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VERDICTS

Credibility was at issue in 2009's largest verdict

A jury gave Centocor Ortho Biotech $1.67 billion in a patent dispute with Abbott.

BY SHERI QUALTERS

It was during closing arguments in a trial testing who had invented the antibody behind Abbott Laboratories' hugely successful autoimmune drug, Humira. Defense attorney Bill Lee highlighted testimony by a researcher for rival Centocor Ortho Biotech Inc.

The researcher had acknowledged, Lee told the jurors, that unlike Abbott's drug, Centocor's wasn't based on a completely human antibody. "He told you that it was never their intention to make a human antibody," Lee said, according to the trial transcript.

Then it was plaintiffs' attorney Dianne Elderkin's turn to speak, and she pounced.

"I want to point out a few things that Mr. Lee said and what he didn't say," Elderkin told the jury. Lee, she insisted, was quoting the testimony selectively. He'd left out the next part: Was the researcher saying that human antibodies were not part of Centocor's invention?

"No, I'm not saying that," the witness responded.

"So keep in mind credibility when you're back there deliberating, ladies and gentlemen," Elderkin told the jurors.

That attack on Abbott's credibility and case theory may have helped Centocor score a $1.67 billion verdict on June 29. *Centocor Ortho Biotech Inc. v. Abbott Laboratories* represented the largest verdict last year, according to NLJ affiliate VerdictSearch's Top 100 Verdicts of 2009.

AKIN GUMP'S DIANNE ELDERKIN

The Eastern District of Texas jury found that Abbott had infringed in four claims regarding a patent on the antibody developed jointly by Centocor and New York University. NYU granted Centocor an exclusive license under the 2006 patent.

The damages made sense in light of Abbott's billions of dollars in sales of the infringing product, the autoimmune drug Humira, according to Richard A. Sayles of Dallas-based Sayles Werbner, one of the lawyers for the plaintiffs.

"If there was going to be a verdict in that case," Sayles said, "the numbers were going to be high numbers."

In October, U.S. District Judge John Ward threw out the jury's verdict that Abbott's infringement was willful. His final judgment in December awarded Centocor prejudgment interest, which boosted the total to $1.85 billion. Also in December, Centocor filed a separate lawsuit seeking damages for Abbott's infringement since the verdict, along with pre- and post-judgment interest. Abbott notified the U.S. Court of Appeals for the Federal Circuit of its appeal on Dec. 21.

Elderkin declined to comment on the case. She worked at Philadelphia intellectual property boutique Woodcock Washburn during the trial but in February jumped with four colleagues to Akin Gump Strauss Hauer & Feld's Philadelphia office. Lee, co-managing partner of Wilmer Cutler Pickering Hale and Dorr, declined comment at his client's request. Abbott is pleased that it "can now move forward to the appeals process," company spokesman Scott Stoffel said.

Stoffel said Centocor's parent, Johnson & Johnson, "did not start working with human antibodies until years after Abbott's groundbreaking discovery." He said that Abbott discovered Humira in 1995, seven years before Abbott applied for its patent. "We believe this verdict is out of step with the law, the facts and the scope of prior patent damage awards," Stoffel said. "Abbott remains confident that we will prevail on appeal."

A QUESTION OF TIMING

Humira and Centocor's Remicade treat autoimmune disorders like rheu-

matoid arthritis by neutralizing a protein called tumor necrosis factor, an immune system protein that plays a role in inflammation.

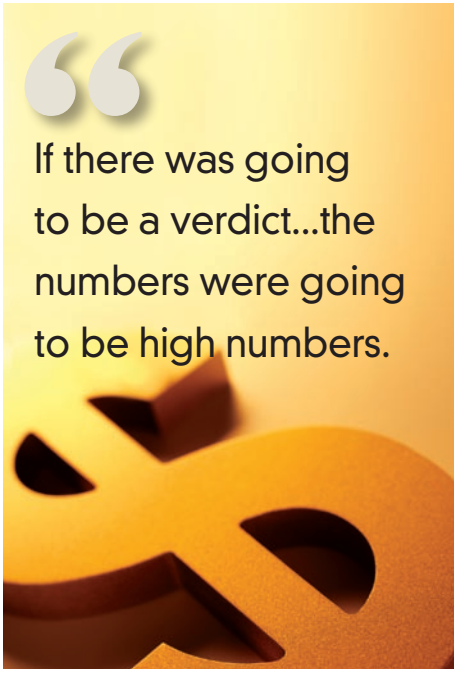
Centocor and NYU filed the patent at issue in 2002 and the patent was granted in 2006. Additionally, Centocor claimed that a 1994 predecessor patent application contained a written description of the human antibodies in dispute plus so-called "enabling language" that would allow someone skilled in the technology to make and use the invention. Abbott insisted that the 1994 application lacked sufficient enabling language and that the U.S. Patent and Trademark Office should not have issued Centocor's patent because Abbott's own patent application in 1996 anticipated Centocor's claims. Abbott received its Humira patent in 2000.

Several experienced patent trial lawyers not directly involved in the case pointed to a number of factors that likely affected the outcome. Several noted Elderkin's observation during closing arguments that Abbott had earned $11 billion on the infringing product. Under those circumstances, Elderkin told the jury, Centocor's request for $2.1 billion was "fair and reasonable." The jury ultimately gave Centocor all of its nearly $1.2 billion in lost profits and more than $504 million in royalties—about half of what Centocor asked for in lost royalties.

Abbott's apparent strategic choice to assert its lack of liability for infringement, rather than suggest a more reasonable figure, also may have been a factor, said Michael Albert, chairman of the litigation group at Boston intellectual property shop Wolf, Greenfield & Sacks. He noted that Lee repeated Centocor's damages number to the jury while arguing that the company was overreaching. "It seems to have backfired in that the jury remembered how much money was being asked for and doesn't seem to have agreed the plaintiff didn't have a strong case."

Ultimately, the jurors appeared to agree with the simple notion that Abbott should pay because Centocor and NYU came up with the invention first. They rejected Abbott's arguments that it was the first to produce a fully human antibody and that Centocor erroneously claimed that its product was superior.

The relative merits of the competing products are, "legally, not an important distinction," Sayles said. "You have to compare the accused product to the elements in the claims." The jury "correctly analyzed [Abbott's] accused product Humira to the elements in the patent claim. That's what went on in the case."



Not surprisingly, each side attacked the credibility of the other side's testimony and experts. For example, Abbott argued that it hadn't realized it might face an infringement suit until Centocor and NYU filed suit in 2007. During his portion of the closing arguments, Sayles pointed out that a former Abbott in-house lawyer had testified that he knew in February 2006 that the company likely would be sued when the patent issued. He produced an internal Abbott document spelling out that Abbott planned to adopt "an aggressive IP strategy in risk management"—unless an opposing company had litigation resources.

"You know what that says, folks?," Sayles asked the jury. "That says, 'We'll play hardball to get the drugs we want.' "

And then there was the accusation of selective quotation.

Said Moore: "There's nothing worse than when you give half a quote [to the jury] and the other person can come back and read the whole quote."

Albert agreed that credibility "is enormously important in jury cases," particularly highly technical patent cases.

"The jury may not have any independent way of knowing who's right on these technical questions," Albert said. "They may largely base their decision on who seems the most believable."

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