



## News Bulletin: Judges From the Federal Circuit and Delaware District Court Address Leading Topics in Patent Law

On Thursday, October 10, the Intellectual Property Section of the Delaware Chapter of the FBA hosted a roundtable discussion of a variety of issues with Judge Timothy B. Dyk, Judge Kathleen M. O'Malley, and Judge Evan J. Wallach of the Federal Circuit Court of Appeals, and Chief Judge Gregory M. Sleet, Judge Sue L. Robinson, and Judge Richard G. Andrews of the District of Delaware.

We have summarized the judges' notable remarks below. As always, please let us know if you have any questions or would like further information.

Regards,

*Young Conaway Stargatt & Taylor IP Litigation Team*

### Claim Construction

- Judge Dyk observed that a "plain and ordinary meaning" construction can be appropriate, although a trial court may start out with it and then realize later on that the term must be construed. Judge Dyk does not favor expert testimony for plain and ordinary meaning.
- Judge O'Malley prefers that parties and district court judges articulate a construction when they interpret a term as having its plain and ordinary meaning, unless there is a stipulation as to the meaning of that term.
- Judge Robinson addresses claim construction at the same time as motions for summary judgment so that the parties are fully aware of the relevant disputes at the time of the *Markman* hearing. When necessary, Judge Robinson may construe terms post-*Markman* and at any time up until jury instructions.

### Potential Sanctions

- Judge Robinson bifurcates liability and damages and therefore does not generally use Section 285 as a tool for sanctions. Judge Robinson observed that Rule 11 may work as an appropriate tool for addressing frivolous complaints and litigation abuse. To that end, in response to a Rule 11 motion, Judge Robinson recently requested access to plaintiffs' pre-suit investigation.

### Damages

- The panelists agreed that damages issues have become more common, at both the district and appellate level. Judge O'Malley observed that the Federal Circuit addresses damages issues more often than in the past because parties and trial courts are presenting those issues more often.
- Chief Judge Sleet expressed willingness to take up a *Daubert* issue during trial where counsel offer compelling reasons to do so.
- In some cases, Judge Andrews has reduced damages awards by several million dollars. Judge Andrews has interpreted recent Federal Circuit opinions to encourage judges to be more proactive in this area and to get reliable expert opinions.

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