

Tips For Overcoming Unfavorable ITC Initial Determination

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January 18, 2018, 1:33 PM EST

The U.S. International Trade Commission is a powerful forum for litigating unfair trade cases involving a variety of causes of action under 19 U.S.C. § 1337, ranging from statutory intellectual property rights like U.S. patents to anti-competitive conduct. An ITC investigation differs from litigation in district court in several important respects. One important difference is that the adjudication process, which involves discovery and trial before an administrative law judge, is followed by a “final initial determination” (final ID) that goes to the full commission for review. The final ID is not as oxymoronic as it sounds when one considers the preliminary nature of the decision on the merits, i.e., the final ID is subject to commission review, and the fact that the final ID is the last, i.e., final, order that the ALJ issues before the entire case goes to the commission. Although the importance of creating the proper evidentiary record before the ALJ cannot be overstated, the power of the commission in making its final adjudication extends well beyond those of an appellate body. Because cases can be won or lost on commission review, this stage warrants proper attention for both complainants and respondents seeking to change the course of a Section 337 proceeding.



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Overview of Commission Review

In order to appreciate the strategic nuances of commission review, it is important to understand the makeup of the agency. The ITC is composed of six different commissioners with differing viewpoints, political affiliations, and professional experiences. Those commissioners have their own dedicated “inside” counsel who advise them on the facts, law, and policy issues that are implicated in any proceeding pending before the full commission. The ITC’s Office of the General Counsel acts as “outside” counsel to the commissioners. The OGC makes a recommendation to the commissioners on what, if any, parts of the final ID the commission should review and, ultimately, another recommendation on how to dispose of the matter in its entirety. The commission can follow or not follow the advice of the OGC in making its final determination. The OGC then defends the ITC’s FD on appeal to the U.S. Court of Appeals for the Federal Circuit.

Each commissioner individually and carefully vets the advice received from the OGC so that he or she can vote on the issue(s) at hand. Given the participation of both commissioners and their personal staff in the review process, there are many cases where there are as many as a dozen lawyers carefully scrutinizing the ALJ’s final ID and OGC’s recommendation. While some may argue this intensive review is

unnecessary, this redundancy leads to careful review and may be one factor in the commission's high affirmance rate at the Federal Circuit.

When it comes to the final ID, Commission Rule 210.43 (19 C.F.R. § 210.43) provides an opportunity for the parties to file petitions for review within 12 days of the final ID asking the commission to review and either reverse, modify or vacate (by taking "no position on") a finding or conclusion made in the final ID. Oftentimes a party will seek review of an important issue even if it ultimately prevailed on the determination of whether a Section 337 violation occurred. For example, a respondent may seek to petition for review on a finding that a protectable trade dress exists even if that respondent was found not to infringe that trade dress in order to potentially add another grounds to support the finding of no violation.

The commission has 60 days from the issuance of the final ID to determine whether to review the final ID. On the 60th day, the commission typically issues a notice setting forth the scope of review (if any), requesting briefing on remedy, bonding, and the public interest, and in many instances requesting additional briefing on some or all issues under review.[1] The commission then takes another 60 days to issue its FD in the form of a notice along with remedial orders (if any) and an opinion explaining its rationale.[2] The commission review procedure provides an important opportunity to flag for the commission (and ultimately the Federal Circuit) errors of law, fact, procedure, or policy. As discussed below, there are traps for those unfamiliar with the procedure and the strategic nuances that accompany this procedure. By the same token, those that know the mechanics of the commission review process well — along with the stakeholders involved — will inevitably gain an advantage over those who are less familiar with this process.

Whether you are lead outside counsel or in-house counsel, you should think critically about your case and carefully plan your strategy for overcoming the partial or total loss you have suffered in the final ID. And you should begin this exercise before the final ID issues to ensure that you have enough time to readjust your strategy (if necessary) given the mere 12 days you have to prepare and file a petition for review.

Strategic Considerations for Overcoming an Unfavorable Final ID

For a party facing a final ID that is partially or entirely unfavorable, commission review provides the proverbial "second bite at the apple." The commission has wide latitude to take steps necessary to address and correct both factual and legal findings and, in cases involving a violation, determine the correct remedy.

