1996

Re-Tailoring Jury Trial Rights

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Dry-cleaning patent case raises larger Seventh Amendment issues

BY RICHARD C. REUBEN

The debate over improving the civil justice system has gone through many permutations over the years. Discovery, punitive damages and alternative dispute resolution are but a few of the paths that have been pursued.

A case argued to the U.S. Supreme Court in January addresses the question from yet another—and potentially a more fundamental—direction: the reach of the Seventh Amendment's guarantee of a jury trial in civil cases in federal court.

The specific issue in *Markman v. Westview Instruments,* No. 95-26, is whether questions over the interpretation of a federal patent are issues of fact for the jury to decide (and generally not subject to appeal) or matters of law to be decided by the trial judge. It is the wider ramifications for civil jury trials that give the case its larger significance.

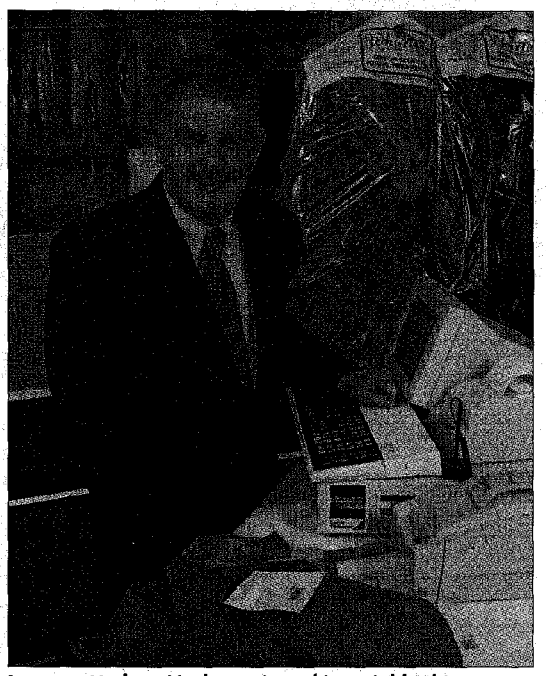
The issue bitterly divided the en banc U.S. Circuit Court of Appeals for the Federal Circuit at Washington, D.C., which was founded just more than a decade ago, in part to handle the burgeoning intellectual property docket. Patents are government-granted monopolies on the use of intellectual property. Such litigation often is worth millions, even billions, of dollars as parties jockey over the ownership of potentially lucrative products and processes.

In *Markman,* the fight is over the rights to an inventory control system that could save the dry cleaning industry untold millions in lost clothing and revenues.

Writing for the majority in the Federal Circuit, Chief Judge Glen L. Archer Jr. compared a patent to a statute granting a monopoly and said questions over its interpretation are matters of law for the trial judge, just as with any other statute.

The dissents were unusually strong. Judge Pauline Newman accused the majority of denying "200 years of jury trial of patent cases in the United States ... simply by calling a question of fact a question of law." Judge H. Robert Mayer chastised the majority for creating a "complexity exception" to the Seventh Amendment that "is a piece of a larger bid afoot to essentially banish juries from patent cases altogether."

Before the Supreme Court, inventor Herbert Markman's lawyer, William B. Mallin of Eckert Seaman Cherin & Mellott in Pittsburgh, says the Federal Circuit's opinion is "semantic sleight of hand" that ignores the history of the Seventh Amendment and assumes federal judges will do a better job than jurors of interpreting patents.



Inventor Herbert Markman is seeking trial by his peers.

But ultimately, Mallin contends, the ruling, if upheld, will prove to be an "unworkable and inevitable source of confusion."

In defending Westview Instruments' patent on its Datamark dry cleaning-inventory control system, Frank H. "Terry" Griffin III of Gollatz, Griffin & Ewing in Philadelphia says the whole Seventh Amendment argument is a red herring.

A Supreme Court decision affirming the Federal Circuit in *Markman* would have a profound impact on patent litigation and probably other areas of intellectual property as well.

Many patent litigators predict juries would virtually vanish from their realm because the central question in most such cases hinges on the meaning of a patent's precise language. (See "Ruling Cuts Jury's Role in Patent Cases," July 1995 *ABA Journal,* page 24.)

The Court's decision on whether there should be a complexity exception under the Seventh Amendment could be a bellwether of the views of the justices on the civil jury system.

Law v. Fact

Fiddling with the distinction between law and fact provides one way to get at the complexity problem, albeit indirectly, and if it works in the patent context, why not other "complex" areas of federal law, such as antitrust or securities?

More than 15 years ago, the Burger Court left the complexity question open when it declined to resolve a split between the circuits on the viability of a formal complexity exception. See *In re United States Financial Securities Litigation,* 609 F.2d 411 (9th Cir. 1979), and *In re Japanese Electric Product Antitrust Litigation,* 371 F.2d 1069 (3rd Cir. 1980).

Much has changed since then, of course. Perhaps most importantly, the lineup on the Supreme Court has changed, and *Markman* presents the current Court with its most important Seventh Amendment question to date.

The issue "will surely be in the back of their minds" as the justices consider the surface arguments in *Markman,* says Albert W. Alschuler, a University of Chicago Law School professor who favors an exception. And while Jeffrey White of the Association of Trial Lawyers of America opposes such an exception, he agrees that "one way or another, [*Markman* is] about a vote of confidence in civil juries." ■

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