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Federal Circuit Update

This edition of Gibson Dunn's Federal Circuit Update for August summarizes the current status of petitions pending before the Supreme Court, en banc activities before the Federal Circuit, and recent Federal Circuit decisions concerning claim construction, patent eligibility, and derivation proceedings under the America Invents Act (AIA).

Federal Circuit News

Noteworthy Petitions for a Writ of Certiorari:

There were a couple potentially impactful petitions filed before the Supreme Court in August 2025:

- [**Lowe v. ShieldMark, Inc.**](#) (US No. 25-169): The questions presented are: “1. Whether a district court, after first deciding it lacks subject matter jurisdiction and dismissing with prejudice a cause of action, retains the power to declare an ‘alternative’ decision on the merits despite the apparent ‘advisory’ character of any such ‘alternative’ decision. Whether a court of appeals has the power to affirm a decision of a district court issued ‘in the alternative’ after that district court first decided it lacked subject matter jurisdiction to hear the cause of action on the merits.” The respondent waived its right to file a response. The Court will consider the petition at its September 29, 2025 conference.

- [*J. Reynolds Vapor Co. v. Altria Client Services LLC*](#) (US No. 25-158): The questions presented are: “1. Does the Federal Circuit’s judicially created ‘built-in apportionment’ exception, which allows patent owners to use unrelated prior licenses to prove damages without providing ‘evidence tending to separate or apportion’ the patent’s contribution, violate *Garretson v. Clark*’s requirement that apportionment ‘must in every case’ be shown? 2. Alternatively, in light of the Federal Circuit’s intervening en banc decision in *EcoFactor, Inc. v. Google LLC*, . . . should the Court grant the petition, vacate the judgment, and remand for application of that precedent . . . ?” 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 [July 2025 update](#):

- The Court will consider the petitions in ***D R Burton Healthcare, LLC v. Trudell Medical International Inc.*** (US No. 25-17) and ***Purdue Pharma L.P. v. Accord Healthcare, Inc.*** (US No. 24-1132) at its September 29, 2025 conference.
- 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 26, 2025.

Federal Circuit En Banc Activity:

Kroy IP Holdings, LLC v. Groupon, Inc., No. 23-1359 (Fed. Cir. Aug. 1, 2025): The summary of the original panel opinion is available in our [February 2025 update](#). As relevant here, the Court had held that a decision of invalidity from the Patent Trial and Appeal Board (Board) did not collaterally estop the patentee (Kroy) from asserting unadjudicated claims of related patents in a parallel district court litigation due to the different evidentiary standards in the two forums.

The en banc Federal Circuit [denied the petition for rehearing en banc](#). Chief Judge Moore joined by Judge Stoll concurred in the denial for rehearing en banc, explaining that the Supreme Court has consistently reprimanded the Federal Circuit for establishing patent-specific rules for well-established principles, and collateral estoppel is a well-established doctrine. Because the standard of review before the Board for invalidity is preponderance of the evidence, whereas the district court requires clear and convincing evidence, collateral estoppel does not apply because of the differing standard of proof. And “[p]olicy implications cannot override the desire for uniformity in the application of law across different subject matters.”

Judge Dyk joined by Judge Hughes dissented from the denial for rehearing en banc, reasoning that not applying collateral estoppel would undermine the *inter partes* review (IPR) procedures as set forth in the AIA. Indeed, one of the central purposes of the AIA was to provide a “more efficient and less expensive alternative to costly district court invalidity litigation.” These congressional objectives would not be achieved if IPR final decisions affirmed by this Court were not given preclusive effect in district court.

V.O.S. Selections, Inc. v. Trump, No. 25-1812 (Fed. Cir. Aug. 29, 2025): Under the International Emergency Economic Powers Act (IEEPA), President Trump imposed various tariffs to address (1) a “national emergency of trafficking opioids into the country” and (2) “an unusual and extraordinary threat to national security” posed by the “lack of reciprocity in bilateral trade relationships.” Five small businesses challenged these orders before the Court of International Trade (CIT). The CIT held that the tariffs exceeded the President’s authority under the IEEPA and permanently enjoined the Government from imposing those tariffs.

The en banc Federal Circuit (per curiam) [affirmed](#). The Court held that the IEEPA did not give the President the authority to impose the tariffs he ordered, and the Government’s reading of the term “regulate . . . importation” contained in the statute was too broad. Judge Cunningham joined by Judges Lourie, Reyna, and Stark filed additional views concluding that the IEEPA does not authorize the President to impose *any* tariffs and that the Government’s interpretation of “regulate” is too expansive and not supported by the plain text of the statute.

