

## Varian Found To Infringe University's Radiation Patent

By **Ryan Davis**

*Law360, New York (January 03, 2012, 2:35 PM ET)* -- A Pennsylvania federal judge ruled Friday that Varian Medical Systems Inc. has infringed a University of Pittsburgh patent for a device used in radiation cancer treatments, setting the stage for a trial this month on whether the infringement was willful.

U.S. District Judge Arthur J. Schwab granted the university's motion for summary judgment on liability and denied Varian's motion for summary judgment that the asserted patent is invalid.

Varian's argument that its product, the Real-time Position Management Respiratory Gating System, known as the RPM system, does not infringe the university's patent "is not convincing, and lacks any proper evidentiary support," the judge wrote.

"This court finds that there is no genuine dispute of material fact that the RPM System satisfies each of the elements" of the key claim, he ruled. "Accordingly, the RPM System indisputably, and as a matter of law, infringes ... the subject patent."

The issue of willfulness will now be the sole subject of a jury trial set to begin on Jan. 23, the judge wrote.

The university sued Varian in 2008, alleging that its product infringes a patent that covers an apparatus for turning on and off a radiation treatment beam in time with a patient's breathing.

The patent describes a system that uses a video camera to monitor patient movement, and turns off the radiation beam when a tumor moves out of the beam's path due to breathing and turns 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, according to the ruling.

The key claim in the university's patent involves determining movement of the patient through digital image signals, including movement associated with breathing, the judge wrote.

Varian maintained that its product does 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.

Judge Schwab was not persuaded, writing that Varian's position "defies logic because there is no meaningful difference" between tracking markers or tracking a single point. As a result, there is no genuine factual dispute that the product infringes, he wrote.

The judge also rejected Varian's argument that the patent is invalid because it does not teach how to detect patient movement, finding that the patent does provide such information.

Additionally, Judge Schwab denied Varian's motion for a determination that its proposed changes to the product would avoid infringement. All of the proposed modifications, he wrote, would still infringe.

Finally, the judge wrote that there is sufficient evidence to allow the issue of willfulness to be put to a jury, including that the university shared its patent applications with Varian, assuming the company to be a trusted business partner.

Those facts "establish an objectively high likelihood that Varian's development and launch of products using the same technology would infringe Pitt's patents," and the issue is best left to a jury, the judge wrote.

Attorneys for the parties could not immediately be reached for comment on the ruling.

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

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 and Joseph R. Carnicella of Picadio Sneath Miller & Norton PC, and Joseph A. Greco of Beck Ross Bismonte & Finley LLP.

The university 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.

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.

--Editing by John Quinn.