

Multiple Defendant Patent Infringement Cases: Complexities, Complications and Advantages⁺

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I. INTRODUCTION

Patent infringement lawsuits that involve multiple defendants have become more prevalent over the decade. Plaintiffs choose to file suit against a number of defendants in the same case for a variety of reasons. Some choose this approach in an effort to try to reduce the plaintiffs' costs of pursuing patent enforcement. Where patentees do not mark their products or require marking from their existing licensees, plaintiffs may want to pursue their rights simultaneously to reduce any potential loss of rights. By bringing all of the potential defendants into a single lawsuit, further potential loss of damages under the marking statute can be minimized.

In addition, plaintiffs want multiple defendants together in a single lawsuit in hopes that when one or more of the defendants settle, it will increase the pressure on other defendants to also settle to avoid being the "last man standing" in the case. They are particularly popular for patent-holding companies or small companies who want to enforce their patent rights against larger, well-funded defendants, and in the pharmaceutical field where a patent-holder wants to enforce its rights against a number of "generic" manufacturers.

While most of this paper will focus on multiple defendant lawsuits — a lawsuit in which a plaintiff names multiple defendants in the same lawsuit — many of the issues addressed herein also apply to situations in which the same plaintiff files numerous lawsuits against different defendants in different cases and even in different jurisdictions.

This paper does not focus on the issues and strategies involved from a plaintiff's perspective, but rather on how defendants are affected when they are involved in a multiple defendant patent infringement lawsuit. In general, such situations increase the complexity of the litigation and provide complications to the defendants but also bestow some advantages. Each of these is discussed below.

II. COMPLEXITIES

From a defendant's perspective, participating in a lawsuit involving multiple defendants makes the case more complex for a variety of reasons. This is particularly true where the defendants are competitors of one another. In addition, because of the number of parties involved, sheer logistics for any court activity are seemingly exponentially increased. Simple things like finding a time for a status conference with the court or scheduling of a deposition or a meeting to discuss how to handle a particular witness can take numerous emails and phone calls to set up.

In addition, because various tasks in a litigation are often divided and/or shared amongst the defendants, the oversight needed to ensure quality consistent with a lawyer's and client's needs requires constant attention to every aspect of the case — even those assigned to other defendants. The complexities associated with being a defendant in a multiple defendant patent infringement lawsuit start from the very beginning of the case (even earlier if notice is provided before a suit is filed.)

A. Agreeing On A Protective Order When Defendants Are Competitors

One of the first issues often dealt with in a patent infringement litigation is the omnipresent protective order put into place by the parties to control the disclosure and use of company confidential information. While protective orders in patent cases are part of the standard operating procedure, most existing protective orders were drafted to deal with the situation in which there is only a single defendant or related defendants (such as a parent-subsidary situation).

1. Standard Protective Orders May Raise Some, But Not All Issues, Necessary With Multiple Defendants

Some protective orders even contemplate that discovery might be sought from third parties via subpoena and provide provisions that allow third parties to avail themselves of the protections of the protective order for any information they provide responsive to subpoena. For example, a provision might allow a third party subpoenaed for technical information to provide that information under an “Attorneys Eyes Only” designation and have that information used only during the course of the litigation.

Many such standard protective orders with which attorneys handling patent cases are all-too-familiar do not, however, address many of the complex issues that might arise when multiple competing companies are named as co-defendants in a patent infringement lawsuit. In such circumstances, defendants often are less concerned about how the information might be used by the plaintiff (particularly if the plaintiff is a non-competing patent holding company, for example), but more concerned about how a co-defendant might use such information.

This raises a number of issues regarding who from a defendant corporation will be able to participate in various activities that require access to various types of confidential information. As a result, a protective order in a complex multi-defendant patent infringement case may involve more than one level of confidentiality, and even three, four or even more levels of confidentiality. Each level is designed to define specific information from each defendant that can be reviewed by specific personnel from a co-defendant and/or its outside litigation and/or in-house counsel.

For example, many protective orders allow some level of involvement by in-house personnel (including, in some cases, in-house counsel, business personnel and technical personnel). A protective might provide two levels of confidentiality — “attorneys’ eyes only” Confidential Information that may be shared only with outside counsel for the parties and/or their experts — and a lower level of Confidential Information that may be shared with one or more designated in-house personnel. Some protective orders allow that in-house personnel to be a business person, whereas others only permit in-house attorneys to view that information.

