

## Varian Again Loses Bid To Nix Pitt X-Ray Patent Ruling

By Django Gold

*Law360, New York (June 29, 2012, 6:44 PM ET)* -- Varian Medical Systems Inc. on Friday was again denied its bid to have discarded a Pennsylvania federal court's findings that the company infringed a cancer-treatment device patent owned by the University of Pittsburgh in a case that has netted a \$74 million damages verdict for Pitt.

U.S. District Judge Arthur J. Schwab denied Varian's latest motion for judgment as a matter of law in its patent dispute with Pitt over Varian's allegedly infringing X-ray imaging system, finding once more that the court had correctly determined the medical device company's willful infringement of Pitt's patent, as well as the ensuing damages. Judge Schwab also denied Varian's request for a new trial.

"This case has been litigated by skilled attorneys representing both parties," the judge said. "The attorneys have zealously represented their parties' interests during all phases of this protracted litigation. The court has carefully reviewed all of the evidence presented at the three-part trial and rulings that it made during the course of the trial. For the foregoing reasons, the court finds that Varian is not entitled to judgment as a matter of law and there is no valid reason to grant a new trial."

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 patent-in-suit is U.S. Patent Number 5,727,554, issued in 1998 and titled "Method and apparatus for conformal radiation therapy." The patent 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.

When the court found otherwise, ruling in summary judgment proceedings that Varian's RPM products did in fact infringe the '554 patent, Judge Schwab divided the ensuing 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 jury found Varian's infringement was willful in January and awarded the university \$37 million in damages in February. After the patent's validity was upheld, Judge Schwab doubled the damages award to \$74 million after finding that Varian's infringement was blatant.

In denying Varian's newest bid for judgment as a matter of law — its sixth — the judge said Friday that the medical devices company had again failed to demonstrate either that the '554 patent is invalid, the company's infringement was not willful or that damages were incorrectly calculated.

The judge also disagreed that Varian was entitled to a new trial, saying that the court's rulings on jury instructions and certain evidentiary rulings were correct, as well as that the company was not prejudiced by the order in which the individual sections of the three-part trial occurred.

“Varian does not present any argument as to exactly what action should have been taken to ensure that it was not prejudiced because of this alleged 'reverse bifurcation,’” the judge said.

Representatives for the parties were not immediately available for comment on Friday.

The patent-in-suit is U.S. Patent Number 5,727,554.

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.

--Additional reporting by Carolina Bolado, Erin Coe and Ryan Davis. Editing by Andrew Park.