Intellectual Ventures Wins Summary Judgment to Defeat Capital One's Antitrust Counterclaims

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In a decision that is sure to please patent assertion entities, on December 1, 2017, several Intellectual Ventures (IV) companies prevailed on summary judgment on antitrust counterclaims that Capital One asserted in response to a patent infringement suit filed by Intellectual Ventures I LLC and Intellectual Ventures II LLC in the district court in Maryland. Intellectual Ventures I LLC v. Capital One Financial Corp., No. 8:14-cv-00111-PWG, Memorandum and Opinion, ECF No. 686 (D. Md. Dec. 1, 2017). Although the court said that it found that Capital One had identified admissible evidence establishing a genuine issue of fact as to whether IV possesses monopoly power in a relevant market and whether IV had willfully acquired or maintained any such power, the court concluded that Capital One's claims were barred by the Noerr-Pennington doctrine and collateral estoppel. The court's opinion is a helpful addition to court decisions and academic scholarship regarding non-practicing entities and so-called "cluster markets," as well as the application of Noerr-Pennington immunity and collateral estoppel in the context of antitrust counterclaims in patent infringement litigation.

Background

IV is a non-practicing entity that attempts to generate revenue by licensing patents that it owns. The dispute in this case arose from IV's efforts to license a portfolio of its financial services patents to Capital One. When the parties were unable to reach agreement on a license, IV sued claiming Capital One infringed five of its patents but it later withdrew one of the patents and proceeded on four patents. A court-appointed Special Master held that two of the four remaining patents claimed subject matter that is patentable under 35 U.S.C. § 101, but the court subsequently ruled that all four patents did not claim patentable subject matter—two patents because the court itself determined they did not, and two patents on the basis of collateral estoppel because another court had so determined. The court entered judgment for Capital One on all four of the remaining patents, and that ruling was upheld by the Federal Circuit, thus ending IV's patent infringement claims against Capital One. Memo Op. at 2-3.

Meanwhile, Capital One had asserted three antitrust counterclaims against IV claiming monopolization and attempted monopolization under Section 2 of the Sherman Act, and unlawful asset acquisition under Section 7 of the Clayton Act.

Capital One alleged that IV had tried to compel Capital One to license its patent portfolio, including the patents at issue in the case and in a separate case in Virginia. Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 13-cv-740-AJT (E.D. Va.) (the "Virginia case"). After the court denied IV's motion to dismiss Capital One's antitrust claims, discovery ensued and IV then moved for summary judgment.

Antitrust Theories at Issue

Capital One asserted that IV is a patent troll that offers a portfolio license at "a jaw-dropping high price," and then threatens to file patent litigation if the party does not take the license. Id. at 5. It characterized IV's business model as (1) accumulating a vast portfolio of banking-related patents, (2) concealing the details of those patents, and then (3) serially litigating to force banks to take the portfolio license at an exorbitant price. Id. at 6. This conduct, according to Capital One, violates the antitrust laws.

IV responded that its patents are presumptively valid and that it lawfully acquired them. IV claimed that it offers to license its portfolio with an opening offer and expects the bank to counteroffer in a negotiation that will result in a mutually agreeable licensing fee. IV further argued that it does not conceal details of the patents or those details are publicly available. IV also asserted that Capital One is an "efficient infringer"—a company that willingly runs the risk of infringing patents on the theory that few patent holders will enforce their rights. IV argued that Capital One's antitrust theory was flawed because it could not prove IV exercises monopoly power within a relevant market, and also that Capital One's claims were barred by the Noerr-Pennington doctrine and collateral estoppel due to prior proceedings in the Virginia case. Id. at 6-8.

Disputed Issues of Fact Regarding Monopoly Power in a Relevant Market

The threshold antitrust issue concerned the parties' disagreement regarding the proper definition of the relevant market—an issue the court ultimately declined to resolve on summary judgment.

