

The “Boomerang” Summary Judgment Rule: If You File a Weak Motion For Summary Judgment, Your Motion Will Be Denied and Summary Judgment May Even Be Entered Against You

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In a decision this week by a federal court in Boston, *AMBIT Corp. v Delta Air Lines, Inc., et al.*, Civil Action No. 09-10217 (this firm represents the plaintiff), the Court expressed displeasure with the overkill tactics of patent litigators. The Court took a decisive step to discourage those who file inadequate summary judgment motions by application of what might be best termed “the boomerang rule”: *sua sponte* granting of summary judgment against the party that had moved for summary judgment where the underlying motion is “woefully inadequate.”

Specifically, the Court observed that “summary judgment practice in patent cases is out of control” and commented that parties in some cases are now filing up to 15 summary judgment motions and over 100 motions *in limine*. The Court observed that “it is this blizzard of motions that makes American patent litigation the slowest and most expensive on the planet” which “[t]ragically causes other countries to deride our American jury system, when the reality is that it is the parties who seek to swamp the courts with efforts to avoid the jury.”

Thus, the Court served notice on the patent bar:

It is important that the patent bar understand that, should they move for summary judgment upon an issue as to which they bear the burden of proof, it behooves them to lay every bit of evidence before the court – once; well knowing that failure puts the moving party at risk of judgment on the issue being taken against them and the issue dropping out of the case.

In this litigation, the plaintiff alleged that Delta Air Lines and another defendant infringed patents relating to certain types of wireless communications on an aircraft. After the completion of discovery, the defendants filed several summary judgment motions, including a motion for summary judgment of patent invalidity under Section 103 of the patent laws. The Court denied the motions for summary judgment and advised the defendants that Court was considering *sua sponte* issuing summary judgment against the defendants on the invalidity point (*i.e.*, dismissing the defendants’ 103 defense from the case). Under governing First Circuit

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procedural law, not Federal Circuit law that normally applies to substantive patent issues, "a party that moves for summary judgment runs the risk that if it makes a woefully inadequate showing, not only might its own motion for summary judgment be denied the court may *sua sponte* order summary judgment against the movant."

After considering the issue, the Court found defendants' proffered expert testimony to be "rather conclusory," but ruled that the defendants' submission sufficed "albeit barely" to avoid summary judgment against them.

In sum, this opinion represents part of a growing -- and welcome -- trend by the federal courts to streamline patent litigation and lower the high costs and lengthy delays so frequently associated with patent litigation. Thus, patent litigants would be wise to avoid filing summary judgment motions that are not well-founded, or filed for dubious purposes, and to file only those motions that are fully supported with competent, persuasive, complete and undisputed evidence.



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