



Intellectual Property Alert

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U.S. Supreme Court Holds "Willful Blindness" Is Sufficient for Inducement of Patent Infringement

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A patent can be infringed either directly (35 USC § 271 (a)) or indirectly (35 U.S.C. §§ 271(b) and (c)). Direct infringement does not require knowledge of the patent or any intent to infringe, but indirect infringement under 35 USC § 271(b) occurs when one actively induces the infringement of a patent by encouraging, aiding, or otherwise causing another person or entity to infringe a patent. While indirect infringement can only arise when the accused indirect infringer has at least some knowledge of the patent and intent to engage in infringing activity, it has not been clear whether a party can be liable for inducing infringement if it has no actual knowledge of the patent. The Supreme Court has now answered this question, holding that in some cases actual knowledge of the patent is *not* required to find inducement of infringement if the inducer is willfully blind to the existence of the patent. The *Global-Tech* majority held that one who "actively induces infringement of a patent" under 35 U.S.C. § 271(b) must *know* that the induced acts constitute patent infringement. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. ____ (2011) (emphasis added). But actual knowledge is not required. An eight member majority agreed that "willful blindness" is enough. Under the standard articulated by the Court, the defendant must (1) subjectively believe that there is a high probability that a fact exists and (2) *take deliberate actions to avoid learning of that fact*. In adopting the willful blindness standard, the Supreme Court rejected the Federal Circuit's finding that "deliberate disregard" of a known risk that a protective patent exists was sufficient to meet the knowledge requirement.

Under the new rule in *Global-Tech*, one who is "willfully blind" *takes deliberate action* to avoid confirming a high probability of wrongdoing. It is one "who can *almost be said to have actually known* the critical facts." Thus, mere knowledge of a substantial risk (reckless disregard) or the failure to recognize the risk where it should have been recognized (negligence) is not enough. Instead, "*active efforts*" are required by the accused inducer of infringement *to avoid knowing* about the infringing nature of the activities.

The Court found ample evidence on the record that Global-Tech's wholly owned subsidiary, Pentalpha, acted with willful blindness regarding the existence of SEB's patent. At issue was a patent covering the design of SEB's cool-touch fryer, a deep fryer for home use having external surfaces that remain cool to the touch. SEB competitor Sunbeam asked Pentalpha to supply deep fryers for sale in the U.S. having certain specifications. Pentalpha's belief that the cool-touch fryer represented innovative technology that would be valuable in the U.S. market was evidenced by its decision to copy all but its cosmetic features. The copying of an overseas model of SEB's fryer was also noted by the Court as evidencing willful blindness because Pentalpha's CEO, John Sham, was aware that products made for overseas markets usually do not bear U.S. patent markings. And while Pentalpha sought the opinion of patent counsel regarding its freedom to operate, the Court found it "telling" that the attorney was not informed that the product being evaluated was "simply a knockoff" of the cool-touch

fryer. The Court went further, stating that "we cannot fathom what motive Sham could have had for withholding this information other than to manufacture a claim of plausible deniability in the event that his company was later accused of patent infringement." The Court did not decide whether more than willful blindness is required with respect to the induced acts themselves because there was no dispute that Pentalpha knew its customers were selling the infringing product in the U.S.

In dissent, Justice Kennedy agreed with the majority that knowledge is required for induced infringement under Section 271(b). But Justice Kennedy disagreed that willful blindness is sufficient, and would have instead required actual knowledge. In Justice Kennedy's opinion, Pentalpha's actual knowledge that its product was infringing could have been inferred from its acts. Specifically, its copying of SEB's innovative fryer in all its functional details and its failing to inform counsel performing a freedom to operate search that it had copied an existing marketed product.

What lessons does *Global-Tech* give patent attorneys and their clients? At a minimum, if there is the possibility of a third-party patent blocking your product, it is important to arm your attorney with all of the information you have regarding the competitive landscape so that the most relevant patents are more likely to be identified. In *Global-Tech*, a freedom to operate opinion was not enough to protect against a claim of induced infringement even though there was no evidence that the defendant had actual knowledge of the patent infringed. Going forward, it is unlikely that a defense based upon lack of knowledge will prevail, even when supported by opinion of patent counsel, where the accused infringer withholds important information about the product to be searched.

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