

## Pitt's Award Doubled To \$74M For Varian's Willful Infringement

By Django Gold

*Law360, New York (April 25, 2012, 4:45 PM ET)* -- A Pennsylvania federal judge on Wednesday doubled a jury's damages verdict against Varian Medical Systems Inc. to \$74 million after finding that the company had blatantly infringed a cancer-treatment device patent owned by the University of Pittsburgh.

U.S. District Judge Arthur J. Schwab granted Pitt's motions for enhanced damages against Varian, finding that the X-ray imaging device manufacturer was well aware of the validity of the university's radiation therapy patent before it began selling its own competing devices 10 years ago.

Though Varian was well aware that its imaging device violated Pitt's patent, U.S. Patent Number 5,727,554, the company pushed forward with its allegedly infringing product, meriting a doubling of damages, Judge Schwab said.

"The court's finding of infringement ... the jury's finding of willful infringement, and the '554 patent prosecution history all demonstrate that although Varian investigated Pitt's '554 patent, it did not have a reasonable good-faith belief that Pitt's patent was invalid or, if valid, that Varian's devices did not infringe," the judge said.

Pitt sued Varian in 2008, alleging its Real-Time Position Management respiratory gating system infringed a patent that covers an apparatus for turning a radiation treatment beam on and off in time with a patient's breathing.

The '554 patent, titled "Method and apparatus for conformal radiation therapy," which was issued in 1998, describes a system that uses a video camera to monitor patient movement, turning off a radiation beam when a tumor moves out of the beam's path due to breathing and turning it back on when the tumor re-enters the beam's path.

Varian's RPM System is also a video-based system that monitors patient breathing during radiation and turns the beam off and on in time with breathing, though Varian argued its product did not infringe because it does not track markers on a patient's body, as described by the patent, but rather the position of a single point.

However, the court opined otherwise in summary judgment proceedings, finding Varian's RPM products had, in fact, infringed the '554 patent.

Judge Schwab subsequently divided the jury trial into three separate trials before the same jury: one on

the willfulness of Varian's alleged infringement; one on damages; and one on Varian's allegations that the patent was invalid.

The Pennsylvania jury found Varian's infringement was willful in January 2012 and awarded the university \$37 million in damages in February. The jury upheld the validity of the '554 patent earlier this month.

Judge Schwab determined Wednesday that Varian's conduct both within and outside of the litigation had been egregious enough to merit a doubling of the damages — though Pitt had requested in February that they be trebled.

In analyzing the enhancement factors set out by the Federal Circuit's 1992 *Read Corp. v. Portec Inc.* ruling, the judge found that only one aspect of Varian's misconduct — that it had acted not out of malice but rather out of a simple desire for profitability — weighed against enhanced damages.

On the other hand, Judge Schwab found that several of the other *Read* factors called for boosted damages, including the duration of Varian's infringing activity and the fact that the defendant had at several points attempted to delay the trial through gratuitous objections and other tactics.

“Although it has not acted in bad faith, Varian has continually reargued the court's rulings and attempted to delay the litigation with an extensive motion practice,” the judge said.

In addition to doubling the damages verdict, Judge Schwab awarded Pitt prejudgment interest in the amount of 6 percent per year, as well as reasonable attorneys' fees and continuing royalties on Varian's RPM products and accessories at rates assessed by the jury earlier this year.

Counsel for Pitt declined to comment on Wednesday.

A representative for Varian was not immediately available for comment.

Pitt is represented by William P. Quinn Jr., David W. Marston Jr., Elizabeth Stroyd Windsor, John D. Zele and Bradford A. Cangro of Morgan Lewis & Bockius LLP and Arthur H. Stroyd Jr. and William S. Stickman IV of Del Sole Cavanaugh Stroyd LLC.

Varian is represented by William L. Anthony Jr., Matthew H. Poppe, Zheng Liu and M. Leah Somoano of Orrick Herrington & Sutcliffe LLP, Henry M. Sneath, Joseph R. Carnicella and Robert Wagner of Picadio Sneath Miller & Norton PC, and Joe Greco of Beck Ross Bismonte & Finley LLP.

The case is *University of Pittsburgh of the Commonwealth System of Higher Education v. Varian Medical Systems Inc.*, case number 2:08-cv-01307, in the U.S. District Court for the Western District of Pennsylvania.

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