Moreover, while a protective order is enforceable against all parties, attorneys at least are obligated under the ethical obligations of the bar to comply with the terms of the protective order to ensure that information designated thereunder is not used improperly. For example, under the terms of many common protective orders, if one co-defendant produced technical information designated as confidential under the protective order, that information could not be shared with

an in-house attorney for a competing co-defendant. Some defendants may want their own in-house attorneys to view that information for a number of reasons: to evaluate the strengths and weaknesses of a party's case, to evaluate the strengths and weaknesses of a co-defendant's case, and to provide better assistance to outside counsel in developing strategies and defenses. Indeed, in-house counsel often seeks access to some level of confidential information in a case in an effort to monitor all ongoing activity in a litigation, instead of relying exclusively on outside counsel to provide that information. While such a request is understandable for companies with extensive in-house legal departments, it does create an added level of complexity.

2. Patent Prosecution Bar

If an in-house patent lawyer who also oversees or writes patent applications for his client has access to a competitor's confidential technical information, there is at least the perception of a risk that the attorney would use that information, even unknowingly, in preparing patent applications for his client. The result would be patents that could be asserted against co-defendants. While the merits of that view can be debated, many courts recognize this concern.

To address this concern, many protective orders, particularly those involving multiple defendants, include a patent prosecution bar provision. Such provisions have become more and more common to preclude attorneys with access to confidential information in a litigation from participating in the prosecution of patent applications under certain circumstances or with certain limitations. With competing co-defendants, this concern may be very strong, depending on how sensitive the information is and how competitive the defendants are. On one hand, each defendant may have an in-house patent lawyer that they want to have participate in the lawsuit. On the other, that same defendant may not want its competitors' in-house counsel to see its own Confidential Information. This sets up an interesting complexity that must be resolved among the defendants to address the meets and bounds of any patent prosecution bar.

Defining the restriction on the patent prosecution activities in which the patent attorney may engage may involve significant negotiations. For example, there may be a negotiation amongst the co-defendants as to how long a prosecution bar should last. Additionally, there may be a dispute over the scope of the prosecution bar. Instead of a blanket prohibition against prosecuting patent applications, the patent prosecution bar may be restricted only to certain types of inventions or sub-categories of inventions. As a practical matter, if the patent prosecution bar is defined too broadly, the bar could effectively preclude an in-house attorney participating in litigation from participating in any patent prosecution for his client.

Take, for example, an in-house patent attorney who works for a large software company. If the patent prosecution bar precludes that person from participating in any patent applications relating to software, he theoretically could be precluded from any patent prosecution activities for his client if he chooses to obtain access to confidential information subject to the patent prosecution bar under the protective order. This could be an even more acute problem if he or she is the only patent attorney for the company. Precluding that in-house patent attorney from any level of patent application work due to participation in patent litigation could create a significant financial obstacle for the company. That company would be faced with the choice of either having no in-house person review certain documents in the litigation or hiring another patent attorney to handle patent application work on an ongoing basis.

Moreover, if several defendants also are software companies, it is unlikely any would seek such a preclusion unless they did not plan to have in-house patent attorneys participating in the lawsuit. The co-defendants may seek to define the patent prosecution bar more narrowly to allow in-house patent attorneys to both participate in the lawsuit and then engage in ongoing patent prosecution work.

These are just a few examples of situations in which the negotiation of a patent prosecution bar becomes much more complicated in a multi-defendant situation than in a single-defendant lawsuit. As the example illustrates, depending on who the competitor defendants are and what their interests are, negotiating the terms and scope of a patent prosecution bar can add complexity to the task. One company's interest in ensuring that a competitor's counsel not have access to its confidential information and then participate in prosecuting patent applications, so as to obtain patents that could be asserted against the company, must be balanced against the interest of other defendants who may not have similar concerns and may want their in-house patent attorneys to participate in the lawsuit.

3. Source Code Escrow

Another issue that often arises in the context of multiple defendant patent litigation is whether to utilize the services of an escrow agent for certain types of confidential information. One common type of information subject to escrow is source code, although escrow services also could be used for many other types of highly confidential and trade secret information. The use of escrow agents comes into play when, while recognizing the need to provide discovery to the plaintiff, a defendant also recognizes that some of the information that may be relevant to the plaintiff may be the defendant company's most prized intellectual property and trade secret information.

Many companies treat their source code as the so-called company "crown jewels." This type of information may be of such value that, if it were even inadvertently placed in the wrong hands, it could cause significant financial damage to the producing party.