Judge Taranto joined by Chief Judge Moore and Judges Prost and Chen dissented, stating that the IEEPA’s language authorizes tariffs to regulate importation and “embodies an eyes-open congressional grant of broad emergency authority in this foreign-affairs realm.”

Other Federal Circuit News:

- ***Release of Materials in 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](#).

Upcoming Oral Argument Calendar

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

Key Case Summaries (August 2025)

FMC Corp. v. Sharda USA, LLC, No. 24-2335 (Fed. Cir. Aug. 1, 2025): FMC sued Sharda for infringing two of its patents directed to insecticide and miticide compositions and sought a preliminary injunction against Sharda. The district court granted the preliminary injunction, determining that Sharda failed to show that the claims were anticipated or rendered obvious by the prior art. This conclusion was based in part on the construction of the term “composition,” which the district court had construed to have a stability requirement and to exclude unstable compositions. In support of this construction, the district court reasoned that the provisional application to which the patents claim priority and another related patent in the family distinguish the prior art based on the “stability” of the composition.

The Federal Circuit (Chen, J., joined by Moore, C.J., and Barnett, J. (district judge sitting by designation)) [vacated and remanded](#). The Court held the district court erred by relying on the provisional application and related patent to impose a stability requirement in its construction of “composition.” The Court explained that the common specification of the asserted patents had removed all references to the “stability” of the claimed composition that had been present in the provisional application and related patent. The Court therefore concluded that a skilled artisan would not understand that “composition” as claimed in the asserted patents would cover only stable formulations in light of such deletions. Because the district court’s rejection of Sharda’s anticipation and obviousness arguments was premised on its incorrect claim construction, the Court remanded with instructions for the district court to consider those arguments under the plain and ordinary meaning of “composition.”

PowerBlock Holdings, Inc. v. iFit, Inc., No. 24-1177 (Fed. Cir. Aug. 11, 2025): PowerBlock sued iFit for infringing its patent that relates to a system for selecting and adjusting the weight of “selectorized” dumbbells using an electric motor and a movable selector element. iFit moved to dismiss, arguing that the claims were patent ineligible under 35 U.S.C. § 101. The district court granted iFit’s motion as to all but one of the claims, holding in part that the claims were directed to the abstract idea of automated weight stacking. The parties stipulated to dismissal of the remaining eligible claim.

The Federal Circuit (Stoll, J., joined by Taranto and Scarsi (district judge sitting by designation), JJ.) [reversed](#). The Court held that the district court erred in its *Alice* step one analysis by concluding that the claims preempted all methods of automated weight stacking. The Court reasoned that although the claims were broad, they recited “meaningful limitations” that provided a patent-eligible “specific implementation” of an automated weight stacking system, including selectorized dumbbells, an electric motor, and a movable selector coupled to one another.

Global Health Solutions LLC v. Selner, No. 23-2009 (Fed. Cir. Aug. 26, 2025): Selner filed a patent application for a method of preparing a wound treatment ointment without emulsifiers, which can irritate a patient’s skin. Global Health Solutions (GHS) filed an application for the same invention shortly thereafter. GHS then filed a petition for an AIA derivation proceeding against Selner, alleging that Selner was not the true inventor because GHS’s founder conceived of the invention before Selner and communicated it to Selner. The Board concluded that Selner had conceived of the invention first and therefore could not have derived it from GHS’s founder.

The Federal Circuit (Stark, J., joined by Stoll and Goldberg (district judge sitting by designation), JJ.) [affirmed](#). The Court explained that in a derivation proceeding, an inventor may obtain a patent under the AIA despite filing the application second, if they can prove that the first filer derived the invention from them. While pre-AIA derivation proceedings focused on comparing the dates of conception, under the AIA, which moved the United States to a first-to-file system, the Court held that a petitioner must now “show (i) conception of the claimed invention, and (ii) communication of the conceived invention to the respondent prior to respondent’s *filing* of that patent application.” In turn, a respondent can “overcome the petitioner’s showing by proving independent conception prior to having received the relevant communication from the

petitioner.” The Court determined that the Board erroneously focused on whether Selner was the first-to-invent, which was the derivation inquiry for pre-AIA interference proceedings. However, the Court concluded that the error was harmless because the Board indirectly determined that Selner had independently conceived of the invention and therefore did not derive it from GHS’s founder.

The following Gibson Dunn lawyers assisted in preparing this update: Blaine Evanson, Jaysen Chung, Audrey Yang, Julia Tabat, 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:

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