

Appellate MVP: Morgan Lewis' Ted Cruz

By **Derek Hawkins**

Law360, New York (November 16, 2011, 8:47 PM ET) -- A nuanced legal strategy and attention to outside stakeholders helped Morgan Lewis & Bockius LLP partner Ted Cruz convince the U.S. Supreme Court to adopt a new legal standard for patent infringement this year, one of several victories that earned Cruz a spot on Law360's list of appellate MVPs.

Cruz, who works out of Morgan Lewis' Houston and Washington offices, leads the firm's Supreme Court and appellate practice — a position in which he has specialized in arguing prominent federal and state court appeals.

In one of the most closely watched intellectual property cases this year, Cruz represented SEB SA, a French appliance maker that had alleged a Hong Kong company, Pentalpha Enterprises Ltd., infringed its patent for a popular deep fryer model. SEB claimed Pentalpha, a subsidiary of Global-Tech Appliances Inc., copied all but the cosmetic aspects of the company's deep fryers and that Global Tech had willfully ignored it.

The Federal Circuit ruled in SEB's favor, finding that deliberate indifference to the possibility of infringement was enough to find that Global-Tech had infringed the patent. But when Global-Tech appealed, Cruz said he thought it was unlikely that the Supreme Court would agree with the Federal Circuit's standard.

Cruz, who led the appellate team, proposed an alternative. Addressing concerns among high-tech companies that good-faith research and development could give rise to liability if the court set the standard too low, Cruz argued for an exception that balanced actual knowledge of infringement and willful blindness.

In late May, the Supreme Court ruled 8-1 in SEB's favor, deciding that induced patent infringement requires that a defendant be aware of a patent and allegedly infringing acts, but creating an exception if the defendant is willfully blind on the ground that willful blindness can amount to knowledge.

Cruz said he and his team proposed the willful blindness standard as an exception targeted at "truly bad actors."

"It's a rule that avoids ensnaring innocent conduct," he said. "At the same time, it prevents unscrupulous manufacturers from deliberately copying and stealing U.S. intellectual property and sticking their head in the proverbial sand."

Rather than simply trying to convince the court that it need not worry about over-broad patent liability, Cruz said he tried to reconcile the interests of multiple stakeholders.

The narrative he was able to present was “[commensurate] with the concerns that were animating the court itself,” he said.

In another major win, Cruz was able to slash \$36 million from a punitive damages award against Dentsply International Inc., the country’s premier dental equipment supplier.

Guidance Endodontics LLC alleged that Dentsply and another company had stopped supplying it with one of its key products and created a marketing campaign to run it out of business. A jury found that Dentsply breached a manufacturing agreement and violated unfair practices laws, and awarded Guidance Endodontics \$40 million in punitive damages, on top of more than \$4 million in compensatory damages.

Morgan Lewis was retained following the verdict, and Cruz said he filed a series of post-trial motions contending that the punitive damages award was far too excessive. He pointed to Supreme Court decisions that undercut the 10-to-1 ratio of punitive to compensatory damages in the verdict and argued that the company’s conduct wasn’t severe enough to justify the award.

In May, the U.S. District Court for the District of New Mexico agreed, ruling that Supreme Court precedent required that the punitive and compensatory damages be equal, at \$4 million each.

Cruz also helped secure a precedent-setting victory for AstraZeneca Pharmaceuticals LP in the Eleventh Circuit in March.

Health insurers in three consolidated class actions had alleged that AstraZeneca violated the Racketeer Influenced and Corrupt Organizations Act by fraudulently inducing physicians to prescribe the antipsychotic drug Seroquel for off-label uses. They sought to recover billions of dollars in damages, claiming they paid more than they should have for their enrollees’ medications.

Affirming a lower court’s judgment, the Eleventh Circuit ruled unanimously in AstraZeneca’s favor, holding that plaintiffs must allege that the prescriptions were medically unnecessary or inappropriate. The fact that Seroquel was more expensive than an alternative wasn’t sufficient, the court said.

The decision raised the requirements third-party payers had to fulfill to bring claims against pharmaceutical companies and is expected to affect other class actions around the country.

“I’ve been very fortunate in my practice to be able to focus on litigating high-stakes appeals,” Cruz said. “It’s a tremendous challenge to handle an appeal where the odds are stacked against you and to craft a legal theory that can produce a win.”

--Editing by Cara Salvatore.