Confidential Information produced in a litigation even under the terms of a protective order might be accessible by any number of lawyers working at a receiving law firm, as well as paralegals, professional assistants, copy vendors, trial strategy vendors, experts and/or their assistants, the court, and many other personnel. Having that many people access source code can cause many companies great angst. And, with multiple defendants, the number of individuals with access is multiplied by the number of parties. This potential list of people can be too many for some companies to bear. Accordingly, many such companies may choose to fight disclosure of the trade secret information at all.

In a situation in which the source code or other highly confidential trade secret information relates to the accused product in a patent infringement case, courts almost invariably are going to require production of that information but may impose restrictions on how it can be used. Anticipating such a likelihood, many defendants in a multiple defendant patent infringement lawsuit want to create provisions that make misuse of this trade secret information as least likely as possible. Indeed, they may want to preclude access by co-competitors. Or, they may insist on an escrow arrangement.

An escrow arrangement essentially operates as follows: An escrow agent is provided with the rules under which parties to the lawsuit can access highly confidential information. The producing party then deposits the highly confidential information with the escrow agent. Then, approved personnel can visit an escrow facility, and, under the watchful eye of an escrow agent, examine the confidential information in an environment in which copies may not be made and/or other restrictions are in place to preclude the information from leaving that escrow agent's facility without approval from the owner of the highly confidential information. Oftentimes, the escrow agent is required to maintain a log of personnel who visit and review the information, and must validate by identification a list of preapproved visitors to the escrow facility.

Such a provision has become more common in multiple defendant lawsuits to prevent competitor co-defendants from having in-house technical people view the most prized information of a competitor. The protective order often contains provisions requiring the identification of outside counsel who will have access to the escrowed material and provides an opportunity for objection to those individuals before they obtain access. In this way, competing co-defendants can best monitor exactly who has access to their highly prized trade secret information. It further provides them with the security of providing access to such confidential information only in an environment that is less likely to involve inadvertent disclosure to a competitor's technical personnel.

Again, such escrow provisions could be used for information other than source code, and are often used in litigations involving one plaintiff and one defendant. However, this issue appears to arise more frequently when source code production is required in multiple defendant litigations involving competitors. The possibility that one of many defendants might seek a source code escrow again increases the complexity of preparing a protective order.

In sum, it can be extremely complicated to negotiate a protective order in litigations involving multiple defendants who are competitors because each defendant may bring to the table one or more issues that they want to see in the protective order, each of which will have to be negotiated not only among the defendants, but with the plaintiff. The possibility that negotiations over a protective order can drag on for many months increases the cost to all the parties, including the defendants.

B. Getting A Joint Defense Agreement In Place

Joint defense agreements have become extremely common in litigations involving multiple defendants who plan to share information. Agreeing on the scope of a joint defense agreement is another complexity that multiple defendant patent litigations often involve. Courts have recognized a joint defense privilege to preclude disclosure of information shared among parties with a common interest, such as joint defendants. Accordingly, the issues that must be decided and described in a joint defense agreement at the outset is what issues are in common.

1. Issues on Which to Share Common Defense

It is very common in a patent infringement case that all of the affirmative defenses that attack the patent or patentee will be in common including, for example, invalidity based on prior art or formalities, unenforceability based on inequitable conduct, lack of ownership, failure to

mark or provide notice and the like. Other issues might not be common, including issues related to estoppel and laches, noninfringement, and claim interpretation, for example. Indeed, whether claim interpretation issues are in common will depend widely on the similarity of the accused products of the different defendants in the multiple defendant patent infringement case.

Because a joint defense agreement should only be enforceable as to communications related to common issues, defining what the common issues are at the outset is a very important endeavor. Defendants tend to include all issues that might be common so that their communications can be protected from disclosure to the plaintiff in the case. However, the joint defense agreement should also contain provisions regarding what each party's rights are if a disagreement arises amongst the co-defendants as to areas of common interest. For example, if two parties have dissimilar products and yet agree to work on issues related to claim interpretation, a difference might arise as to how a particular claim term in a patent should be interpreted.

For example, one party may want a term to be interpreted narrowly such that its product would not fall within the scope of the claim. Another company may want it interpreted more broadly so that the claim is anticipated by a prior art reference. In situations in which such a dispute arises, the joint defense agreement should specify what each party has a right to do relative to briefing in the case. As a result, negotiating the scope of a joint defense agreement can be complex and add yet another layer of cost to the case for defendants.

