

## Chiron Vows to Continue Fight With Genentech

**By Brenda Sandburg**  
RECORDER STAFF WRITER

**A**fter being handed a defeat Friday by a federal jury, Emeryville, Calif.-based Chiron Corp. said it plans to resurrect a strategy it had identified earlier in the trial to prove the validity of its patent. After 1 1/2 days of deliberations, the Sacramento, Calif., jury concluded that Chiron did not invent the technology underlying Genentech's Herceptin breast cancer drug, freeing Genentech from having to fork over more than \$300 million in royalties. Herceptin is one of Genentech's top-selling products, generating sales of nearly \$1 billion since it came on the market in 1998.

"This is a case where Chiron tried to rewrite history, and they got caught," said Genentech attorney Henry Bunsow, a partner at San Francisco's Keker & Van Nest. "It tried to take patent claims written in 1984, 1985 and 1986 and turn them into cutting-edge technology which they were never intended to cover."

But Chiron says the battle is far from over.

"Chiron continues to believe that its patent covering the anti-HER2 monoclonal antibodies is valid," the company said in a statement. "The evidence clearly showed that Chiron was the first to invent these

antibodies. Chiron intends to pursue multiple courses of action to overturn the verdict, including an appeal should that be necessary."

Robert Blackburn, Chiron's chief patent counsel, said the company plans to refile a motion it had pending before the trial. The motion requested a ruling that the evidence South San Francisco, Calif.-based Genentech had put forward couldn't support a jury verdict.

"The judge will decide whether to accept the jury verdict or set it aside," Blackburn said.

John Keker, a partner at Keker & Van Nest who led Genentech's trial team, said the patent infringement case was fairly unusual in that Chiron "waited 16 years to write claims that cover intervening technology."

"Lawyering on the other side really made up for a lot of deficiencies in the patent and allowed it to get as far as it did," Bunsow added. "This was a lawyer-made patent ... It didn't have its genesis in any Chiron laboratory."

In 1984, Chiron filed an initial application on the patent, which covers monoclonal antibodies that bind to a human breast cancer antigen known as HER2. The company filed continuance applications to the U.S. Patent and Trademark Office to revise the claims in 1985, 1986 and 1995 and was issued the

patent in 2000.

An interesting twist occurred in the middle of the three-week trial when the patent office agreed to review whether Chiron is the legitimate owner of a patent related to the one disputed in the trial. U.S. District Court Judge William Shubb, of the Eastern District of California, ruled that neither side could refer to this related patent, covering the so-called "Drebin/Greene" antibodies. And he told the jury to disregard comments about the antibodies that were made by Chiron attorney Harold McElhinny, a partner at San Francisco-based Morrison & Foerster, in his opening statements.

While Chiron plans to fight the jury verdict in this case, it's also gearing up for separate litigation against Genentech involving another patent issued in 1988. A trial over that patent is set for next year before Shubb.

Genentech's win in the current case may be particularly sweet given its recent loss in another high-profile suit. A Los Angeles County Superior Court jury awarded the City of Hope National Medical Center \$300.1 million in compensatory damages and \$200 million in punitive damages against Genentech for breach of a 1976 contract and failing to pay royalties on human insulin and human growth hormone.