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# Cost of Patent Infringement Litigation Falling Sharply

By Malathi Nayak, Bloomberg BNA

Patent litigation costs declined drastically from 2015 to 2017, as litigants controlled expenses and increasingly skipped courtrooms to challenge a patent's validity at the Patent and Trademark Office, IP attorneys told Bloomberg BNA.

The median overall cost for a patent infringement case with \$1 million to \$10 million at stake declined 47 percent from 2015 to \$1.7 million in 2017, according to the American Intellectual Property Law Association's "2017 Report of the Economic Survey" obtained by Bloomberg BNA.

The annual survey gathers data such as annual incomes and billing rates of IP law practitioners. In cases with below \$1 million at stake, the median cost fell 27 percent from 2015 to \$800,000 in 2017, the survey that's based on responses from 1,160 AIPLA members to an online questionnaire shows.

The survey of litigation cost included infringement lawsuits filed in U.S. courts, challenges at the PTO, and the International Trade Commission. This year's survey expanded categories in litigation cost questions to include initial case management; discovery, motions and claim construction; pre-trial, post-trial, and appeal; and mediation costs.

"Litigation used to be called the 'sport of kings' because it cost so much," Stephen Y. Chow, an intellectual property and business litigation partner at Burns & Levinson LLP in Boston, said. But the ability to challenge patents at the PTO's Patent Trial and Appeal Board, as created by the America Invents Act of 2011, has shrunk litigation volume and lowered costs, Chow said.

The PTAB process, known as inter partes review, gives someone accused of infringing a patent another route, in addition to court, for defending themselves by attacking a patent's validity. With the availability of this less-expensive route, "some of the older knock down and fight to the death litigation is not happening," Chow said.

## Hatch-Waxman Case Costs Drop

Pharmaceutical industry litigation under the Hatch-Waxman Act specifically saw the largest drop in costs, the survey shows. The Act provides a legal framework for generic drug market approval and the resolution of related patent disputes.

Pharmaceutical patent litigation involving Hatch-Waxman Act lawsuits saw median litigation costs in cases involving risk over \$25 million fall 78 percent to \$1.8 million in 2017 from 2015, the survey says. Moreover, cases with risk less than \$10 million fell 74 percent to \$706,000 in 2017 from 2015.

Pay-for-delay or reverse payment settlements, which are patent litigation settlements that generally involve payments from branded drug companies to generic drug companies in exchange for keeping the generic off the market, could be driving litigation and related costs down in the pharmaceutical industry, Chow said. Pay-for-delay settlements are a major concern for antitrust regulators.

"Things get negotiated faster now," Chow said.

## Alice Motions

In addition to the ability to file IPRs, recent U.S. Supreme Court rulings on patent issues, especially on patent eligibility, continue to influence a patent holders' decision on whether they should litigate, IP attorneys said.

The Supreme Court's 2014 ruling in *Alice Corp. v. CLS Bank Int'l* resulted in the invalidation of hundreds of software patents for covering ineligible abstract ideas.

After the Alice verdict, "litigants were using a lot of motions to dismiss under Section 101 of the Patent Act," that lets defendants file motions to dismiss at the earliest stages of the suit, Donika Pentcheva, a patent attorney at PayPal who chairs AIPLA's law practice management committee that put together the results of the AIPLA survey, said.

"They are basically a low-cost motion with a high success rate," Pentcheva said. The motions nip cases in the bud and lessen litigation costs, she said.

## Companies Moderating Costs

Another factor affecting litigation costs is that "companies are much more in tune these days with trying to manage costs," Brad D. Pedersen, a patent partner at Patterson Thuenete Pedersen, Minneapolis, and a member of AIPLA's board of directors, told Bloomberg BNA.

Increasingly patent infringement lawsuits have at least one party with an alternative fee arrangement instead of the traditional hourly billing structure, Pedersen said. For example, patent litigation is taking place with fees being contingent on the outcome of the case more often.

The America Invents Act, which was a major overhaul of U.S. patent law, barred the practice of one plaintiff filing an infringement complaint against multiple defendants. Such lawsuits, which required high-level coordination among various defendants' law firms and were more lucrative, are no longer a part of the mix, Pedersen said.

"There was a lot of extra overhead on those kinds of suits from a defendant's perspective," Pedersen said. "What we may be seeing is that the last of those are dropping off the table."

## Patent-Holding Company Defense

Litigation costs to specifically defend against claims brought by patent holding and licensing companies, often called nonpracticing entities because they don't produce a product or provide a service based on their patents, also dropped significantly, the survey shows. NPEs are known for aggressively asserting their patents against alleged infringers.

Median litigation costs in such cases, involving risk over \$25 million fell 45 percent to \$3.3 million in 2017 from 2015, the survey says. Moreover, cases with risk less than \$25 million fell 39 percent to \$2 million in 2017 from 2015.

## Costs Through Filing IPRs Rise

Despite costs falling in some specific types of lawsuits, the median cost charged through the filing of an inter partes review petition rose 25 percent to \$100,000 in 2017 from 2015, the survey shows. The median cost for a PTAB hearing, however, fell 9 percent to \$250,000 in 2017 from 2015.

Costs appear to be rising in the initial IPR petition filing phase as "people will front load by getting the best expert declaration possible and fine tune how many grounds you want to raise," Burns & Levinson's Chow said. "Later on things get smoothed out."

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