

## Chancery Halts Zimmer Investor Claims During Patent Appeal

By **Matt Chiappardi**

*Law360, Wilmington (December 15, 2014, 7:14 PM ET)* -- A Delaware Chancery judge agreed Monday to halt a shareholder derivative suit blaming medical device company Zimmer Holdings Inc.'s board for a more than \$200 million judgment in a patent infringement lawsuit until a Federal Circuit appeal in that litigation has run its course.

During a hearing in Wilmington, Chancellor Andre G. Bouchard granted Zimmer's motion to stay the derivative case until the medical device company's appeal of the outcome of a lawsuit lodged by rival Stryker Corp. in Michigan federal court claiming infringing surgical irrigation patents has been resolved.

In February 2013, a jury found that Zimmer willfully infringed three of Stryker's patents for a battery-powered pulsed lavage device and awarded the company \$70 million in lost profits. Six months later, U.S. District Judge Robert Jonker upped the judgment to \$210 million, granting Stryker's request for enhanced damages. Court records in the Delaware case indicate the figure now sits at \$228.9 million when interest and additional damages are taken into consideration.

Chancellor Bouchard ruled that the litigation before him essentially flowed from the judgment in the patent infringement case and rejected arguments from the suing shareholder that the Federal Circuit's ruling on the appeal would have little effect on the derivative claims against the board.

"The harm at the center of this action is dependent on the outcome of the patent case," the chancellor said from the bench. "I agree with Zimmer that it is appropriate to stay pending the appeal."

Zimmer shareholder James Hays lodged the derivative suit in June. The suit claimed that board members breached their fiduciary duties and had some responsibility for the conduct that led to the patent infringement action and the resulting hundreds of millions of dollars in liability exposure.

Hays' claims are based, in part, on the record of the underlying patent case, trial evidence from which shows that Zimmer's design team was specifically directed to model its orthopedic pulsed lavage device — a handheld combination spray gun and suction tube, used to clean wounds and tissue during surgery — on Stryker's products, according to the investor's original complaint.

The shareholder sent Zimmer's board a presuit demand in late 2013, but the board didn't investigate the claims, according to the lawsuit.

On Monday, Zimmer attorney Marc J. Sonnenfeld of Morgan Lewis & Bockius LLP argued that the board considered the demand premature because the appeal was still pending.

“This is not a situation where the demand has been ignored,” Sonnenfeld told Chancellor Bouchard.

Shareholder attorney Robert B. Weiser of The Weiser Law Firm PC contended that what Zimmer wants is to toll investors' ability to investigate claims until some arbitrary external time period is up, something that runs counter to several decisions from the Delaware Supreme Court.

“The defendant is seeking the exception that would swallow the rule whole,” Weiser said.

The derivative litigation should be allowed to move forward regardless of the state of play for the patent appeal, he said. The federal case turns on whether Zimmer infringed the intellectual property, a different issue than who is responsible internally, Weiser argued.

Weiser added that Zimmer's motion to stay could essentially stymie shareholder claims based on any connected litigation out there. However, Chancellor Bouchard did not agree that Zimmer's request was that broad.

Zimmer already argued in front a three-judge Federal Circuit panel in September, but the panel's decision had not been released into the court docket as of Monday's hearing.

Sonnenfeld said he did not have a read on when an opinion might be coming but estimated it could arrive about three months after the oral arguments.

Zimmer is represented by Colm F. Connolly, Jody C. Barillare, Marc J. Sonnenfeld, Troy S. Brown and Karen Pieslak Pohlmann of Morgan Lewis & Bockius LLP.

Hays is represented by Seth D. Rigrodsky, Brian D. Long, Gina M. Serra and Jeremy J. Riley of Rigrodsky & Long PA, Robert B. Weiser, Brett D. Stecker and Joseph M. Profy of The Weiser Law Firm PC, and Alfred G. Yates Jr. and Gerald L. Rutledge of The Law Office Of Alfred G. Yates Jr. PC.

The instant case is Hays v. Dvorak et al., case number 9768, in the Delaware Court of Chancery.

The patent case is Stryker Corp. et al. v. Zimmer Inc. et al., case number 1:10-cv-01223, in the U.S. District Court for the Western District of Michigan.

--Additional reporting by Jeff Sistrunk. Editing by Kat Laskowski.