them may have some recourse.

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