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# Attys Ask Fed. Circ. For More Fees In TheraSense Suit

By **Brian Mahoney**

*Law360, New York (September 9, 2013, 8:11 PM ET)* -- Counsel for Becton Dickinson & Co. and Nova Biomedical Corp. asked the Federal Circuit on Monday to reverse a lower court's order limiting their attorneys' fees in a long-running intellectual property dispute with TheraSense Inc., saying the company eroded their fee award through a tortured appeals process.

Becton Dickinson attorney Bradford "Jim" Badke told a three-judge panel at oral argument on Monday that a lower court judge arbitrarily denied a $2 million in a supplemental fee award after a relentless appeal from TheraSense, which is now known as Abbott Diabetes Care Inc.

"What they managed to do, Abbott, was to erode the fee award by well over a third by continuing this case," Badke said.

Abbott spent years fighting a lower court's ruling that a patent at issue was invalid and unenforceable due to inequitable conduct. The ruling was vacated by the Federal Circuit in a well-known decision in 2011, but on remand the same lower court judge ruled that Abbott had still committed inequitable conduct under the Federal Circuit's newly heightened standard.

While dealing them a victory, the court denied fees to Becton Dickinson and Nova for costs incurred during the appellate phase of the litigation, while granting about $6 million in fees for the initial phase of the case, according to court records.

Becton Dickinson and Biomedical are now appealing that ruling, saying that the district court's decision to limit compensation for Abbott's case was "arbitrary, clear error and grossly unjust," according to their briefs.

The appeal is one of the last battles in the landmark case arising from Abbott's allegations that the companies infringed its patents for blood glucose test strips.

At oral argument on Monday, TheraSense attorney Clara J. Shin said the decision not to award fees for the appeals process was a reasonable decision and that Abbott's appeals in the case were not frivolous.

"What the court did is a very classic method of splitting the baby here," she told the panel. "What it chose to do is to reinstate fees for the initial phase of the proceeding but deny fees for the appeal and for the remand where he made express findings that there is no litigation misconduct, no bad faith and that neither of the proceedings is exceptional."

Shin asked for permission to submit further briefs to the court on whether the lower court ruling conflicts with the 1990 U.S. Supreme Court decision in Commissioner, INS v. Jean, which was not relied upon in Becton's briefing but was cited by panel Judge Timothy B. Dyk as potential grounds for reversal.

The panel on Monday asked Badke twice about fee requests that a special master in the lower court case called "problematic and troublesome" and included instances of individual attorneys billing more than 24 hours of work for a single day. Abbott had seized upon those findings in its briefing to support its larger argument that it should not pay the added fees.

Badke, who said he was surprised that his adversaries focused so intently on the mistaken billing, said the real issue was that the lower court had made a clearly unfair and erroneous ruling in denying the supplemental fees. He said the special master tasked with overseeing the fee requests had helped correct any discrepancies in the matter.

Crucially, he said, the case, from inception to appeal, was sufficiently exceptional to award his clients attorneys' fees for all stages of the litigation.

Becton is represented by Jim Badke and Sona De of Ropes & Gray LLP.

TheraSense is represented by Clara J. Shin and Philip A. Scarborough of Covington & Burling LLP.

The case is TheraSense Inc. and Abbott Laboratories v. Becton Dickinson & Co. et al., case number 12-1504, in the U.S. Court of Appeals for the Federal Circuit.

--Editing by Katherine Rautenberg.