



District Court Excludes Expert's Infringement Opinion As Based On Rejected Claim Construction

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Sprint moved to exclude 2Way's expert's opinion on literal infringement of one claim (claim 6) because the "opinion centered on an interpretation of claim construction that [the] court later rejected." 2Way did not contest this point, instead arguing that the court should "consider [the expert's] report as a whole since that report contained sufficient information in the analysis of claim 1 to provide the basis ... for a literal infringement theory of claim 6." The court rejected this argument, stressing the fundamental unfairness of "forc[ing] another party to anticipate all possible arguments that an expert may proffer at trial by assembling disjunctive statements scattered throughout his 2,429 page report."

The court found that allowing this "new" infringement opinion would prejudice Sprint, even though Sprint's own expert had foreseen the "potential opinion" and offered a brief rebuttal. Although Sprint was "not surprised" by the new opinion, Sprint did not have the opportunity to fully explore it. In the end, the court excluded the new opinion—even though it was "not willfully withheld or in bad faith"—based on "the prejudice that Sprint would experience, combined with Sprint's inability to cure that prejudice and the likelihood of postponing trial," which was four months away.

Judge Mahan's exclusion order serves a valuable reminder: if your expert renders an opinion before claim construction, make sure to have the expert review (and update, if necessary) his or her report to account for the court's interpretation of the claims.

2Way Computing, Inc. v. Sprint Solutions, Inc., No. 2:11-CV-12 JCM, 2015 WL 1932173 (D. Nev. Apr. 28, 2015) (Mahan, J.).

Categories

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