

High Court Skips Amgen Unit's Arthrex Arguments In IP Case

By **Tiffany Hu**

Law360 (June 21, 2021, 5:37 PM EDT) -- The U.S. Supreme Court refused Monday to review whether an Amgen Inc. unit's patent on treating inflammatory disorders was improperly struck down, despite arguments that the invalidation was decided by unconstitutionally appointed judges under the Arthrex ruling.

On the same day the justices issued a ruling in the Arthrex case, they declined a petition for certiorari filed by Amgen's Immunex Corp., in which it asked the justices to take up its appeal of the Federal Circuit's decision affirming the PTAB's invalidation of its patent that was challenged by Sanofi and Regeneron in the companies' legal battle.

Immunex had tried to get a new hearing under the Federal Circuit's Arthrex ruling, which held that PTAB judges are unconstitutionally appointed, but the appeals court said in a footnote that the company forfeited the appointments clause challenge by failing to raise it in its opening brief. On Monday, the Supreme Court ruled in the Arthrex case that administrative patent judges are unconstitutionally appointed but that giving the U.S. Patent and Trademark Office's director more control over their rulings will correct the problem.

In its petition, Immunex said that the Federal Circuit has "repeatedly refused" to apply Arthrex to cases like its own, and warned the high court that affirming Arthrex "would be so profound and sharp as to have a far greater impact than the Federal Circuit originally envisioned."

"[I]f this court further reverses the appellate court's severance remedy, as Arthrex has urged, and holds that the constitutional defect is fixable only by Congress, then the director of the patent office would no longer have the authority ... to issue the certificate finally revoking Immunex's patent," the company wrote. "The resulting significant change in the law would vitiate the court of appeal's prior forfeiture rule."

Sanofi, for its part, urged the justices to reject Immunex's "attempts to manufacture a cumbersome workaround" by arguing the impact of affirming Arthrex, saying that Immunex already forfeited its Arthrex challenge.

"This transparent effort to circumvent Immunex's forfeiture likewise provides no basis for this court to intervene," Sanofi wrote in an opposition brief.

Counsel for the parties did not immediately return requests for comment Monday.

The court's Arthrex opinion, written by Chief Justice John Roberts, on Monday severed the section of the Patent Act that made PTAB decisions reviewable only by a panel of judges and instead gave the director single-handed authority to reverse panel rulings.

"The structure of the PTO and the governing constitutional principles chart a clear course: decisions by APJs must be subject to review by the director," the chief justice wrote.

Also on Monday, the justices rejected a petition from Wi-Lan arguing that it should get a rehearing under Arthrex on the PTAB's decision invalidating its patent relating to preallocated access codes sent to wireless devices.

Immunex is represented by Eldora L. Ellison and Jon Wright of Sterne Kessler Goldstein & Fox PLLC.

Sanofi is represented by George W. Hicks Jr., Nathan S. Mammen and Noah Frank of Kirkland & Ellis LLP and Lauren L. Fornarotto and John F. Garvish II of McKool Smith PC.

The case is Immunex Corp. v. Sanofi-Aventis US LLC et al., case number 20-1285, before the U.S. Supreme Court. The Wi-Lan case is Wi-Lan Inc v. Hirshfeld, case number 20-1261, also before the U.S. Supreme Court.

--Editing by Jill Coffey.