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You Cannot "Game" the Appellate System by Filing a "Protective" Cross-Appeal

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Believing that an appellee's cross-appeal following a favorable judgment was nothing more than an attempt to get the upper hand in the appeal, the U.S. Court of Appeals for the Federal Circuit granted a motion to dismiss a cross-appeal, finding the cross-appeal improper because, if successful, it would not expand the scope of the judgment in appellee's favor. ***Aventis Pharma S.A. v. Hospira, Inc.***, Case No. 11-1047 (Fed. Cir., Mar. 24, 2011) (Moore, J.).

In separate actions, Aventis Pharma sued Hospira and Apotex for infringement of patents relating to drugs used to treat certain types of cancers. The cases were consolidated and the district court ruled in favor of the defendants, finding that all the asserted claims were invalid for obviousness and unenforceable due to inequitable conduct. The district court, however, rejected Apotex's assertion that some of the claims were invalid for **double-patenting**.

After Aventis appealed, Apotex filed a **"protective" cross-appeal**, allegedly aimed at preserving its right to challenge the district court's double-patenting ruling should the Federal Circuit reverse the invalidity and unenforceability rulings. Subsequently, Aventis asked Apotex to withdraw the cross-appeal. After Apotex refused, Aventis moved to dismiss the cross-appeal.

The Federal Circuit granted Aventis' motion. The Court noted that "[a] cross-appeal may only be filed 'when a party seeks to enlarge its own rights under the judgment or to lessen the rights of its adversary under the judgment,'" The Court noted that parties should not be permitted "to game the system by filing a cross-appeal to obtain the final word: this is neither fair to the appellant nor an efficient use of the appellate process."

The Federal Circuit rejected Apotex's argument that Federal Circuit policy is in conflict with other circuits, characterizing other circuits' allowance for conditional cross-appeals "as a means to raise additional arguments which do not expand the scope of the judgment." The Federal Circuit noted it offers the same opportunity, albeit in a different form, by "requir[ing] parties to raise such arguments in their primary briefing."

The court explained that under its precedent "as a general matter … a finding of invalidity means there is 'no basis for a cross-appeal' of non-infringement or additional claims of invalidity." The Federal Circuit acknowledged that the court has not *sua sponte* struck every improperly filed cross-appeal,

but found that “[t]his infrequent leniency is not an invitation to flaunt our practice and precedent, and the improper use of a cross-appeal directly contrary to our precedent may meet with sanctions.”

Practice Note: At the Federal circuit, an invalidity decision in a lower court leaves no room for the successful defendant to file a contingent cross-appeal as to infringement or other validity issues.

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