



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Ericsson Avoids New Damages Trial After Judge Backtracks

By Ryan Boysen

Law360 (May 10, 2018, 10:36 PM EDT) -- The federal judge overseeing Ericsson Inc.'s cell phone patent infringement case against TCL Communication Technology Holdings Inc. has reversed course, reinstating Ericsson's previously stricken \$75 million award and topping it off with \$35 million in enhanced damages and interest.

In an order filed Thursday, Magistrate Judge Roy S. Payne of Texas' Eastern District said he jumped the gun by accepting TCL's arguments as to why the \$75 million figure was too high and **ordering a new trial on damages** in March.

TCL, a Chinese cell phone maker and rival of Ericsson, **had argued** that the \$75 million award was reached through a damages model put forth by Ericsson that was deeply flawed. The model, TCL said, required jurors to add up damages for products that aren't even "currently sold" or will only be "launched a year from now" and weren't at issue in the case.

Judge Payne initially agreed, crediting TCL's argument that the Federal Circuit case *Cardiac Pacemakers v. St. Jude Medical* mandates that damages be available only for instances of infringement tied to actual, completed products.

But now, after reading over Ericsson's counterarguments, Judge Payne said TCL had overstated the extent to which the case law was on its side, and he told the company that it had plenty of chances to poke holes in the damages model at trial.

"TCL had every opportunity to illuminate the flaw, but the jury agreed with Ericsson, and it was the jury's province to make that decision," Judge Payne said. "Daubert should not be used as camouflage to invade the jury's province, and it is upon that basis the court reconsiders its prior order."

Daubert refers to the landmark 1993 Supreme Court case *Daubert v. Merrell Dow Pharmaceuticals*, which set the precedent that's used to determine whether or not expert testimony is admissible.

TCL had argued that Ericsson's damages model was so flawed that it should have been ruled inadmissible. Judge Payne had initially been convinced, but in Thursday's order he said that on second thought he'd been wrong, noting that the Fifth Circuit is "especially deferential to a jury verdict."

"Eight jurors unanimously found that TCL willfully infringed [Ericsson's patent], and awarded \$75 million in damages," Judge Payne said. "While the court previously found Ericsson's damages theory unreliable under Daubert, the flaw in the theory should have gone to the weight of evidence, not its admissibility."

TCL had also cited the fact that Ericsson initially asked for a whopping \$245 million in damages to justify its bid for a new trial on damages, arguing that figure was impossible to arrive at without

lumping noninfringing devices into the damages calculations.

TCL also called the high figure “prejudicial,” since it planted a large number in the jury’s mind that wasn’t based on allowable damages.

In Thursday’s order however, Judge Payne said that he “fails to see why” the figure would have that effect.

If TCL is right, he said, the \$245 million figure “should have been fertile ground for TCL to explore on cross-examination, and in fact, should have worked to TCL’s advantage in discrediting” Ericsson’s damages theory.

“TCL failed to seize on the opportunity, and in any event, the reduced \$75 million assessment is an indication the jury was not swayed by Ericsson’s initial high demand,” Judge Payne wrote.

The judge said he would enhance the \$75 million damages award by \$25 million to deter future infringement, and that he would award prejudgment interest at the prime rate, which works out to roughly \$10 million.

Ericsson filed the instant suit in early 2015, claiming that TCL had infringed five of its patents. The suit prompted TCL to seek invalidation of each of the patents at the PTAB, and the board granted inter partes review of each of them. However, only four were invalidated, leaving just one at issue in the infringement case.

Neither party responded Thursday to requests for comment.

The patent-in-suit is U.S. Patent Number 7,149,510.

TCL is represented by Bradford Cangro, Winstol Carter Jr., Adam Allgood, Jacob Snodgrass, Michael Lyons and Michael Carr of Morgan Lewis & Bockius LLP.

Ericsson is represented by Theodore Stevenson III, Nicholas Mathews, Warren Lipschitz, Mitchell Sibley, Samuel Baxter and Laurie Fitzgerald of McKool Smith PC.

The case is Ericsson Inc. et al. v. TCL Communication Technology Holdings Ltd. et al., case number 2:15-cv-00011, in the U.S. District Court for the Eastern District of Texas.

--Additional reporting by Cara Salvatore and Steven Trader. Editing by Adam LoBelia.