

# The Federal Circuit

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THE United States Court of Appeals for the Federal Circuit has nationwide jurisdiction over appeals involving international trade, federal contracts, patents, trademarks, certain monetary claims against the U.S. government, such as the Vaccine Injury Compensation Program, and other federal claims. It also has jurisdiction over various administrative agency decisions, including those involving patents and trademarks, federal contracts, and federal personnel.

Because ruling on whether to admit expert testimony is a procedural issue not unique to

patent law, the decisions of district courts on expert testimony are reviewed under the law of the regional circuit court.<sup>1</sup>

## ***Liquid Dynamics Corp. v. Vaughan Co.***<sup>2</sup>

A patent holder sued a manufacturer alleging its patent for a method and apparatus for handling wastewater slurries had been infringed. The trial court in the Northern District of Illinois denied judgment to the manufacturer as a matter of law for non-infringement and other issues resulting in appeal.

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<sup>1</sup> Bose Corp. v. JBL, Inc., 274 F.3d 1354, 1360 (Fed. Cir. 2001).

<sup>2</sup> 449 F.3d 1209 (Fed Cir. 2006).

In its appeal, the patent holder did not challenge the reliability of the expert's computational fluid dynamics studies generally. It challenged the expert for its opinions, showing three ways the application of those studies was flawed factually. The expert admitted his models were not perfect models of the individual tanks at issue but were based on reliable scientific methodology.

In its decision, the court did not reference the 2000 version of Rule 702 and cited Eighth Circuit decisions prior to its adoption to hold that the challenge goes to the weight of the evidence, not its admissibility. In effect, the court held that whether the principles and methods were reliably applied goes to the weight of the testimony to be measured by the jury.

***i4i Limited Partnership v. Microsoft***<sup>3</sup>

Microsoft appealed an infringement judgment and challenged a patent holder's damage expert's methodology to arrive at his damage opinion. The opinion of the patent holder's expert on the reasonable royalty rate which would have resulted through hypothetical negotiations was challenged because the facts used by the expert to determine the

reasonable royalty rate were not relevant to the circumstances in the case.

The court applied Fifth Circuit decisions to find, similar to the court in *Liquid Dynamics*, that "[w]hen the methodology is sound, and the evidence relied upon sufficiently related to the case at hand, disputes about degree of relevance or accuracy (above this minimum threshold) may go to the testimony's weight, but not admissibility."<sup>4</sup>

***Arkansas Game & Fish Commission v. United States***<sup>5</sup>

Arkansas wildlife management areas were flooded annually for seven years by the defendant, damaging trees in those areas, allowing it to seek damages for the taking. At trial, an appraiser for the state based his opinion on his own experiences appraising and observing trees and their mortality rates. The federal government challenged the opinion.

The court noted that determining the value of real estate is not a science and further pointed out that "[t]he government was free to challenge the expert's estimates as unreliable, or to introduce competing evidence as to the mortality rates of the damaged trees and the value of the timber produced from the degraded trees.

<sup>3</sup> 598 F.3d 831 (Fed. Cir. 2010).

<sup>4</sup> *Id.* at 852 (citing *Moore v Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th Cir. 1998)).

<sup>5</sup> 736 F.3d 1364 (Fed. Cir. 2013).

In these circumstances, it was not an abuse of discretion for the trial court to conclude that the government's challenges to the expert's testimony went to the weight of the evidence, not its admissibility, and to allow the expert to testify based on his lengthy experience working in the field.”<sup>6</sup>

***Apple v. Motorola***<sup>7</sup>

This case was part of the smartphone wars between competing patent holders and was tried in Northern District of Illinois before Seventh Circuit Judge Richard Posner. His decision was reversed principally on the basis of the court's finding that Apple's patents were subject to claims limitations.

However, the appellate panel also found, following Seventh Circuit decisions, that a judge “must be cautious not to overstep its gatekeeping role and weigh facts, evaluate the correctness of conclusions, impose its own preferred methodology, or judge credibility, including the credibility of one expert over another. These tasks are solely reserved for the fact finder.”<sup>8</sup>

The court also noted “[t]hat the gatekeeping role of the judge is limited to excluding testimony based on unreliable principles and methods is particularly essential in the context of patent damages. This court has recognized that questions regarding which facts are most relevant or reliable to calculating a reasonable royalty are ‘for the jury.’”<sup>9</sup>

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<sup>6</sup> *Id.* at 1378.

<sup>7</sup> 757 F.3d 1286 (Fed. Cir. 2014).

<sup>8</sup> *Id.* at 1314 (citations omitted).

<sup>9</sup> *Id.* at 1315 (citing *i4i*, 598 F.3d at 856 (“[w]hen the methodology is sound, and the evidence relied upon sufficiently related to the case at hand, disputes about the degree of relevance or accuracy (above this minimum threshold) may go to the testimony's weight, but not its admissibility”).