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BLOG

Judge Albright Opens Virtual Courtroom Doors to Public — Shares Thoughts on Markman, 101, His Procedures

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In his ongoing effort to provide more transparency into his decision-making, Judge Albright opened the virtual doors to his "courtroom" on Wednesday (April 22, 2020) for the Markman hearing in *Slyce Acquisition Inc. v. Syte – Visual Conception Ltd. et al.,* WDTX-6:19-cv-00257. Announcing the Markman hearing in advance to his Advisory Committee and providing dial-in information for the same, the Judge allowed the public to join the call. A number of us from Winston attended, as did a couple dozen others.

The Judge followed his current practice of providing the parties with preliminary constructions two to three days in advance of the hearing. (This is a change from the Judge's original practice of providing preliminary constructions by 5 p.m. the night before the hearing.) The additional time allows parties to meet and confer and reach resolution on claim constructions or to otherwise narrow their disputes. The Judge would prefer that to happen. He noted: "It is frustrating to me if someone makes an argument and the other side says I would have agreed to that." It also allows the parties to focus their arguments on how the court might be able to improve its constructions.

Judge Albright made clear at the outset of the hearing that not only had he studied the parties' positions and tutorials but that two of his law clerks (one who has a PhD in electrical engineering) had done so as well. Though the Judge permitted the parties to make whatever arguments they wanted to make, and to speak on the record for as long as they wished, he signaled that the best use of the parties' time was not to rehash arguments the court had already considered.

When one party raised a tweak to one of the constructions to which the other side objected, the Judge made clear that even if an argument had not previously been raised, he is going to do all he can to come up with the right constructions. Judge Albright noted, "I'm pretty soft-touch when people amend or change arguments . . . if arguments had not been argued before, unless you show some prejudice such as not enough time to respond, I'll allow it." In this particular hearing, where it looked like the parties might reach agreement on an issue, the Judge was amenable to giving the parties more time to reach agreement, and indeed was open to a second Markman day should the parties need it.

On the substance, the Judge noted that he went in the direction of the plaintiff to the extent the defendant was arguing the limitations were means-plus-function or that the claims were indefinite. As to the means-plus-function

arguments, the Judge declined to construe processor claims as means-plus-function, noting, “I am reluctant as a judge to re-write what the inventor wrote or the examiner allowed.”

And, where he didn’t allow further consideration for the parties to reach agreement, the Judge provided the final constructions during the hearing. An order is expected to follow in around three weeks and discovery will open up shortly.

Procedurally, because in this case the Judge was adopting the plaintiff’s constructions, he allowed the defendant to argue first. He also thanked the parties for getting him Markman slides shortly after he provided the preliminary constructions.

As for discovery, the Judge is inclined to open discovery as soon as he issues his Markman rulings or shortly thereafter. To the extent his prior orders set dates for the opening of discovery a week out from Markman, the Judge is flexible to sticking to that date or to any reasonable proposal to which the parties may agree.

When asked about motion practice and whether now would be a good time to file a 101 motion, the Judge responded, “I’ve said pretty publicly, for better or worse until I’m told otherwise, I view a 101 [argument] . . . as really 103 arguments in the end. So my general philosophy is that 101, 102, and 103 motions are better suited later, after discovery, as a motion for summary judgment.” He continued, “But if you think it is best in your client’s interest to file 101 motions early, that is entirely up to you . . . I have absolutely no prejudice on filing 101 motion at any time. But my general philosophy is [a 101 motion is] most appropriately filed as motion for summary judgment later on in the case.”

As for lessons learned, Judge Albright is not just throwing constructions against the wall to see if they stick. He is inclined to stick with his constructions unless a party can clearly identify where the court may have missed something or where the court could make a small modification to improve a construction. (That doesn’t mean you don’t start the hearing by voicing on the record that you disagree with the constructions on which you lost. Always a good idea to preserve your rights for appeal!) The Judge’s practice of virtually opening his courtroom doors to the public not only provides transparency into his decision-making, it also provides ripe and needed training for junior associates or those new to patent law. Also, though the phone format does not allow for verbal feedback from the bench, just as we can learn from our own past hearings, the hearing reinforced to us the need to seek interaction from and “check in” with the bench from time to time. And now, more than ever, pointed and clear arguments and concrete compromise proposals seem to win the day.
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