2. Cost Sharing

One of the primary issues and benefits of agreeing to a joint defense agreement is the prospect of saving costs on certain items, including search for prior art, preparing and taking depositions of the inventors and plaintiff's witnesses, preparing for and briefing various issues before the court and other activities in which efforts may be either shared or divided amongst the multiple defendants. While all of these benefits seem on their face to make common sense, issues can arise either during the litigation or after the litigation if the obligations amongst the defendants related to costs are not clearly specified.

For example, if the defendants agree to hire a third party prior art search firm to undertake an extensive patent prior art search, some agreement should be put in place that specifies what defendants would each owe for the services associated with that activity. That agreement ideally should be in place before the work begins. A failure to do so raises numerous issues: if no agreement is in place before the work begins, what happens if one of the defendants settles during the course of the work being performed? What obligation does the defendant that settled have to pay for the work? Should they pay a pro-rata portion of all of the work done, even after they settle, or should they pay for work performed as of the date of their settlement? Setting out an agreement in advance specifying what each party's obligation is may preclude disputes that arise later as to which of these alternatives or other alternatives is the appropriate way to share costs for that activity.

Another example arises when the activity that is being shared has a greater benefit to one of the defendants than others. In such circumstances, it may be determined in advance that the cost should not be shared equally. Rather, the party that obtains the most benefit from the work

should pay a greater portion of the cost. Again, if such an agreement is not put in place in advance, after the work is done, issues can arise about how much each of the parties should pay.

For this reason, a joint defense agreement or other agreement that deals with costs should specify how costs will be shared amongst the defendants. In addition, it should be clear that one defendant cannot obligate the other defendants to make payment without express written approval. This is advisable to preclude a situation in which one party purports to hire a service provider to benefit all of the defendants and the service provider then bills all of the defendants. If one of the defendants does not agree with the quality of the work done or that they should bear an equal share of the costs, a dispute among the defendants may arise. If there is an express agreement that no party may obligate another to make payment, such a provision helps the party who disagrees with the charge to dispute whether or not it should be paid and if so, in what amount.

Again, these examples are just a few of the many that might arise during the course of a litigation involving multiple defendants and that should be dealt with amongst the defendants so as to make a clear delineation as to who should bear the cost for what types of expenses.

3. Collection, Sharing and Use of Prior Art

One of the primary reasons for joint defense agreements has been to share costs associated with identifying potential prior art. Identifying prior art in some fields of industry can be extremely time-consuming and costly. Taking different approaches and trying different possible sources of prior art are all techniques often used in trying to find the best available prior art to defend the lawsuit. By having more than one defendant in a case, the resources that can be used to search for prior art should be increased. Because prior art can be one of the most useful tools in helping to negotiate a more favorable settlement in a patent infringement suit, the defendant that locates key prior art may have an incentive not to share it with the group.

For example, if one defendant identifies a key piece of prior art, it may decide to inform the plaintiff about the prior art in hopes of negotiating a better settlement. If that defendant does not have an obligation to share prior art with its co-defendants, it can use the prior art in such a tactical manner. Accordingly, the joint defense agreement or other agreement between the parties ideally will specify what the obligations are amongst the defendants as to use of prior art identified pursuant to the joint defense agreement.

Other problems arise when one defendant enters into a joint defense agreement after already locating prior art. For example, a plaintiff patentee may have corresponded with one of the defendants before the lawsuit's filing, after which the defendant performed a prior art search. Thus, that defendant may have prior art that it collected with its own resources. Other defendants may not have been aware of the patent prior to the lawsuit and thus have little, if any, prior art collected when the joint defense agreement is entered. One defendant thus brings more "to the table."

In such circumstances, the party with the prior art may wish to control when that information is disclosed to the plaintiff. For example, the defendant with the prior art may decide to disclose it at the outset of the lawsuit in response to initial interrogatories or may

decide to disclose it in a confidential manner during settlement discussions. The joint defense agreement also may specify that only the party who found the particular prior art before entering into the joint defense agreement may use the information before it is disclosed to the plaintiff.

Again, this is just another example of a situation that can arise with multiple defendants -- each of whom comes into a litigation with a different situation -- and how it can make the patent litigation more complex.

