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Petition Watch: Patent Obviousness, ADA Trials, Spoofing

By **Katie Buehler**

Law360 (January 25, 2024, 10:37 PM EST) -- The U.S. Supreme Court receives thousands of petitions for review each term, but only a few make the news. Here, Law360 looks at four petitions filed in the past two weeks that you might've missed, including questions over pleading standards, the correct obviousness test to apply in patent disputes, whether Americans with Disabilities Act retaliation plaintiffs are entitled to jury trials, and how the government should prosecute spoofing.

Pleading Standards

Facebook Inc. petitioned the Supreme Court on Jan. 11 to overturn a Ninth Circuit panel's June ruling reviving a proposed class action that alleges the platform's now-defunct audience-selection tools allowed advertisers to exclude certain types of users from seeing housing ads in violation of the Fair Housing Act.

The three-judge panel reversed a California district judge's dismissal of the suit brought by lead plaintiff Rosemarie Vargas, a Hispanic woman with disabilities, and four other Facebook users. The district court wrongly dismissed the class action on grounds that the plaintiffs hadn't adequately shown they were injured by advertisers' use of the audience-selection tools, the panel held.

Facebook told the justices the appellate panel failed to apply the Twombly-Iqbal plausibility standard, which requires plaintiffs to show they can back up their claims with facts. Instead, the panel used a "watered-down" pleading standard to find that the class' allegedly conclusory allegations could survive a motion to dismiss, the company said.

The panel's decision separates the Ninth Circuit from the rest of the country when it comes to applicable pleading standards, Facebook argued.

"As a result, in the country's largest circuit, case law on the standard for assessing allegations of standing is significantly confused at best and flatly inconsistent with this court's precedent at worst," the platform said. "This court should intervene to bring the Ninth Circuit in line with every other court of appeals on this important issue."

The class action, filed in 2019, was one of many lawsuits over Facebook's housing advertising offerings, which the company agreed to overhaul in March 2019.

Vargas' suit specifically alleges Facebook provided advertisers with tools to exclude women of color,

people with disabilities and other protected groups from seeing certain ads for housing. Facebook established the various categories and used its own methods to assign users to specific categories, the lawsuit claims.

A California district judge in August 2021 dismissed the proposed class action after finding Vargas and her fellow Facebook users had failed to demonstrate that the platform's advertising tools illegally excluded them from seeing more desirable housing options. The judge also found that Section 230 of the Communications Decency Act ultimately bars the lawsuit.

In a 2-1 decision, the Ninth Circuit panel held that the district judge applied too strict a pleading standard to the class' claims.

Facebook is represented by Theodore J. Boutrous Jr., Bradley J. Hamburger, Ryan Azad and Matt Aidan Getz of Gibson Dunn & Crutcher LLP.

Vargas and the class were represented at the Ninth Circuit by Gerard V. Mantese and David Honigman of Mantese Honigman PC and Wilmer J. Harris and Michael D. Seplow of Schonbrun Seplow Harris Hoffman & Zeldes LLP.

The case is Facebook Inc. v. Vargas et al., case number 23-764.

Patent Obviousness

Vanda Pharmaceuticals Inc. asked the justices in a Jan. 12 petition to reverse a Federal Circuit panel's May decision invalidating four patents related to its brand-name treatment Hetlioz, arguing the circuit has set the bar too low for determining whether inventions are obvious.

The three-judge panel affirmed a Delaware federal judge's December 2022 opinion axing four patents related to sleep disorder drugs Vanda Pharmaceuticals had asserted against rivals Teva Pharmaceuticals USA Inc. and Apotex Inc. The patents were deemed obvious because a skilled artisan in the field would've reasonably expected the inventions based on previous clinical trials and other developments, the panel ruled.

The appellate panel's decision shows how far afield the Federal Circuit has taken its obviousness test compared to the test that the Supreme Court and every other court in the country uses, Vanda Pharmaceuticals argued. The high court has previously said an invention is obvious if it is predictable, a much higher standard than that used by the Federal Circuit, the company said.

"A skilled artisan will often have a 'reasonable expectation of success' long before one could ever conclude that a result is 'predictable,'" Vanda Pharmaceuticals said.

If the Federal Circuit is allowed to continue to use its low-bar test, many advancements in drug development will ultimately be deemed unpatentable, the company added.

"That is an especially pernicious result for rare diseases, where patent-based incentives are crucial for innovators to invest the billions required to develop new, successful treatments," Vanda Pharmaceuticals said.

The drug developer first filed suit against Teva Pharmaceuticals in April 2018, claiming its rival had filed

an abbreviated new drug application for sleep disorder drug Hetlioz that infringed patents issued by the U.S. Patent and Trademark Office. Vanda Pharmaceuticals then slapped Apotex and another rival, MSN Pharmaceuticals Inc., with separate but similar claims a month later.

In 2020, the lawsuits were consolidated, and in January 2022, Vanda Pharmaceuticals settled its claims against MSN Pharmaceuticals.

Following a Delaware bench trial in 2022, a federal judge invalidated various claims in Vanda Pharmaceuticals' four patents for obviousness, given information that was available to anyone in the drug developing field due to prior clinical trials and studies.

Vanda Pharmaceuticals is represented by Paul W. Hughes, Sarah P. Hogarth, Christopher M. Bruno, April E. Weisbruch and Grace Wallack of McDermott Will & Emery LLP.

Teva Pharmaceuticals was represented in the Federal Circuit by J.C. Rozendaal, Byron Pickard, Deirdre Wells, Will Milliken, Sasha Rao and Will Rodenberg of Sterne Kessler Goldstein & Fox PLLC.