If you lost in the final ID before the ALJ, you are statistically likely to lose again in the FD before the commission. At least one recent study shows that the commission usually affirms the outcome of the final ID (i.e., violation or no violation) notwithstanding any modifications or clarifications the commission may make in its FD at the margins. That study showed that the commission affirmed its ALJs at rates as high as 80 percent.[3] That said, there are strategic decisions a party can make to increase the likelihood of "flipping" a finding of violation to no violation (or vice versa) and avoid becoming another commission statistic. Moreover, even if you do not (or do not need to) flip the outcome, you can get the commission to reverse, modify, or vacate findings on significant issues that may impact parallel proceedings or future litigation involving the same subject matter.

Re-Evaluate Your Case

It is no secret that most lawyers have a tendency to fall in love with their own arguments. This can be dangerous when it comes to preparing a petition for review. Given the 12 calendar days litigants have to generate and file this petition from when the final ID issues, it is tempting to simply repackage the same arguments that the ALJ already rejected. In some cases, the ALJ may be just plain wrong; in other cases, however, it may be that the petitioner (i.e., the party seeking review) may not have emphasized the right arguments or sufficiently developed the record before the ALJ. Regardless of what you believe to be the reason for having lost before the ALJ, it is critical to take a step back and do an honest re-evaluation of the strengths and weaknesses of your case so that you can readjust or refocus what might be a losing strategy to make it easier for the commission to review and reverse, vacate, modify, or even remand the final ID that you are challenging.

If you are managing the case on the in-house side, your access to information about the case is severely limited given the restrictive nature of ITC protective orders. Therefore, this may be a logical time to seek a second legal opinion or hire a shadow counsel who can sign onto the protective order to ensure you get the honest feedback you need to maximize your chances of beating the odds.

Select the Right Issues

In addition to reevaluating the merits of your case, you will need to carefully select which issues on which to seek commission review. This can be a difficult task in highly contested, multipatent cases given the 100-page limit for petitions for review and responses coupled with the short 12-day timeframe for turning the petition around.[4] A complainant who is faced with a finding of no violation has little choice but to petition on all dispositive issues. However, a respondent who was found to violate Section 337, need only get reversal on either noninfringement, invalidity, or domestic industry, for example, to flip the final ID's finding to a finding of no violation. This leaves a losing respondent some discretion in selecting the right issue or issues on which to petition. On the one hand, that respondent should select only the strongest arguments to ensure that the commission focuses its limited attention in this short time frame on its most meritorious points. On the other hand, Commission Rule 210.43(b)(2) provides that any issue not raised in the petition for review will be deemed abandoned — a rule the Federal Circuit has enforced.[5]

Oftentimes, the potential for abandoning an issue under 210.43(b)(2) along with the tight deadline leads parties to petition for review on most, if not all, issues on which they lost so that parties can raise these issues on appeal to the Federal Circuit. This is not the right approach, however, and parties should give more thought to strategy before putting pen to paper. Before you or your ITC counsel reflexively crank out another brief on a particular issue seeking review, consider (1) the importance of the issue to your desired disposition, (2) the standard of review on appeal to the Federal Circuit if you find yourself having lost at the commission, and (3) the strength of the merits of your argument as discussed above. For example, it may be that the finding you want to challenge is intensely factual and/or dependent on a credibility determination in which case the Federal Circuit will affirm that finding as long as it is supported by substantial evidence — a low bar for affirmance — which requires “more than a mere scintilla but less than the weight of the evidence.”[6] Similarly, petitioning on less important issues or advancing weak merits arguments will inevitably lead those at the commission to view your stronger arguments with skepticism.

Know Your Audience

The commission has a sharp, highly qualified and talented group of lawyers and staff. Many of the attorneys have advanced engineering degrees, have clerked in various federal courts around the

country, and have worked at top law firms. Because the staff in the OGC and the commissioners' offices get served with all pleadings in the investigations to which they are assigned, and it is likely that they have read the final ID in anticipation of receiving petitions for review, long factual, procedural, or technological background sections are unnecessary.

It may seem obvious but commission lawyers and staff are motivated by doing what is right and fair with efficiency. Oftentimes, there are "gaps" in the ITC's statute that allow the commission discretion in making rulings or creating a framework for applying its laws and rules. In these instances, the commission has sought to create rules that adhere closely to its mission, generate the most predictability, and advance the best policy. To maximize your chance of success on commission review, ensure that you or your ITC counsel can recognize these gaps or gray areas and use them wherever appropriate to advance you or your client's interests. Two recent examples include the commission's work on (1) developing a framework for creating an evidentiary record to address the public interest factors of Section 337(d)(1) that the commission must assess in every case before it issues a remedy, and (2) developing a legal framework to apply in cases where the complainant relies on licensing to satisfy the domestic industry requirement under Section 337(a)(3)(C). There are few cases and very little legislative history interpreting the meaning of the statutory public interest factors; thus, this is fertile ground for commission adjudications. Similarly, although domestic industry has seen rapid evolution over the last 10 years, there is still room for interpretation and additional clarification given the commission's case-by-case approach to development of its precedent.