C. Time - Everything Will Take Longer

1. Scheduling of Anything Can be a Chore

One of the overarching complexities in cases involving multiple defendants is time. With the number of lawyers increasing, the time it takes to reach agreement on even the simplest items in a litigation increases non-linearly. Deciding on the selection of an expert might involve review of multiple resumes, interviews, and eventual selection of an expert. To get to that decision, the defendants may have to schedule multiple meetings, telephone conferences, or other actions in the case. Even scheduling a meeting can involve transmission of numerous emails, multiple telephone calls and last minute rescheduling to try to make sure that as many people as possible can attend the meeting.

As a result, multiple lawyers for each defendant may be involved in such discussions and all of the dialog adds “noise” to the daily email traffic of each of the lawyers involved in the lawsuit. Every event in the case involves more time and more cost to the defendant’s clients as a result.

2. Approval of Drafts of Common Submissions

Many courts adjudicating multiple defendant patent cases specify that certain submissions to the court must be made jointly by all defendants. For example, the court may establish a page limit for all defendants for Markman briefing and other common issues. Deciding which defendant will take the lead on which activity and then sorting through comments from all of the different defendants before submission again adds to the email and telephone “noise” for each of the lawyers involved in the case. Because each of the defendants may not know which lawyer for one of their co-counsel is handling what issue, it is very common for all emails amongst a joint defense group to be addressed to all lawyers for each of the different parties. Again, this increases the level of email traffic to each individual attorney, adding costs and making participation in such cases much more time consuming for each defendant and their counsel.

III. COMPLICATIONS

Being a defendant in a multi-defendant patent infringement case provides additional complications for each defendant as well. Among these are the handling of differences, settlement by co-defendants and the timing of these and other issues that must be dealt with by defendants due to the number of parties in the suit. In addition, if the case involves multi-district issues, there are other complications that can arise.

A. Handling Of Differences

As discussed above, not all issues will be identical for defendants in a multiple defendant case. Every defendant is likely to have some variation in its products that raises different non-infringement issues, may have defenses related to laches and estoppel that are not common with other defendants, may have damages or marking issues that are different from different defendants, and/or may have notice of the patent at different times leading to question of willful infringement that is different amongst defendants. Handling these differences adds complication to patent cases, which already are complicated by nature.

1. Prioritization of issues for Markman hearing

One of the most important issues in a patent infringement case is the proper interpretation of various claim terms. Differences among the defendants as to products often leads to the need by different defendants for different claim interpretations to be given higher priority. In many cases involving multiple defendants, the court wants to avoid receiving separate briefs from each of the defendants. In such cases, courts often limit the number of pages that defendants may submit jointly, obligating the defendants to cooperate in putting together a single Markman submission for the Court's consideration. As a result, the parties have to work together to decide which terms are discussed first in the brief and are given greater treatment in the brief. Where page limits are an issue, getting sufficient space to have an issue treated with the same level of treatment that would be provided in a single defendant case can be one of the most challenging issues for a defendant.

In addition, if a court holds a Markman hearing, it is common that the court will set a time limit for the amount of time that would be reserved for the hearing. Again, order of presentment at the hearing and time allocation amongst defendants is another issue that often needs to be addressed amongst the defendants. If one claim interpretation issue affects all defendants, it is likely to be the primary issue presented to the court in terms of pages in the briefing and allocation of time at the hearing. Issues that affect only one defendant, while important to that one defendant, invariably will be found later in Markman briefing, and later in Markman hearings before the court. As a result, that issue will receive less treatment than what would ordinarily be provided if that defendant was the only defendant participating in briefing the issues.

2. Prioritization of issues in discovery when discovery limitations are applied to defendants as a group

In addition to allocation of time in Markman hearing and briefing, many courts involving multiple defendants set discovery limitations dealing with various issues in the case. Those limitations may include the number of interrogatories, the amount of time that each party may take for depositions, the amount of time that the defendants jointly have to depose certain individuals in the case, including the inventors in a Rule 30(b)(6) deposition of the plaintiff, the amount of time each party may take depositions of common experts, and other provisions that plaintiffs will request to try to avoid defendants ganging up on the plaintiff.

For example, in a lawsuit in which a patentee has asserted infringement against five defendants, each of the defendants ordinarily might want to depose the inventors. Under the Federal Rules of Civil Procedure, each defendant ordinarily has the right to take a seven-hour deposition of each inventor. Supposing there are three inventors in the case, if each defendant used all of the available time permitted under the Federal Rules of Civil Procedure, it could take 21 hours to depose the inventors. If each of the five defendants took that time, inventor depositions alone would last up to 105 hours. Further, if each of the five defendants took seven hours to depose every witness in the case, the number of deposition hours could mushroom uncontrollably.