Apotex was represented in the Federal Circuit by William B. Coblentz, Aaron S. Lukas and Keri Schaubert of Cozen O'Connor PC.

The case is Vanda Pharmaceuticals Inc. v. Teva Pharmaceuticals USA Inc. et al., case number 23-768.

ADA Retaliation Trials

A former Hewlett Packard worker petitioned the Supreme Court on Jan. 12 to overturn a Fourth Circuit panel's August finding that he was not entitled to monetary damages or a jury trial over allegations that he was fired for requesting assistance during work trips because of arthritis in his toe.

The three-judge panel upheld a Maryland federal judge's bench trial ruling that Jeffrey B. Israelitt failed to prove his termination from Enterprise Services, a former subsidiary of Hewlett Packard, was related to accommodation requests he made due to his degenerative foot condition.

The appellate court also rejected Israelitt's claim that his Americans with Disabilities Act retaliation claims should've been heard by a jury because Section 1981a(a)(2) of the act only provides the possibility of monetary damages and jury trials for ADA discrimination claims.

Israelitt asked the justices to correct the Fourth Circuit's misreading of the act, which is shared by the Seventh and Ninth circuits.

"The plain text of the Americans with Disabilities Act (ADA) makes clear twice over that plaintiffs are entitled to seek monetary damages in cases asserting retaliation claims," he argued. "Nevertheless, decisions from circuit and district courts disagree about whether the act means what it says."

Israelitt, a former senior cybersecurity architect, sued Enterprise Services in 2018, claiming he was fired after asking to stay in a hotel during a conference in mid-2013 and to have access to a rental car during a work trip in 2014. He suffers from hallux rigidus in his right foot, which sometimes causes such intense pain that he can barely walk, according to court records.

But after a two-day bench trial in March 2022, a Maryland federal judge handed the company a win,

finding that Israelitt hadn't come close to showing that his accommodation requests caused his termination. Instead, the court found that Israelitt was let go because of interpersonal issues with his colleagues, such as airing grievances during meetings and failing to complete his assigned projects.

The Fourth Circuit panel affirmed the district judge's holding, adding that ADA retaliation plaintiffs are not guaranteed a jury trial by the Seventh Amendment.

Israelitt is represented by Pamela S. Karlan and Easha Anand of Stanford Law School's Supreme Court Litigation Clinic and Levi S. Zaslow and Abdullah H. Hijazi of Hijazi Zaslow & Carroll PA.

Enterprise Services was represented at the Fourth Circuit by Heather F. Crow and Allison A. Fish of The Kullman Firm.

The case is Israelitt v. Enterprise Services LLC, case number 23-776.

Spoofing

Two former Merrill Lynch traders asked the justices in a Jan. 22 petition to reverse a Seventh Circuit panel's October opinion affirming their wire fraud conspiracy convictions related to allegedly spoofing the precious metals market.

The three-judge panel upheld John Pacilio's commodities fraud, wire fraud and conspiracy convictions and Edward Bases' wire fraud and conspiracy convictions for fraudulently manipulating the precious metals market with false orders on the Chicago Mercantile Exchange with the sole purpose of inducing other traders to buy and sell futures contracts at manipulated prices.

The panel rejected claims that the pair were wrongly prosecuted under federal fraud statutes instead of the spoofing provisions included in the 2010 Dodd-Frank Act that carry shorter prison sentences and have a shorter statute of limitations.

Pacilio and Bases told the justices the U.S. Department of Justice is "stretching the criminal fraud statutes beyond their breaking point" to prosecute actions that are described as "disruptive practice" but allegedly bear little resemblance to fraudulent activity. The Commodity Futures Trading Commission has also disclaimed that spoofing is a type of fraud, the pair said.

The men have asked the Supreme Court to address this issue, which has split the Fifth and Seventh circuits.

Additionally, they claim the prosecutions violated their due process rights by charging them for conduct that, at the time it occurred, wasn't illegal or prohibited.

"This court's intervention is needed to resolve the circuit split and prevent the government from overextending the general fraud statutes to cover non-fraudulent conduct Congress specifically addressed elsewhere," Pacilio and Bases said. "The Seventh Circuit's decision both misinterprets the fraud statutes and violates due process, retroactively criminalizing pre-Dodd-Frank spoofing as fraud — despite the CFTC conceding as recently as 2014 that spoofing did not 'sound in fraud.'"

Spoofing is a market manipulation technique that involves a trader placing a market order but canceling it before it can be executed by the other party. Pacilio and Bases claim that even if a trader hopes their

order isn't executed, they are still willing and able to trade if they can't cancel it in time.

Under the Dodd-Frank Act, convicted spoofers face up to 10 years in prison, and the act has a five-year statute of limitations. Federal fraud statute convictions, on the other hand, are punishable by up to 20 years in prison, and are subject to a 10-year statute of limitation.

Pacilio and Boses were indicted in 2018 for allegedly spoofing between 2008 and 2014. An Illinois federal jury convicted them of their respective charges in 2021, and the men were each sentenced to one year and one day in prison.

Pacilio is represented by Robert M. Loeb, David H. McGill, James Anglin Flynn and Alyssa Barnard-Yanni of Orrick Herrington & Sutcliffe LLP.

Bases is represented by Roman Martinez and Michael Clemente of Latham & Watkins LLP and Daniel S. Noble and David R. Allen of Finn Dixon & Herling LLP.

The federal government was represented at the Seventh Circuit by Daniel Lerman and Jermey Sanders of the U.S. Department of Justice.

The case is Pacilio et al. v. United States, case number 23-794.

--Additional reporting by Lauren Berg, Patrick Hoff and Gina Kim. Editing by Janice Carter Brown.
