

Locke Lord QuickStudy: Back to Basics: Despite Winning the ?Appeal, Failure to Appeal a ?Preliminary Injunction Bond ?Constituted Waiver of Damages ?

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There is no denying the importance of preserving rights for appeal. A recent example of this came about in *Novartis Pharmaceuticals Corp. v Accord Healthcare, Inc. et al.*, Civil Action No. 18-1043 (Memorandum Opinion dated July 9, 2024), when Judge Jordan, sitting by designation in the District of Delaware denied one of the defendants' motion for recovery of \$50 million in damages for failing to appeal the order dismissing a preliminary injunction.

In 2019, Novartis Pharma. Corp. ("Novartis") sued twenty-three drugmakers, including HEC Pharma Co., Ltd. ("HEC"), over infringement of its patent for Gilenya®, an immunosuppressive drug indicated for treating relapsing forms of multiple sclerosis. Novartis successfully moved for a preliminary injunction against HEC and was required to post a \$50 million bond for damages that HEC would incur if the preliminary injunction proved unwarranted. After trial, the lower court issued a permanent injunction and final judgment of no invalidity and infringement. Of procedural significance, the lower court also issued an order extinguishing the preliminary injunction bond. HEC appealed the final judgment of no invalidity and infringement, but unfortunately did not appeal the court's order extinguishing the preliminary injunction bond.

On appeal, the Federal Circuit at first affirmed the judgment of no invalidity and infringement. However, after HEC sought rehearing, the Federal Circuit reversed, finding Novartis's patent invalid. Novartis petitioned the Supreme Court for a writ of certiorari, which was denied, thus making the finding of invalidity final. HEC then moved at the lower court to recover damages under the preliminary injunction bond.

Novartis moved to strike HEC's motion arguing that the court is precluded from reinstating the bond because HEC never appealed the order dismissing the bond, despite appealing the court's finding of no invalidity and infringement. HEC countered by stating the Federal Circuit ultimately found in its favor, so the lower court's order extinguishing the bond never took effect. Judge Jordan sided with Novartis, writing "HEC should have separately appealed the December order extinguishing the bond or amended its October appeal of the judgment to include it." In response to HEC's arguments that the order dismissing the bond could not be decided separately since it was "so closely tied to the final judgment on validity," Judge Jordan says "[t]he order...was a separate final order, entered post-judgment and relying on legal principles aside from the merits of the final judgment...HEC provides no case citation demonstrating that post-judgment bond orders are traditionally non-appealable." As such, Judge Jordan found that the order dismissing the preliminary injunction bond was subject to issue preclusion.

This case provides a good reminder for litigants, including patent litigants where preliminary injunction bonds can be substantial, to follow closely all details of their case and to take appropriate steps to preserve their rights on appeal. Otherwise, they could risk potential waivers. Had HEC timely appealed the lower court's order extinguishing the preliminary injunction bond, they might have obtained \$50 million in damages instead of being barred by issue preclusion.

Locke Lord attorneys can assist you if you have any questions concerning litigation, including patent litigation or preserving issues for appeal.

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