

9:53.

7/13/2013

Looks like 4 aside for the counsels. Same top 4 for MS as last time plus 2^{men} on the bench. Only recognize one younger man for MT, 3 women on bench, chief counsel unknown woman (one from last time not here) If on night behind gate, including fellow gnatlew note taker from last time.

→ Ralph

K.C. (or Casey just called someone in on speakerphone)

12 on the left. One man in sweatshirt and jeans taking notes, one reporter type (I think) I recognize from last time is behind me with laptop.

MS corp vs MT mob.

Hanning, Penningsham, Sideroff, Colvany. Wyan, (named didn't → Hanning arguing. → Named counsel.

Bill McEwan, Columbus, Kathleen Sullivan, Bill Bruce

Andrea Roberts, Sherry Berry, someone Thomson

Robert → Something about visiting judges and part of history yes.

Here today Motions for Summary Judgment.

MS Finsk. Damages for seeking injunctive relief.

Motion re: Marvel, "what else do we have" Pocket of Fed lough "Blatantly unreasonable conduct" (after 3 other types of unreasonable).

20 minutes v 20 minutes.

Hennigh → Note book with quotes. Court has decided jury will compare MT's first offer to Rand Rate, and there's only 1 reasonable answer. Yesterday court said unreasonable things would be unreasonable / breach of RAND covenant. MT said this in an October 2012. "Nominal competitive costs". 4000 times Rand, objective standard would be unreasonable if 4x reasonable. ^{meaningless}

Nominal competitive costs presumably stricter. MT said they know more stuff now. Doesn't matter if objective standard. *Seviner v. World com.* MT's conduct continued after this trial and for years (including appeal). This conduct continued after October exchange of letters. Reference to 9th circuit ~~injunctions~~ not allowed who rejected RAND offer. Robert interprets reference to "final... decision". Judge somebody would be surprised to hear that it is binding. *Re Merrigan mentions Posner.* "Posner sitting as one of us (bonding in vineyards sitting from on high!"

H → Legal question... stuff is such inductive relief violates contract with continuing conduct. R → Mr. Price doesn't agree with calculations. "Are they obligated to follow it?" H → we take that as a given for this case.

R → You seem to have latched onto one number/aspect. Sometimes you argue they're acting in bad faith independently. There is a level that could be in commercial bad faith, but still struggling with 'commercially reasonable' language.

H → Get same answer either way. MT knew about stacking problem. $2.25 * 92 = 200$ something. Inevitably leads to stacking problem. MT bound by finding that MT's patents are a sliver. Agree stacking at 20% only true if all patents are the same value. H, 20% tiny little piece of optional piece of OS wants 50% of OS price.

R asked → Various deposition questions were claimed as deposition. (and will other stuff doesn't relate to stacking / Marvell chips. Court said functionality/price should be same across all products. Merrigan says since functionality is the same unreasonable to ask for the same percentage for each.

R → Would be finding that anything made as a percentage would be "commercially unreasonable" Are you belt & trackings

H → Would be fine for very low percentage, still illogical but so how 2 of 8 it's still RAND. Blatantly unreasonable. No reason to change Royalty

Privilege issues -
Fr #1 MS summary #1 pg 69, ex #2 pg 39-49

H has 5 minutes. Howell criticized 20¢/mobile device in cord
Guy in first row passed him legal pad
was too expensive for H. 264. 1% Royalty in chip industry.
One must offer reasonable royalty/RAMP rate. Stand on brief

MS. Sullivan → brief visual aids already shared with opposing counsel.

Begin with point you made so able. Use contextual inquiry, looks to all facts and circumstances.

→ Brief good faith law. Slide 2 has a timeline. Wa law does not hold that a non-opening offer can breach good faith. No case establishing that a too high offer vs objective standard can bring bad faith. Want to argue timelines Oct 1 (MT) vs Oct 21, i.e. opening offers/terms in a vacuum, and want to present to jury.

R → is there inducive relief sought on unreasonable rate. Judicial authorities around the world. #

S → MS never said they were willing to take RAMP offer.

R → Want things. Concession that prev Feb 9. 9:19-10:06
I think it appropriate to start with #. Some discussion about what server may have conceded or not. And counsel can't waive governing law. They want to get to jury.

