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"It's Too Late Baby, Now It's Too Late Though We Really Did Try to Make It": The Perils of Missing Patent Litigation Deadlines

The recently concluded (and now appealed) Gardner v. Toyota Motor Corporation patent case offers yet another important lesson in the pitfalls of missing case schedule deadlines. These deadlines inundate patent litigation, especially with the advent of many local patent rules.

Even the best substantive points and arguments can turn sour when they are brought by procedurally tardy litigants. Arguing that "we really did try to make it" does not play well to a federal court audience, even if Carole King's song "It's Too Late" topped the Billboard record charts in 1971.

The plaintiff, Conrad Gardner, is the inventor of U.S. Patent No. 7,290,627, entitled "Extended Range Motor Vehicle Having Ambient Pollutant Processing." His case did not start out its life on a judge's troublesome list, but it appears to have ended there. If anything, Gardner's patent claims had some very sympathetic hallmarks for a case venued in Seattle federal court. Gardner is in his mid 70s. In addition to being a former Boeing engineer, Gardner is a patent attorney and former patent examining attorney for the United States Patent and Trademark Office (USPTO). Surely, he knows the ropes of patent prosecution.

The '627 patent covers hybrid vehicle technology for automobiles. More specifically, the patent "relates to the use of an internal combustion engine and separate electric motor for powering a hybrid vehicle." View Order Gardner filed his patent lawsuit in 2008 claiming that Toyota's

Prius, Camry and two-wheel drive Highlander automobile models infringed the '627 patent.

The numerical imbalance (2 vs. 6 attorneys) between plaintiff and defense counsel did not seem that overmatched when the case was first filed. In addition to the plaintiff being a patent lawyer and former patent examiner, Gardner was represented by out-of-state patent counsel and a solo practitioner with extensive commercial litigation experience. Five attorneys from the well-known Finnegen Henderson law firm entered appearances on behalf of Toyota, as well as a local counsel from a Seattle law firm.

So, how did the case unravel for Gardner? A perplexing inability to meet case schedule deadlines provides an atmospheric explanation. Much of Toyota's consternation stemmed from Gardner's tardy submissions with respect to simultaneous filings often required by local patent rules, e.g., proposed claim element terms for construction and disclosures of extrinsic evidence and responsive claim construction briefs.

Delays in filing simultaneous submissions can lead to a tactical advantage for the late filer—as Toyota would convincingly argue. Gardner's counsel appeared to make a habit of granting himself one more day to work on these "simultaneous" submissions. It's always nice—but certainly not fair—to know where the other side is coming from when preparing your so-called simultaneous submission.

Adding a fuel to the fire for Toyota's contentions regarding Gardner's slack regard for meeting case schedule deadlines, no patent litigator wants to read a minute order stating: "Plaintiff's counsel did not appear at the scheduling conference, and has not contacted the court to explain his absence." Gardner's counsel apparently miscalendared the date and time of a scheduling hearing he had helped organize. Ouch!

After missing more due dates or seeking belated extensions of them, the Court convened another hearing that resulted in yet another nightmare-inducing minute order: the "Court will not tolerate any further missed deadlines and will consider a motion for sanctions by Defendant."

What were Gardner's excuses for missing case and discovery schedule deadlines? In opposing Toyota's motion for sanctions, plaintiff's papers revealed that Gardner himself was infirm (he was battling cancer), his Seattle counsel was a busy solo practitioner, and his out-of-state counsel was not involved in drafting pleadings, but only served as an advisory resource for strategy purposes. Deadlines were variously missed due to an epic December 2008 snowstorm in Seattle, an alleged two-day shutdown of a DSL internet line, and the general complexity of the briefing tasks involved in patent-related summary judgment motions.

None of these excuses garnered sympathy with the Court. They did not amount to excusable neglect. While the delays involved did not warrant the terminating sanction of case dismissal—as Toyota urged—the Court ruled that a monetary award was an appropriate sanction. Toyota requested an award of $133,371 in its fee petition. The Court discounted the requested sanctions amount by 35% because that appeared to be the difference in overall patent litigator rates between Washington D.C. and Seattle counsel. The Court ordered Gardner to reimburse Toyota

$88,952 in attorneys' fees. View Order

Although not its intended purpose, the Court's fee petition order offers Seattle-based patent litigators with a selling point: litigating patent cases is generally one-third cheaper using them instead of their "other" Washington counterparts!

Gardner's patent claims ultimately did not survive dispositive motion practice. One claim was ruled invalid; all others were ruled non-infringed. Gardner was also unsuccessful in seeking summary judgment dismissal of Toyota's inequitable conduct counterclaim.

Did the Court's expressed displeasure with Gardner's proclivity for missing deadlines color and impact the substantive rulings in the case? No one can say for sure. The case is now on appeal.

Gardner's timeliness issues aren't over yet though. Although he appealed the fee sanction and moved to stay its enforcement, Gardner did not file a supersedeas bond. Rather, he moved for Court approval of the proposed terms of a bond. Toyota then moved for entry of a separate final judgment for the fee sanction amount, arguing that a motion for approval of a "hypothetical" bond does not stay enforcement of a judgment. In characteristic fashion, Gardner's counsel missed the the due date for filing opposition papers to Toyota's motion by one day.

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