

LITIGATORS CORNER:

Hysteria Lane



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Wow. Contingent fee litigation is dead. We know this is true because the pundits who pontificate about *eBay, Inc. v. MercExchange LLC*, 127 S.Ct. 1837 (2006) tell us so. Shortly before the Supreme Court's unremarkable decision in this case, *Time* magazine breathlessly reported on April 10 that judges "automatically" issue injunctions in "most" intellectual property cases. It didn't cite a source, presumably because that is beneath *Time* magazine.

Of course, nothing has grabbed the media's attention like the litigation between NTP and RIM over the Blackberry. Yet *Time* made its silly remark about thoughtless injunctions even after all the publicity about the \$612 million dollar settlement in *NTP v. RIM*, where the district court stayed a permanent injunction rather than put it into effect "automatically." Years of litigation preceded that decision. No one who actually read what the district court said and did in the *NTP v. RIM* suit could ever say that that court acted "automatically" or thoughtlessly in making its decisions. Here is what the district court said about the history of the case when it denied the fourth and last of RIM's motions for a stay:

Perhaps the most influential tool the Court can use to analyze RIM's Motion is to simply trace the history of this litigation. NTP and RIM participated in a lengthy, complex, fair and fully exhaustive trial process at the end of which a jury of the parties' peers found that RIM had infringed NTP's patents-in-suit. RIM had the opportunity to appeal and did so. Two years later, the Federal Circuit, although reversing and vacating some aspects of this Court's judgment, affirmed several of the findings of infringement and issued a mandate directing the Court to begin proceedings on the remanded issues.

This decision is docket no. 423.

Before entering and staying an injunction, the district court did exactly what the Supreme Court requires in *eBay*: make an informed decision, using its discretion. The district court set a briefing schedule on the injunction, and allowed the parties to make their arguments. The district court even allowed third parties to make their views known. It accepted briefs from the United States, Viacom, Inc., Ascension Health, Science Applications International, and Skadden, Arps, Slate, Meagher & Flom LLC. See the docket entries 425 and following in the case. Every one of these events and briefs occurred long before *Time's* article on April 10. The last entry in the *NTP v. RIM* docket is no. 464, on March 3, 2006, dismissing the case because of the settlement. Yet *Time* says judges enter permanent injunctions "automatically."

In fact, *eBay* reiterates the right of individuals and universities, who do not commercialize their inventions by manufacturing them, to seek injunctions:

Most notably, it [the district court] concluded that a "plaintiff's willingness to license its patents" and "its lack of commercial activity in practicing the patents" would be sufficient to establish that the patent holder would not suffer irreparable harm if an injunction did not issue. *Id.*, at 712. But traditional equitable

principles do not permit such broad classifications. For example, some patent holders, such as university researchers or self-made inventors, might reasonably prefer to license their patents, rather than undertake efforts to secure the financing necessary to bring their works to market themselves. Such patent holders may be able to satisfy the traditional four-factor test, and we see no basis for categorically denying them the opportunity to do so. To the extent that the District Court adopted such a categorical rule, then, its analysis cannot be squared with the principles of equity adopted by Congress.

The same decision says an injunction is possible even when the patent owner refuses to do anything with his patent:

The court's categorical rule is also in tension with *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 422-430, 28 S. Ct. 748, 52 L. Ed. 1122 (1908), which rejected the contention that a court of equity has no jurisdiction to grant injunctive relief to a patent holder who has unreasonably declined to use the patent.

No one seems to have noticed that the Supreme Court rejected the concept that patent owners had to be treated differently based on their status as manufacturers or "trolls." Permanent injunctions are governed by the usual four-factor test that governs every other injunction.

Ho hum. *eBay* says nothing about contingent fee litigation. Nevertheless, the hubbub of subsequent reporting would make one think that the Supremes had made a pronouncement about contingent fee litigation, as permanent as "The Wicked Witch Is Dead!" Numerous articles before and after the decision say that taking away injunctions is fatal to the scurrilous practices of trolls. Fox News said on March 31 that "now these and other high-tech luminaries are asking the high court to take away a patent trolls' chief weapon: the nearly automatic injunction courts issue against companies found to be in violation of patents." On the day after the decision, May 16, the Electronic Frontier Foundation hyperventilated: "The United States

Supreme Court reversed a lower court decision in the controversial *eBay v. MercExchange* patent case Monday, invalidating a dangerous precedent that threatened free speech and consumers' rights." A columnist for the *Phoenix Business Journal* said on June 9 that "the decision threatens patent trolls' most potent weapon — to force settlement payments from technology firms in Arizona and the U.S." Sughrue Mion PLLC, a law firm, said on its website: "the decision marks a victory in the pharmaceutical, biotech and electronics/software industries, while dealing a blow to patentee 'trolls.'" SmartCompany.com really sailed over the top on June 12: "By far, the biggest news on the patent front was a recent decision by the Supreme Court that basically drove a bright, gleaming sword right through the heart of that most-hated beast — the patent troll."

