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F.C. law firm tackles Supreme test

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FORT COLLINS — When the U.S. Supreme Court convened Nov. 28 to hear arguments in what legal experts say is the nation's most important patent-law case in half a century, partners in a Fort Collins law firm were front and center.

At issue was a test that some lawyers say results in the issuance of too many "junk" patents — those that protect inventions that don't rise to the threshold of true innovation.

Patent-law specialists Cochran, Freund & Young LLC of Fort Collins got a rare invitation to submit a friend-of-the-court brief in the case, a document that outlined support for a widely accepted test for filtering patents that might fall into that category.

The firm's senior partner, Bill Cochran, was the second person to speak at the historic hearing, introducing his partners and formally entering pleadings in a case that could shape patent law for decades to come.

A word that only a lawyer could love — "obviousness" — is the crux of the legal principal that the justices will consider before a ruling next spring.

The question: Did a design for an adjustable accelerator pedal for General Motors trucks and sport-utility vehicles by Canadian manufacturer KSR International infringe upon a patent for a similar device issued to another manufacturer, Teleflex Inc.? KSR's lawyers say no, because the Teleflex patent is too broad,

covering a combination of existing features that ought to be obvious to anyone.

The answer: The one that really counts — the Supreme Court's — could have far-reaching implications for the U.S. patent system, and the economy generally, according to Cochran.

"From what we heard, the court is leaning in the direction of changing the law," Cochran said. "The real problem is for patents in fast-moving technologies. ...License agreements are going to have to be rewritten, and patents are going to be much harder to obtain. It's likely to have a trillion-dollar effect on the economy."

Participation by Cochran and partners Samuel Freund and Ben Hudson in the Supreme Court's hearing required a serendipitous link to the high court. Hudson's friendship with Justice Clarence Thomas, during their first jobs as young lawyers, opened the door for what Cochran called "the very toughest ticket to get" in the legal world.

Hudson, formerly the chief patent lawyer for Fort Collins-based Advanced Energy Inc., worked with Thomas at the St. Louis headquarters of chemical and agri-products giant Monsanto Corp. after graduating from Yale University's law school. While the two were friends there, Hudson said he had not been in close contact with Thomas since his ascension to the high court.

"I called his clerk to see if we could arrange an invitation," Hudson said. "We got very lucky."

Corporate beehive

The case had generated a flurry of friend-of-the-court, or amicus, briefs from interests powerful enough to get the court's ears. Lined up behind KSR were lawyers for the heaviest hitters in industries where intellectual property is the coin of the realm, including Microsoft Corp., Cisco Systems Inc. and even Hallmark Cards. They argued that Teleflex's combination of parts lacked the novelty that would warrant a patent.

Not surprising, Cochran said.

"Large corporations would always do better without a strong patent system," he said. "They can use their market power to just steamroll over smaller competitors."



Courtesy Bill Cochran

SUPREMELY CONFIDENT — Fort Collins lawyers Bill Cochran, left, Ben Hudson and Samuel Freund stand outside the U.S. Supreme Court after presenting an amicus brief before the nine justices on Nov. 28.

Heavy hitters from the manufacturing sector, however, are supporting Teleflex with a brief filed by 3M Co., General Electric Co., Procter & Gamble Co., E.I. DuPont de Nemours and Co., and Johnson & Johnson. They were joined by the American Bar Association and other legal interest groups, including Cochran and partners.

Thanks to the invitation arranged through Justice Thomas, Cochran assembled a "dream team" of practicing patent attorneys — including heavyweights from Washington, D.C. and Austin, Texas — to craft a 12-page brief that laid out, in plain language, a rationale supporting the existing test for obviousness.

The brief called the current test "an objective, workable and predictable standard that makes the best utilization of evidence to judge the validity of patents."

According to Cochran, the existing test is intended to exclude patents for such "inventions" as the use of a laser pointer to play with a cat, for which a patent was granted in 1993, or, in the words of KSR's lawyers, an invention that combines "a refrigerator with a light bulb."

For the nine justices who heard the KSR v. Teleflex arguments, the dire economic consequences that Cochran described were overwhelmed by a complex and legalistic discussion of the "obviousness" standard established by a federal appellate court. The lower court called for use of the "teaching, suggestion or motivation" test to determine whether patent applications were beyond the "obvious."

"This is gobbledygook," Justice Antonin Scalia said after hearing parts of the arguments. "It really is. It's irrational."

Cochran said the so-called "TSM" test is not only valid, but essential for protecting patent rights for inventors who seek investment in their ideas.

"One of the things we tried to say in our brief is that most investors in technology will insist that some prospect of a patent be present before they put their money in," he said.

Assuming the justices rule in favor of KSR, he added, "With this change, you're not going to get investors, and you're not going to develop the kinds of innovations that we've seen in this country."

Strong patent

"A stronger patent system allows for protection of worthy inventions regardless of the manner in which they have been created. In a weak patent system, freeloaders can reap the benefit provided by the innovators and investors in technology. A fundamental precept of a capitalistic society is that people should be able to profit from their innovation. A strong patent system is necessary to allow people to profit from research and development that leads to innovative products and processes."

SOURCE: AMICUS BRIEF FILED BY FORT COLLINS LAWYER BILL COCHRAN AND PARTNERS IN THE U.S. SUPREME COURT PATENT CASE KSR V. TELEFLEX