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Supreme Court's Dual Standard of Review for Claim Construction Creates a Potential Grab Bag For Patent Litigants

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The ***United States Supreme Court*** clarified yet another important standard in patent law by mandating that the Federal Circuit apply clear error review when reviewing subsidiary factfindings in patent claim construction. **Teva Pharms. USA Inc., v. Sandoz, Inc.**, 574 U.S. ___ (2015). This marks a sharp change from the single application of a *de novo* standard of review employed by the Federal Circuit for the last two decades. The *Teva* decision creates a potential grab bag of options for patent litigants to use to their advantage.

Case Facts

Teva owns and markets a drug for treating multiple sclerosis known as ***Copaxone®.*** Copaxone® ranks in the top ten for all pharmaceuticals sold in the U.S. today. Teva enjoys patent protection for its method of manufacturing the active ingredient in the drug. Teva sued two generic makers of Copaxone®, Sandoz and Mylan, for patent infringement in the Southern District of New York. During claim construction, the parties presented expert testimony to determine whether the claim term "molecular weight," was fatally indefinite to a person of skill in the art. The district judge, after hearing testimony and crediting Teva's expert witness, determined that the term was sufficiently definite. Following a ten day bench trial, the court concluded that the patents were not invalid and found infringement.

The Opinion

Justice Breyer, writing for the majority, reaffirmed the Supreme Court's holding in *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), that "'the construction of a patent, including terms of art within its claim,' is not for a jury but 'exclusively' for 'the court' to determine." Slip op. at 1 (quoting *Markman*, 517 U.S. at 372). Interestingly, and despite this edict nearly twenty years ago, the Court in *Teva* implied that it never meant for the Federal Circuit to review factual findings under the *de novo* standard. *See* slip op. at 5 ("Our opinion in *Markman* neither created, nor argued for, an exception to Rule 52(a)."). Relying in part on "practical considerations," the Supreme Court emphasized that "[a] district court judge who has presided over, and listened to, the entirety of a proceeding has a comparatively greater opportunity to gain that familiarity than an appeals court

judge who must read a written transcript or perhaps just those portions to which the parties have referred." Slip op. at 7-8 (citations omitted).

In a rare moment of simplicity, the Supreme Court laid out the procedure for reviewing claim construction orders after *Teva*:

> The district judge, after deciding the factual dispute, will then interpret the patent claim in light of the facts as he has found them. This ultimate interpretation is a legal conclusion. The appellate court can still review the district court's ultimate construction of the claim *de novo*. But, to overturn the judge's resolution of an underlying factual dispute, the Court of Appeals must find that the judge, in respect to those factual findings, has made a clear error.

Slip op. at 13 (citing Fed. R. Civ. P. 52(a)(6)). The Supreme Court emphasized that it is the ultimate legal conclusion of the district court's claim construction, and not the "evidentiary underpinnings" or "subsidiary factual findings," that are reviewed *de novo*. Slip op. at 6-7. Thus, only the district court's factual findings that underlie or support the claim construction are reviewed for clear error. *Id.*

Strategic Considerations and Potential Benefits of the Dual Standard

Arguably, the Supreme Court's ruling raises few, if any, surprises in view of the plain text of Rule 52(a), but the impact on patent litigation strategy going forward is another story. The *Teva* decision arguably created a grab bag of options for patent litigants both at the district court and appellate level relating to claim construction.

The consideration of using experts during claim construction will move to the forefront of litigants' strategic decision-making. Likewise, district courts that ordinarily in the past would not allow the use of experts during claim construction could change course and allow expert testimony on factual underpinnings to insulate rulings on appeal in view of the clear error standard. The problem arises where, as is often the case, opponents in a case take different approaches to each obtain the more favorable standard of review on appeal. That is because the *Teva* decision left open an avenue for patent litigants to still seek the Federal Circuit's *de novo* standard of review on appeal by relying *solely* on intrinsic evidence before the district court. Slip op. at 11-12. Litigants wary of the district court's near-binding decision in construing the claims may consider such an option. This, of course, risks eviscerating the routine practice of relying on experts who aid the court in explaining what the disputed terms mean to a person of skill in the art, as the experts in the *Teva* case did. Thus, district courts may be forced to grapple with complex patented technologies on their own.

The *Teva* decision may have other implications for district courts that the Supreme Court did not contemplate. For example, several jurisdictions in this country are considered more "patent savvy," as they routinely hear more patent cases than other courts. Patentees may file more cases in these courts following *Teva* to avoid the impact of findings made by a less-savvy factfinder. Just as it was in *Teva*, "in some instances, a factual finding may be close to dispositive of the ultimate legal question of the proper meaning of the term in the context of the patent." Slip op. at 13. In these instances, the higher standard of review coupled with the choice of venue may direct the result. Moreover, an increased case-load on patent-savvy districts may in turn nullify the benefit of filing in that jurisdiction in the first place, such as the speed at which cases go to trial.

On appeal, litigants may have more flexibility than before the *Teva* decision. Artful appellate advocates may benefit from the difficulty the court may have in discerning factual underpinnings from the ultimate legal determination. As Justice Thomas argued in the dissent, the "fact" of what a person of skill in the art would have understood is a "legal fiction." *See* slip op. at 10 (Thomas, J., dissenting). Irrespective of what evidence the trial court relied upon, both sides will likely advocate on appeal for the application of the more favorable of the two standards.

Last, but certainly not least, appealing claim construction orders should be more predictable after *Teva*. Under the singularly-applied *de novo* standard of review, litigants on appeal relied on a "complete redo" of a claim construction order from the district court. A successful appeal of a claim construction order was a coin-flip, as the Federal Circuit reversed the district court half the time. That meant even if the litigants endured a full trial on the merits – and the millions of dollars of resources that may have been expended – the winner may only receive another costly trial under a new construction. Under the dual standard explained in *Teva*, the Federal Circuit will arguably reverse fewer claim construction orders on appeal. As a result, litigants will enjoy reduced costs and risk associated with retrying patent cases less frequently. Time will only tell the true impact of the*Teva* case on Federal Circuit appeals involving claim construction issues.

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