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Morgan Lewis Fends Off Malpractice Suit, Thanks to Changes in Law Involving Claims Against Patent Lawyers

By Nate Raymond

Credit the folks at Keker & Van Nest with a thorough understanding of the developing law involving malpractice claims against patent lawyers. On Monday, San Jose federal district court judge Jeremy Fogel granted summary judgment to Keker client Morgan, Lewis & Bockius on the one remaining claim in a malpractice suit brought by Landmark Screens LLC. Judge Fogel's ruling marks the end of a six-year effort by Keker and Morgan Lewis to defeat Landmark's claims in both state and federal court.

The backstory begins in 2000, when Landmark Screens hired patent lawyer Thomas Kohler, then a partner at Pennie & Edmonds, to prosecute a patent for an outdoor light-emitting diode electronic billboard. After Kohler accidentally left some information out of a follow-up application in 2003, the U.S. Patent and Trademark Office rejected the application as incomplete. Without telling Landmark, Kohler--who had by then joined Morgan Lewis--filed an adversary petition, which the PTO dismissed in November 2004.

Kohler finally told Landmark what had happened in December 2005. The company fired Morgan Lewis and brought in new counsel from MacPherson Kwok Chen & Heid, which filed a malpractice suit against Morgan Lewis in Santa Clara, Calif., superior court.

The case was stayed for a couple years while Landmark arbitrated its claims against Pennie & Edmond. And by the time the stay was lifted, the law governing malpractice claims against patent lawyers had shifted. In two separate cases issued on the same day in October 2007--one against Akin Gump Strauss Hauer & Feld and another against Fulbright & Jaworski, the U.S. Court of Appeals for the Federal Circuit held that malpractice cases involving substantial issues of patent law belong in federal district court.

Keker & Van Nest moved to dismiss Landmark's state-court case against Morgan Lewis, citing both the Federal Circuit decisions and California case law, according to Keker partner Elliot Peters. The case was dismissed in May 2008.

On the same day the state-court case was tossed, Landmark filed a federal court malpractice suit against Morgan Lewis. Keker responded with a motion to dismiss the new suit on statute of limitations grounds. In November 2008, Judge Fogel dismissed the malpractice allegations in Landmark's amended complaint, but said Landmark could proceed with a fraud claim against Morgan Lewis.

That claim was eliminated in Monday's summary judgment decision. Once again, Keker prevailed on statute of limitations grounds. "Based upon this record," Judge Fogel wrote, "any reasonable trier of fact would be compelled to conclude that Landmark had actual or inquiry notice of the facts giving rise to the fraud claim" three years before Landmark filed it.

The litigation is not quite over. In October, Landmark filed a certiorari petition asking the U.S. Supreme Court to consider whether its malpractice case–which involves an unsuccessful patent application, and thus has no impact on patent rights–should have been forced into the federal courts.

Keker partner Peters told us Morgan Lewis, not surprisingly, is pleased with Judge Fogel's decision. Landmark counsel Clark Stone of Haynes and Boone (which merged with MacPherson Kwok) did not respond to requests for comment.