R → 1. Is it MT's position that there can never be a high term that violates RAMP. S → Don't concede, opening offer yields bilateral negotiations. R → more clarification ≥ 100% product cost.

H has red notes.
MT → can't concede. That's outrageous how about a couple of pennies"
Industry ^{custom} and practice. Stuff about things under seal. Typical thing is response. Atypical not to respond or counteroffer. 3. Negotiations proceed post-folios see which way things flow. 4. Con ^{stuff} not determinative.
No case that supports categorical rule for opening offer letter. Only case where a lawsuit was in response. Bad faith is fundamentally matter of fact.
slide #16

SCRIVNER is about employer, Client where one party can set a term's meaning. No categorical rules that opening offers are bad faith. Conceivably other cases with absurd offers, the inducive would be unreasonable.

sealed

Sullivan says MS sue on nonessentials and says put "we didn't have any time" MS said "put your patents on the table" S conferring with 1st few person. MT didn't engage in long process, as MS asked for things.

R -> "Was MT asserted ^{privilege for} motives over sending letters".

Attorney client privilege assertions on both sides.

Think it's MS that is trying to defy Roberts plan for case. re give staff 40 Jury. What was available to MT in Oct 2010. Rates H refers to will be "MS started war by suing us" "Novel departure

from all industry custom and practice".

R. Rightness affirmative defense?

S Rightness and unclear hands say inquiries are intertwined. Can do equitable after trial in

litigation needs to stay in for damages.

Smirnov H. "Is it bad faith to seek inducive following 'illusory offer'?"

Is it bad faith to sue before making RAND offer was rejected

Is it right after MS said it would take court RAND rate to sue etc appeal.

Motivation is extension.

R -> "Have you ever considered how much easier my life would be if you said you wouldn't take it and I could take the Judge Crebb approach".

MT needs to show that MS was negligent in not choosing alternative?

Smirnov break. MS pew guy talking to court reporter to check things.

11:05

S → Handout for this as well. R-slacks.

Turn now to what MT intends to be an aid to the court. Suggest 3 ~~themes~~ ^{themes} factors of breach court can decide NOW.

MS asserts violation of good faith to seek injunctions. Judge can well deny RAND injunctions, but it cannot by itself be a duty especially since MS hadn't said they'd give us money and they sued as first Not moving for summary judgement on offer letters.

R → "I'm waiting for you to tell me that the FTC has accepted where the courts are headed".

Dismissal of injunction relief was without prejudice and ruled that MT can try again if circumstances change. No cases where ~~judges~~ ^{injunctions} are barred for SEPs or seeking injunctions are bad faith.

No assurance that they would take ^{care}. Arguing on undisputed facts that this is a case where injunctions aren't breach. So as matter of law not violation of good faith. ^{Ch. 11} "I got well and truly thrashed in that case".

There were some tricks with when good faith is for you and not.

It is arguable that it could be permanent. R → "I enjoyed the thrashing". Are you arguing that MT never sought injunction in Germany after MS said they were a willing licensee. German action filed July 2011, Sept 2011 was MS saying willingness. Argument is that breach can't be a moving target. They are stuck with facts at the time of complaint.

R → "Do you have authority for that?" - sceptical voice.

Answers.

N → "I think you're wrong, but I'll be happy to read your brief."

We have an ongoing duty, but that would be a new breach action and that our litigation isn't included.

pg 7, MS's letter to FTC June 2011. RAND should not preclude injunctions. If MS June 2011 thinks it's reasonable, then how can it be a violation of good faith? Some thing about undercutting Mr. Price for things being not relevant if 6-7 months later. Suggesting FTC letter is only for the injunctive thing.

July 30th supplemental authority. July 22nd clarification of consent order. Docket 807. In page 5 section D. Some commentators say MT should withdraw things, and clarifies that FTC doesn't need ^{MT} to withdraw previous things. Given that MS wasn't known to be willing licensee.

Submit timelines by letter (1 or 2 if disagreement).