Capital One argued "that IV possesses monopoly power in connection with its large financial services patent portfolio, which touches on essential technologies that commercial banks have heavily invested in and cannot realistically design around to avoid the reach of IV's patents." Id. at 9-10. Capital One's expert, Professor Fiona Scott Morton, said that IV has approximately 7725 financial services patents. She maintained that applying an ex ante SSNIP analysis in this context would not be appropriate, and instead an ex post analysis of market power should be conducted because Capital One had already incurred costs to acquire technologies to compete with other banks. Id. at 10-11. She analogized IV's financial services portfolio to a "cluster market" that IV promotes as a single product at a supracompetitive price. Id.

at 11. She asserted that IV exercises monopoly power for that single product, even though no bank has licensed the entire portfolio and IV has not prevailed in any patent infringement suit against any bank. Id. at 11-12.

IV argued that Capital One is incorrect in defining the relevant market as a "cluster market" for financial services patents constituting a single product. Id. at 12. Its expert, Professor Richard Gilbert, argued that IV's patents likely touch on a large number of distinct technology markets, each of which should be analyzed using a SSNIP test. Further, he argued, no such analysis could even be undertaken because no negotiations with banks ever resulted in a license and accordingly there was no transaction price for the alleged single product, and moreover IV had not successfully licensed its portfolio to any bank so there was no market price to analyze. Id. at 12-13.

The court criticized both Capital One's and IV's respective positions. It cited academic criticism of the notion of "cluster markets", but also opined that IV's contention that it would be economically feasible to determine whether there are close substitutes for thousands of patents to avoid IV's portfolio "stretches plausibility to the near breaking point." Id. at 13-16. Reflecting the difficulty of defining a relevant market in this context in light of dueling experts, the court stated that "even if the cluster market analysis ultimately is not the appropriate framework for analyzing the relevant antitrust market in cases such as this one . . . it is hard to deny that there is something concerning from an antitrust perspective about the way in which IV engages in its licensing business." Id. at 18. Having expressed that concern, the court concluded that a genuine issue of fact existed as to the definition of the relevant market so that issue should be left to a jury, and it turned to IV's defenses based on Noerr-Pennington immunity and collateral estoppel. Id. at 18-20.

Noerr-Pennington Immunity

IV maintained that its patent infringement case against Capital One was petitioning activity protected under the Noerr-Pennington doctrine, and therefore Capital One could not succeed on its antitrust counterclaims unless it could demonstrate that IV's claims were "objectively baseless." Id. at 20-21. Capital One countered that Noerr-Pennington immunity did not apply at all because IV's "litigation conduct is part of a broader monopolistic scheme," not just sham litigation as to the patent infringement claims against Capital One, and the doctrine does not insulate IV's entire monopolization scheme. Id. at 21. The court rejected Capital One's argument because it believed the sham litigation allegation was integral to Capital One's entire theory of antitrust liability, and the court was unpersuaded that Noerr-Pennington immunity does not apply where the alleged sham litigation was just one part of an overall scheme to monopolize. Id. at 23.

Having determined Noerr-Pennington immunity was in play, the court then analyzed two possible exceptions: Walker Process fraud and sham litigation. The court quickly discharged Walker Process fraud because “there is no evidence that the Patent Office was tricked by fraud or that IV (which later acquired the patents) was aware of any such fraud, ...” Id. at 25. See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 383 U.S. 172 (1965).

The court’s analysis of the sham litigation exception, which was much more involved, started with the fundamental principle that the exception is “narrow,” and “rarely will ‘a patentee’s assertion of its patent in the face of a claim of invalidity . . . be so unreasonable as to support a claim that the patentee has engaged in sham litigation.’” Id. at 26 (quoting Tyco Healthcare Grp. LLP v. Mut. Pharm. Co., 762 F.2d 1338, 1343 (Fed. Cir. 2014)). After explaining the claimed differences between sham litigation under Professional Real Estate Investors (available for a single patent infringement suit) and California Motor (claimed to be available for “a pattern of baseless, repetitive claims” regardless of the type of lawsuits), id. at 26-30, the court concluded that Federal Circuit law governed and therefore PREI applied (as IV had argued), rather than Fourth Circuit law under which California Motor could apply (as Capital One had argued). Id. at 31-35. See Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49 (1993) (“PREI”); Cal. Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (“California Motor”). The court also found that, in any event, IV’s two lawsuits in Virginia and Maryland against Capital One could not constitute a “series” of claims within the meaning of California Motor. Memo Op. at 33.