The commission is also motivated to make final determinations that will be affirmed on appeal to the Federal Circuit. This is important for two reasons. First, the commission's practice of vacating a nondispositive finding or conclusion by reviewing and "taking no position" (often called *Beloiting*)[7] allows it some leeway to select the grounds on which to defend its determination on appeal. For that reason, ITC counsel should think creatively about identifying the proper disposition to the commission and the one that provides the path of least appellate resistance for the commission. Second, the commission has an institutional memory of the cases in which it has been reversed. If an issue presented to the commission at all resembles one of these cases, particularly on issues such as jurisdiction, remedy, or domestic industry, the commission may go out of its way to avoid history repeating itself. You or your ITC counsel should be familiar with these cases and adjust the presentation of arguments and issues accordingly to avoid (or encourage) setting off alarm bells.

Finally, it is worth noting that, like judges, the commission does not engage in *ex parte* contacts with the private parties or those who have an interest in the outcome. Although industry associations and legislators oftentimes write public letters expressing concerns about the outcome of a particular case, the commission is an independent agency that applies the law to the facts of each case and does not respond to lobbying efforts.

Understand the Significance of Review

The momentum of a litigation (and settlement discussions) can often swing based on the outcome of the final ID and the scope of commission review. Oftentimes litigants try to guess the outcome of a Section 337 matter based on the scope of commission review or whether it has asked for briefing on particular issues. Although obtaining review is important in overcoming an unfavorable final ID, you should be cautious not to read too much into the commission's determination to take review or ask briefing questions. In most instances, the commission's decision to review and/or request briefing signals very little about the forthcoming disposition of the matter. As noted above, statistics show that although the commission frequently takes broad review and may even modify, reverse, or vacate

findings and conclusions, more often than not it leaves the ultimate finding of violation or no violation intact. That said, litigants with well-prepared, ITC-savvy counsel can maximize the chances of changing the outcome of the case, getting reversal or modification on key issues even they are not dispositive, and better position their case for appeal to the Federal Circuit.

There are procedural reasons that explain the commission's predisposition toward taking review. First, it takes a single commissioner to vote to review a finding or conclusion.^[8] Therefore, commission review should not necessarily be viewed as signaling a likely reversal because it takes a majority of commissioners to reverse or vacate a finding. Second, reviewing a final ID gives the commission more time to identify and correct potential errors.

Relatedly, the fact that the commission's review notice asks briefing questions about a particular issue does not mean that all of the commissioners are interested in reversing on that issue. A review question can originate with the OGC, a commissioner, or a commissioner's counsel. In addition, review questions can be used for procedural reasons that have nothing to do with potential reversal of a finding or conclusion in the final ID if, for example, the commission wants to give a party an opportunity to be heard on a particular issue that may not have been vetted fully before the ALJ or if the commission does not want to dig through a voluminous record to identify the key evidence on an issue.

Conclusion

Commission review can be a game-changer. Notwithstanding the short timing for petitions and responses, complainants and respondents alike should give this process the planning and thought it deserves including, if helpful, seeking an unbiased assessment of the merits which can be used to focus the briefing to the commission to ensure litigants make the strongest case for review and reversal.

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[1] See 19 C.F.R. 210.42(h)(2).

[2] See *id.*

[3] See LegalMetric USITC Report, 337 Proceedings, Patent Cases, 1996-July 2017 at 10.

[4] See 19 C.F.R. § 210.43.

[5] *Finnigan Corp. v. International Trade Comm'n*, 180 F.3d 1354, 1363 (1999) (finding a party waived a claim construction argument not raised in its petition for review).

[6] *Yingbin-Nature (Guangdong) Wood Industry Co., Ltd. v. Int'l Trade Comm'n*, 535 F.3d 1322, 1335

(Fed. Cir. 2008) (internal quotations omitted).

[7] *Beloit Corp. v. Valmet Oy*, 742 F.2d 1421 (1984).

[8] 19 C.F.R. § 210.44