Nonsense. I did my own informal survey to find lawyers who thought that the prospect of an automatic injunction after a trial was any factor — much less a key factor — in forcing a defendant to settle and pay. Not one lawyer thought so. In one of our cases that took five years, the determining factors in my view were a claim construction that was adverse to the defendant, and a desire by the defendant to bring to an end its hemorrhage due to attorneys' fees. If a plaintiff comes out of claim construction with a reasonable position and survives summary judgment, most defendants know that the risk is the trial, not the injunction.

An article appearing in *IP Law 360* on June 21 of this year posits that more plaintiffs will opt for hybrid representation because the *eBay* decision will "reduce a plaintiff's total recovery expectations." Hybrid representation usually involves some payment for fees which is less than the total billed, combined with an agreement concerning how the law firm will share in any recovery in the lawsuit. The same article quotes a representative of General Patent Corporation as concurring that "modified contingency fees make more sense for law firms in general."

Such modified plans make more sense for law firms, but not for plaintiffs. In fact, the plan suggested by the article seems designed to make sure the law firm has the best of both worlds: a steady monthly

income, as well as a share in any recovery. The article says that under such agreements a plaintiff company will "pay the firm between 70% and 80% of their fees upfront, with the rest of the recovery hanging on the outcome of the case."

That isn't contingent fee litigation. That is simply billable litigation with a bonus. It reminds me of the Kirkland & Ellis request for a one million dollar bonus in the United Airlines bankruptcy after the firm had already earned just under one hundred million dollars in fees. To give equal time, a bankruptcy proceeding for a non-profit organization, the National Benevolent Association, has paid out about fifty million dollars in legal and consulting fees. The lead firm is Weil, Gotshal & Manges LLP, which also was involved in the Enron (\$780 million) and Worldcom (\$657 million) bankruptcies. (And they say we contingent fee lawyers get windfalls.) Lynn LoPucki, a law professor at the University of California-Los Angeles who studies bankruptcy costs, characterized the National Benevolent fees as "extraordinarily high" and said they should be about thirteen million dollars.

It is ridiculous to think that a contingent fee plaintiff can't afford to pay \$600 an hour for a lawyer's time, but can afford to pay \$500 an hour. And it isn't one lawyer that the plaintiff will pay; in most big firms, it is a squadron of lawyers, because there are a lot of mouths to feed — that is, highly-placed partners profiting from the work of junior partners and associates. These large firms are pyramids, and the lower levels have to be kept working so that the higher level partners (those with a real ownership interest) can earn one or two million dollars each in profits every year. (law.com reports that the top 100 firms get approximately one to two million per year in equity partner profits.) As Cameron Stracher said in a column in the *Wall Street Journal* several years ago, "Big is Expensive," "Big is Slow," and "Big is Misery."

In a hybrid arrangement, the monthly fees can be capped. I have seen instances of \$20,000 per month and \$50,000 per month. Neither is feasible for many contingent fee plaintiffs. In fact, I don't know why any corporation owning patents does litigation on any other basis that full contingent



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fee. Patent litigation has become so chancy that no company should risk even hundreds of thousands of dollars on legal fees, much less millions of dollars. In my opinion, firms that use hybrid arrangements, especially when the plaintiff is supposed to pay 70% or 80% of regular rates, are just shifting all of the risk to their clients.

So calm down, SmartCompany, EFF and everyone else. Try the decaf. The Supreme Court's decision in *eBay* will not make major changes. On the contrary, and as I have written in the past, injunctions could be denied where, for example, the invention is a medical device. The rules are still the same.

Contingent fee litigation is alive and well. It is a risk, but so is non-contingent-fee litigation, where you can spend two million dollars in fees (or a measly fifty thousand a month) and still lose. In fact, contingent fee litigation, where the lawyer has no reason to churn a bad case or run the meter to pay the rent and associates, is less of a risk. More litigants ought to use it. **IPT**