The court then applied PREI’s well-known test that a lawsuit qualifies as sham litigation when it “(1) is ‘objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits’ (the objective element), and (2) is motivated by a desire ‘to interfere directly with the business relationships of a competitor’ (the subjective element).” Id. at 28 (quoting Tyco Healthcare, 762 F.3d at 1343). The court then ticked through a host of reasons why, at least in its view, Capital One could not establish that IV’s lawsuit was “objectively baseless”—the most important being that IV had prevailed on two of its patents before the Special Master. In addition, however, the court said that (1) the patents were presumptively valid; (2) the suit was filed before the U.S. Supreme Court’s decision in Alice Corp. Pty. Ltd. V. CLS Bank Int’l, 134 S. Ct. 2347 (2014); (3) IV has not filed suits against Capital One post-Alice; (4) IV withdrew specific claims, suggesting it believed it could prevail on the others; (5) IV appealed summary judgment rulings; (6) IV incurred substantial litigation expenses; (7) IV obtained the patents from others and was entitled to rely on their presumptive validity; (8) in the parallel Virginia case the court ruled that IV’s lawsuit was not an “exceptional case” marked by “unreasonable conduct” that would justify an award of attorney’s fees; and (9) IV incurred significant expenses in designating nine experts on the objective reasonableness of the claims. Id. at 35-39. In any event, the court said, even if IV's claims were objectively baseless, Capital One and IV are not competitors so the subjective element of the PREI test could not be met. Id. at 39.

Collateral Estoppel

IV also argued that defensive collateral estoppel blocked Capital One from pursuing claims it had unsuccessfully alleged against IV in the Virginia litigation, because that court had determined that the market in that case—the same market Capital One alleged in this case—was not a relevant market for antitrust purposes, and that ruling was critical and necessary for the Virginia court's judgment. Capital One countered that collateral estoppel did not apply because in this case it alleged a materially different relevant market and, in any event, market definition was not critical or necessary to the judgment in the Virginia case because Capital One's Virginia claims were rejected on multiple grounds. Id. at 39-41.

The court rejected Capital One's argument that the relevant markets in the two cases were different. In addition to the fact that IV had not acquired new patents in the relevant investment funds since filing its antitrust counterclaims in the Virginia case, the court found that no company had licensed IV's patent portfolio, which indicated there was in fact no market for it. Id. at 43-45. In short, there either was no market or it was the same in both cases. Although the court acknowledged that the lack of a relevant market in the Virginia case was only one of two alternative grounds for dismissal of Capital One's antitrust claims, the court concluded that the issue of market definition in the Virginia case was "fully and fairly litigated," and it therefore was appropriate to estop Capital One from re-litigating that issue in this case. Id. at 44-52.

Conclusion

The court's opinion demonstrates some of the hurdles in advancing antitrust counterclaims against a patent assertion entity. Perhaps of greatest importance, the decision focused on the challenge of defining a relevant antitrust market in the context of a demand to license a portfolio of patents, even with the benefit of the views and analyses of two well-credentialed economists. More generally, the court's decision to grant summary judgment based on Noerr-Pennington immunity (in particular its analysis of the sham litigation exception) and collateral estoppel provides antitrust counterclaim plaintiffs and defendants with useful guideposts for developing evidence to support their arguments. Of course, we have not have heard the final word yet. On December 28, 2017, Capital One filed its notice of appeal in the Federal Circuit.