As a result, it is very common in multiple defendant cases for the court to set some limitation on the number of total hours of deposition, either for each defendant group or for all defendants collectively, or a combination thereof. For example, limitations may be set related to the number of hours each inventor may be required to sit for deposition. Instead of requiring each inventor to sit for seven hours of deposition for each of the five defendants, a compromise may be negotiated such that each inventor only has to sit for perhaps some smaller number of hours.

When such limitations are put in place, that obviously places restrictions on the amount of time that the defendants may each pursue different avenues of discovery. This is particularly true when the amount of time allotted for depositions is imposed on the defendants as a group, rather than individually. Defendants might be limited in the number of hours of depositions they can expend on issues that are individual to them or to a subset of the defendants. As a result, this may at some point restrict their ability to fully pursue all of the discovery that they would pursue, in comparison to a litigation in which they are the only defendant.

As a result of these kinds of restrictions on discovery in multiple defendant lawsuits, defendants must clearly prioritize what issues are important to them and push amongst the defendant group to have those issues addressed. This results in issues that ordinarily might be pursued having to take a backseat so that all the defendants have an opportunity to pursue key issues important to them in the lawsuit.

B. Settlements By Co-Defendants

Another complication resulting from multiple-defendant litigation is the fact that one or more defendants may settle during the course of the case. In multiple-defendant litigation, lawyers from different defendants often take the lead on certain aspects of the case. Other lawyers, and their clients, begin to rely on the other party's expertise on a particular subject. But when those parties settle, that expertise can be lost to the group. As a result, while there is a tendency to delegate issues amongst the defendant group, it is important that each defendant have some knowledge of all the issues in the case. That way, when a defendant settles, the remaining defendants can address the issues delegated to the now-settling defendant and continue preparing for trial.

Settlements impact multiple-defendant litigations in other ways. For example, when one defendant enters into a settlement agreement, the pressure for other defendants to settle increases. No defendant wants to be the "last man standing." Additionally, the individual costs

of any cost sharing arrangements increase when some but not all defendants settle. As a result, as the number of defendants in the case decreases, the costs associated with the case for each of the remaining defendants increases. There is also an increase in pressure on the remaining defendants to take on more and more responsibility to prepare the case for trial.

In addition, the plaintiff may attempt to use the existence of settlement agreements to the disadvantage of the remaining defendants. For example, if a settlement agreement admits to the validity and infringement of a patent, the plaintiff customarily will want to get that settlement agreement admitted into evidence in the case as proof of non-obviousness. Moreover, if the settlement agreement provides for either a substantial royalty payment or a high royalty rate, the plaintiff invariably will want to rely on that document as evidence of the proper royalty rate to apply in calculating damages from the remaining defendants.

Defendants invariably will want to exclude that evidence because of its nature as a settlement and the potentially unfairly prejudicial value under Federal Rule of Evidence 403. While courts might exclude such settlement agreements or redact certain portions of them, it nevertheless is an issue the remaining defendants have to deal with that complicates the calculation of damages.

C. Multi-District Problems

As mentioned above, some plaintiffs file lawsuits against multiple defendants on the same patents in different jurisdictions. They may do so because it is not possible to obtain jurisdiction over all potential infringers in a single jurisdiction. Or, they may do so because rulings in one case/jurisdiction are not favorable and thus they want to file subsequent suits in other jurisdictions. Whatever the reason, concurrent lawsuits involving the same patents can create additional difficulties for defendants in those lawsuits.

For example, rulings in one lawsuit to which a defendant is not a party may have an influence on rulings in the defendant's lawsuit. While claim interpretation rulings by one district court are not binding on another district court, they certainly could be persuasive. If the interpretation is favorable for the defendant, that obviously could be a positive event. If those rulings are favorable to the plaintiff, convincing another judge that a colleague on the bench is wrong is a complication.

In addition, cases pending in multiple jurisdictions may be subject to a motion by one of the parties to one of the lawsuits to have the cases consolidated under the multi-district litigation statute. Currently, there are seven multi-district litigations based on patent infringement suits. Those suits consolidated a number of pending cases into those seven multi-district litigations. Cases so consolidated provide an additional complication. *See* "How to Simplify Your Patent Litigation," Errol Taylor and Joshua Rothman, available at <http://library.findlaw.com/2003/Mar/11/132786.pdf>, reprinted from www.managingip.com, February 2003 (providing a discussion on complications involved in multi-district patent litigation treatment of patent infringement lawsuits).

