

# GIBSON DUNN

Appellate & Constitutional Law and  
Intellectual Property Update

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## Federal Circuit Update

This edition of Gibson Dunn's Federal Circuit Update for July summarizes the current status of petitions pending before the Supreme Court and recent Federal Circuit decisions concerning obviousness, prosecution history estoppel, interference estoppel, and Federal Circuit jurisdiction.

## Federal Circuit News

### **Noteworthy Petitions for a Writ of Certiorari:**

There was one potentially impactful petition filed before the Supreme Court in July 2025:

- [\*\*\*D R Burton Healthcare, LLC v. Trudell Medical International Inc.\*\*\*](#) (US No. 25-17): The question presented is: "Whether a district court's order changing the time to trial in its case management order from at least 326 days to 146 days, and its time for completion of all discovery (including expert discovery) from 231 days to 108 days, constitutes a fair legal procedure under the due process clause of the Fifth Amendment?" The respondent waived its right to file a response. The Court will consider the petition at its September 29, 2025 conference.

We provide an update below of the petitions pending before the Supreme Court, which were summarized in our [June 2025 update](#):

- In ***Gesture Technology Partners, LLC v. Unified Patents, LLC*** (US No. 24-1281), after one of the respondents waived its right to respond, the Court requested a response. The response is due September 4, 2025.
- In ***Purdue Pharma L.P. v. Accord Healthcare, Inc.*** (US No. 24-1132), the respondent filed its response brief on June 2, 2025, and the petitioners filed a reply brief on June 17, 2025. The Court will consider the petition at its September 29, 2025 conference.

#### **Other Federal Circuit News:**

- ***Release of Materials in Ongoing Judicial Investigation.*** In the ongoing proceeding by the Judicial Council of the Federal Circuit under the Judicial Conduct and Disability Act and the implementing Rules involving Judge Pauline Newman, Judge Newman requested additional materials be released. These additional materials are available [here](#).
- ***Boston Session in October 2025.*** The Federal Circuit announced that it intends to sit in and around Boston, Massachusetts as part of its October 2025 session [here](#).

## Upcoming Oral Argument Calendar

The list of upcoming arguments at the Federal Circuit is available on the court's [website](#).

## Key Case Summaries (July 2025)

***Shockwave Medical, Inc. v. Cardiovascular Systems, Inc.***, No. 23-1864, 23-1940 (Fed. Cir. July 14, 2025): Cardiovascular Systems, Inc. (CSI) filed an *inter partes* review (IPR) petition against Shockwave's patent directed to the treatment of plaque buildup in blood vessels with shockwave pulses. The Patent Trial and Appeal Board (Board) determined that all the challenged claims except one were unpatentable as obvious, relying in part on applicant admitted prior art (AAPA) as evidence of background knowledge in the art. Shockwave appealed the Board's final written decision on the claims that were unpatentable, and CSI cross-appealed on the one claim that was not.

The Federal Circuit (Dyk, J., joined by Lourie and Cunningham, JJ.) [affirmed Shockwave's appeal and reversed CSI's cross-appeal](#). The Court held that the Board did not improperly rely on AAPA in concluding that the claims would have been obvious, because AAPA was properly used as evidence of general background knowledge to show that missing claim limitations were known in the art and not as a basis for any of the obviousness grounds.

***Colibri Heart Valve LLC v. Medtronic CoreValve, LLC***, No. 23-2153 (Fed. Cir. July 18, 2025): Colibri filed suit against Medtronic, alleging induced infringement of Colibri's patent directed to a method for use in implanting a replacement heart valve. The asserted independent claim recites "partially deploying a distal portion of the replacement heart valve device within the patient **by**

**pushing out** the pusher member from the moveable sheath to expose the distal portion of the replacement heart valve device.” During prosecution, Colibri had pursued a second independent claim (claim 39) that included “partially deploying the replacement heart valve device within the patient **by retracting** the moveable sheath to expose a portion of the replacement heart valve device.” However, Colibri cancelled claim 39 in response to the examiner’s rejection of the claim for lack of written description. At trial, Colibri dropped its literal infringement claim and instead pursued a doctrine of equivalents theory that Medtronic’s partial-deployment method, which **retracts** a moveable sheath to deploy the heart valve, was substantially the same as **pushing out** the replacement heart valve as required by the asserted claim. The jury rendered a verdict of infringement. Medtronic sought judgment as a matter of law, arguing that prosecution history estoppel barred Colibri’s doctrine of equivalents argument because Colibri had cancelled the claim including the “retracting” step during prosecution. The district court denied Medtronic’s motion.

The Federal Circuit (Taranto, J., joined by Hughes and Stoll, JJ.) [reversed](#). The Federal Circuit held that Colibri’s cancelling of claim 39 was a narrowing amendment giving rise to prosecution history estoppel and rejected the district court’s holding that estoppel did not apply because Colibri had not amended any claims to exclude the accused equivalent. The Court explained that narrowing for purposes of estoppel can exist not only when a single claim’s terms are amended but also when a closely related claim involving intertwined terminology is cancelled such that its cancellation necessarily communicates that the scope of the other claim has narrowed. The Court determined such narrowing existed here, and thus a skilled artisan would have understood that the subject matter of claim 39 was being surrendered in order to obtain allowance of the closely related remaining claims that included the pushing step.

