

Patent Owners Beware: Serial Filings, Rent-Seeking May Be Grounds for Adverse Fee Award

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The US Court of Appeals for the Federal Circuit vacated and remanded a district court's denial of attorney's fees to an accused infringer, finding the district court did not properly consider the Patent Owner's manner of litigation, including the history of plaintiff's actions in other jurisdictions and the broader context of its litigation practices. *Elec. Comm'n Techs., LLC v. ShoppersChoice.com, LLC*, Case No. 19-2087 (Fed. Cir. July 1, 2020) (Wallach, J.).

Following a finding by a Florida district court that a patent asserted by Electronic Communication Technologies (ECT) was ineligible under 35 U.S.C. § 101, ShoppersChoice filed a motion for attorney's fees, citing ECT's use of standardized demand letters and repeated infringement actions seeking nuisance-value settlements. ShoppersChoice also informed the district court of a recent award of attorney's fees against ECT in the Central District of California (the *True Grit* decision) for conduct relating to the same asserted patent. The district court denied ShoppersChoice's motion, finding that the case was not exceptional and that ECT's litigation position was not so obviously weak. ShoppersChoice appealed.

The Federal Circuit reviewed the district court's denial of attorney's fees under the abuse of discretion standard, analyzing whether the district court made "a clear error of judgment in weighing relevant factors or in basing its decision on an error of law or on clearly erroneous factual findings" and whether it provided a "concise but clear explanation of its reason[ing]." The Court explained that "a pattern of litigation abuses characterized by the repeated filing of patent infringement actions for the sole purpose of forcing settlements, with no intention of testing the merits of one's claims, is relevant to a district court's exceptional case determination under § 285." The Court found that the district court failed to conduct this analysis and erred by not considering ECT's manner of litigation and the broader context of ECT's litigation practices. Addressing the *True Grit* decision, the Federal Circuit noted that the California district court provided a detailed account of the nuisance value rent-seeking practices of ECT (and other affiliated shell companies), but ultimately found that the court failed to conduct an adequate inquiry into ECT's litigation conduct.

The Federal Circuit thus vacated the attorney's fee award and remanded the case, directing the district court to consider both ECT's manner of litigation and the objective unreasonableness of its claims.

Practice note: While the California District Court's decision is not binding in the Florida court, the Federal Circuit made clear that a court cannot ignore developments in other jurisdictions in connection with § 285 fee determinations.

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