D. Trial With Other Defendants

Another complication in multiple-defendant litigation is that each defendant has no way to control the other defendants' witnesses. This problem is particularly acute if the court decides to try all defendants in a single trial. Witnesses who do not fare well for a co-defendant could unfairly impact upon the way a jury views the defendants collectively. For example, if one defendant's Chief Technical Officer makes an admission that is damaging to his client's non-infringement position, that admission also could be damaging to other defendants who have similar products.

In addition, even if the witness does not make damaging admissions, the likeability or jury appeal of one defendant's witnesses might have an impact on the witnesses presented for the other defendants. And, an expert proffered by one defendant to render a non-infringement opinion could be cross-examined based on statements made by non-infringement experts proffered by other defendants to the extent the different defendants' products are similar. These are additional complications that are common to multi-defendant cases generally, but have particular impact in a patent infringement case in which some of the products may actually have common features. Admissions and damaging testimony by one defendant could have an impact on other defendants.

IV. ADVANTAGES TO DEFENDANTS

While we have described certain complexities and complications involved with being a defendant in a multi-defendant patent infringement case, there obviously are a number of advantages. Chief among them is the savings on cost.

A. Sharing Of Costs For Common Issues

As described above, one of the most cost-intensive parts of a patent infringement case is the exhaustive validity search. By agreeing to share the costs associated with searching for prior art and sharing the results of each party's discoveries, defendants can certainly save on costs. These include the costs associated with hiring third-party search firms, engaging consultants, discussing with witnesses their knowledge of the prior art and tracking down of documents, issuing of subpoenas to potential prior art third-party sources, and other activities typically involved in collecting prior art in a patent infringement case.

Similarly, if key witnesses are identified as sources of prior art, there can be a cost sharing agreement amongst the parties as to who will take leads on certain witnesses so that the cost of taking depositions can be reduced. Also, a common invalidity expert can be hired to opine about the validity of the patents; the fees associated therewith can be shared amongst a number of defendants.

It also may be possible to share other experts in the case. For example, damages experts could be shared if a common reasonable royalty defense is being asserted. Although the complexity in evaluating royalty rates among a number of defendants who have different products and different purportedly infringing time frames may increase those costs, an overall benefit can be achieved through sharing costs of research on prevailing royalty rates, evaluating licenses in the field, etc.

B. More Heads Are Better Than One

Another benefit to defendants in a multi-defendant case is the advantage provided when pursuing strategies or leads on prior art and contacts with witnesses. The more parties that are involved, the better the likelihood that useful information can be gleaned from the group in these areas. For example, identifying places to search for prior art can be critical. With more defendants in the case, more people who might know of places to search for prior art are involved. In addition, having more people involved in reviewing key documents can be beneficial because each might raise different issues that others may not have recognized.

By having more parties bring their various experiences to bear, the defendants can benefit. Notably, a defendant with no experience in patent infringement litigation might benefit from communications with other defendants with more extensive experience in such litigations.

C. Security In Numbers

Another benefit in multiple-defendant litigation is that the plaintiff often becomes overwhelmed by the workload and, thus, less capable of timely addressing purported deficiencies in the various defendants' discovery responses. While the plaintiff is likely to eventually communicate with each defendant individually, the plaintiff's delay often benefits the defendants by providing them more time to conclude certain parts of their case.

For example, individual defendants' depositions may be delayed if the plaintiff notices all of the defendants' depositions at the same time. The plaintiff is likely to schedule those depositions over a period of time so that it can have sufficient time in between depositions to prepare for the next one. This allows each defendant potentially more time to prepare in advance of its deposition. It also allows those defendants whose depositions go later to have an idea of exactly what kinds of questions the plaintiff is likely to ask and, thus, prepared better.

V. CONCLUSION

In sum, being a defendant in a multi-defendant case certainly can save costs but it also can add costs that otherwise would not be imposed, in terms of complexity and complications to the defendant. There are some advantages to be gained by cost sharing and by the benefit of being one of many defendants in a case. However, the complexities and complications offset those advantages, sometimes to the extent that they overwhelm any advantages.

⁺ The views expressed in this paper are those of the authors only.

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