**IGT v. Zynga Inc.**, No. 23-2262 (Fed. Cir. July 22, 2025): IGT owns a patent directed to game playing services such as slot machines and video poker machines that securely communicates with devices over the Internet. IGT’s patent issued from an application it filed in 2002. In 2003, Zynga filed a patent application of its own, which included claims copied from IGT’s application. In 2010, the Board declared an interference between the IGT application and the Zynga application. In 2014, the Board granted judgment in IGT’s favor finding that Zynga’s application lacked adequate written description support, and therefore, did not reach the additional issue raised by Zynga of whether the claims were unpatentable as obvious. In 2021, IGT sued Zynga for infringement of its patent, and Zynga filed an IPR challenging certain claims as obvious. In response, IGT argued that the Board should deny institution of Zynga’s petition because Zynga was barred from raising its obviousness challenge based on interference estoppel under 37 C.F.R. § 41.127(a)(1). The Board rejected IGT’s interference estoppel argument because the interference proceedings were terminated based on a threshold issue of lack of adequate written description, and thus, the Board never reached the obviousness issue. IGT petitioned for Director review, and the Director affirmed the Board’s conclusion.

The Federal Circuit (Taranto, J. joined by Clevenger and Hughes, JJ.) [affirmed](#). The Court held that the Board’s determination regarding whether interference estoppel bars institution of Zynga’s IPR petition is within the general unreviewability principle under 35 U.S.C. § 314, which states that institution decisions are final and nonappealable. While there might be exceptions to the general rule of unreviewability “where the agency engaged in blatant violations of legal constraints,” the Court found that did not apply in this case. Indeed, the Board and Director provided sufficient grounds for not applying interference estoppel, including that the interference

was terminated on a threshold issue of written description.

***Acorda Therapeutics, Inc. v. Alkermes PLC***, No. 23-2374 (Fed. Cir. July 25, 2025): Acorda develops Ampyra®, a drug used to treat multiple sclerosis. Alkermes owns the now-expired patent that claimed the active ingredient in Ampyra. Acorda and Alkermes entered into an agreement under which Alkermes licensed its patent to Acorda, who supplied the active ingredient, in exchange for royalty payments. The patent expired in July 2018, but Acorda continued to make royalty payments without protest until July 2020, at which point it made payments but under formal protest. Acorda filed a demand in arbitration seeking recoupment of the royalty payments made after the patent expired in 2018, but the Tribunal only awarded Acorda the payments that it made under protest starting from July 2020. Acorda then filed suit in district court requesting modification of the arbitral award. The district court declined to modify the award.

The Federal Circuit (Taranto, J., joined by Hughes and Stark, JJ.) [transferred the appeal to the Second Circuit](#). The Court determined that it lacked jurisdiction over the appeal because there was no patent-law cause of action. Acorda's case sought modification of the arbitral award under 9 U.S.C. § 207. Acorda had presented two arguments regarding manifest error by the Tribunal, but only one, based on *Brulotte*, rested on federal patent law. Acorda's second argument was based on *Kaiser Steel*, which did not rely on patent law, and therefore provided a way for the district court to decide the case without applying patent law. Thus, because an issue of patent law was not necessarily raised, the Court concluded that it lacked jurisdiction.

**The following Gibson Dunn lawyers assisted in preparing this update: Blaine Evanson, Jaysen Chung, Audrey Yang, Hannah Bedard, and Michelle Zhu.**

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Federal Circuit. Please contact the Gibson Dunn lawyer with whom you usually work, any leader or member of the firm's Appellate and Constitutional Law or Intellectual Property practice groups, or the following authors:

Blaine H. Evanson – Orange County (+1 949.451.3805, [bevanson@gibsondunn.com](mailto:bevanson@gibsondunn.com))  
Audrey Yang – Dallas (+1 214.698.3215, [ayang@gibsondunn.com](mailto:ayang@gibsondunn.com))

**Appellate and Constitutional Law:**

Thomas H. Dupree Jr. – Washington, D.C. (+1 202.955.8547, [tdupree@gibsondunn.com](mailto:tdupree@gibsondunn.com))  
Allyson N. Ho – Dallas (+1 214.698.3233, [aho@gibsondunn.com](mailto:aho@gibsondunn.com))  
Julian W. Poon – Los Angeles (+ 213.229.7758, [jpoon@gibsondunn.com](mailto:jpoon@gibsondunn.com))

**Intellectual Property:**

Kate Dominguez – New York (+1 212.351.2338, [kdominguez@gibsondunn.com](mailto:kdominguez@gibsondunn.com))

Josh Krevitt – New York (+1 212.351.4000, [jkrevitt@gibsondunn.com](mailto:jkrevitt@gibsondunn.com))

Jane M. Love, Ph.D. – New York (+1 212.351.3922, [jlove@gibsondunn.com](mailto:jlove@gibsondunn.com))

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