Marvell and MPEG-LA are simple. MS needs to plead proximate damages. No certainty about what damages go with stuff. MS hasn't managed to come up with damages theory. Robert's Dec exhibit L pg 86 line 10-87 line 9. Docket 721-2. MT didn't assert Patents vs

Marvell and said they didn't need me. And no response to R → "would request for charts." MS have standing" S → "real question". No evidence of breach

or damages G, H, I, J, K, L in Robert's Dec. MPEG-LA simple, Google isn't a party. Basic reason is keeping trial dates. Article 3 can't be best for things. MT not a signatory. As of Aug 2012 Google made offer, MS rejected. ~~for~~

R said would assume →
not asserting it.

Non-Peddington. precludes all damages. extends to state law claims in 4th circuit. Receiving attorneys fees as damages extends things. Can't get fees b/c someone sued for patents. References to Judge Crabbe.

Ever shifting theories on how to shift attorneys fees among the cases.

R → "Do you want to be characterized as the pot or the kettle" (I think for the stuff about being on the spot) S → Seattle vs McCreedy. → You can't get fees as damages from this case or another. R → Not surprised you're a textualist.

R → "Role in this court at the end you get 5 minutes for what they should have said" Mr. Love and Roberts?

2nd say for MS.

Seeing these various claims are evidence vs separate damages?

Seeking inductions give you leverage, and can get threats to bring MS to heel, classic hold up.

R → Problem I have is that keeping things on as evidence of bad faith. At some point needs to be applied to pleadings, it's evidence is not of that time frame.

M → Had Marvel gotten license 80% stuff would have not happened.

Since no categorical it could never be a breach which doesn't follow. We think ^{law} court is moving towards 10 injunctions, but doesn't need.

View that after initial ~~pleadings~~ ^{pleadings} it was clear that MS wanted RAMP terms.

Hold up and ITC January 2012 after MS said it would take contract.

And MS had to relocate distribution facility. No basis for removing stuff from case. Marvel getting ^{license} done ^{was} b/c MS asked. License provided to MS had exclusion for MS and 2.25%. Could view this as "heavy handed intimidation". This was a reasonable thing for MS to do and view was confirmed evidence of holdup.

Threat MPE6-LA is still ripe for court to decide. Did MT offer MS an MPE6-GA license. One license allowed MPE6-LA terms going forward. "At some

R → point going down too many rabbit holes. "and this seems like a giant one."

MS → If you read crabbs's opinion think it doesn't provide things.

3 minutes to Hornigson.

3 grounds for fees.

1. Law in other jurisdictions. Anchor Motor Freight case.

For covenant not to sue, right to be free from suit.

2. Something in New Jersey when cov of good faith was covenant was not to sue.

3. Fees are awarded for dissolving preliminary or permanent injunctions.

B/c of anti-suit thing, court said it would decide if injunctions were proper. All stars something case. Right got fees.

5 → So sees on Anti Fees. Cases he cites aren't applicable due to express covenants not to sue. On wrongful injunctions, anti suit things prevented further injunctions.

Mr. Love.

R → "Age of court worries him so if you bring young lawyers they get to speak".

L → Privilege issues. R → "slow down gestures to CR → Most important person
Deposition staff. Realtek case addressed ITC injunction
seeking when no offer made. W.L. Gore associates →
an offer that's super high is basically no offer 1976 case LR asked who would

Roberts MPE6-LA MS lies no evidence of damages, nothing in their
theory didn't allocate damages to MPE6-LA.

H. Questions/ House keeping. Possibility of written questionnaire.
45 - 70 for questionnaires. Short one that morning. The last
time was 17 pages with Lung cancer estate vs Tobacco company
and Judge Cohen and I went to school on what happened.

MS gave court something Chamber Preliminary MT/MS Jury instructions.

— observations
R → Total on 8/16 ^{maybe not Tue} M, Tu, Th, Fri. then T, W.
16 hours a side. 145 jury instructions. Everything comes out of
those 16 hours (including Jury

Davidson Roberts, McMenley not going to testify b/c of Discovery.
R → "Can't use law department's as sword and shield." but raising.
b/c of what he heard today.

In elevator Harrigan said "my original plan for her was
to produce about 10-12 documents and let her talk about them".

"Lawyers don't decide when to waive attorney client privilege ... so"
↳ not sure if there was word belatedly.