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## Standard for Induced Patent Infringement in Flux

Recent developments in a court case concerning induced patent infringement may have a significant impact on patent owners and patent portfolio valuations, pending review by the Supreme Court.

On October 16, 2014, the Department of Justice (DOJ) filed an amicus curiae brief urging the U.S. Supreme Court to grant certiorari in *CommilUSA, LLC v. Cisco Systems, Inc.* The certiorari petition was filed in January 2014 by CommilUSA. The Supreme Court invited the DOJ Solicitor General to file the brief to express its views on whether to grant review. The DOJ's brief increases the likelihood that the Supreme Court will review the case.

In the DOJ's brief, the U.S. Government recommends that the Supreme Court grant certiorari on the question of whether a good-faith belief that a patent is invalid is a defense to inducement liability under 35 U.S.C. §271(b). The DOJ argues that the Court of Appeals for the Federal Circuit (CAFC) "erred in holding that a person who knowingly induces another to engage in infringing conduct may avoid liability under § 271(b) by demonstrating that it had a good-faith belief that the infringed patent was invalid." The U.S. Government, in what should be a victory for patent-holders, argues the CAFC standard undermines the ability to deter and remedy infringement.

The DOJ's brief argues that the patent statute neither requires "knowledge of the patent's validity" nor suggests that a "good-faith belief in invalidity" is a proper defense.

It is our opinion, given past cases where the Solicitor General recommends review after an invitation for its views by the Supreme Court, that the court likely will grant certiorari and reexamine this standard for defense to inducement.

Whether the Supreme Court will agree with the DOJ's position is an important issue for patent owners and patent portfolio valuations. We suggest that clients involved in negotiations concerning inducement issues consider the possibility of the Supreme Court's reversal of the court standard. We also recommend clients with an interest in the issue consider filing their own amicus briefs with the court should it grant review.

We expect a decision on whether the court will grant review in the coming one to three months.

*This document is intended to provide you with general information regarding induced patent infringement. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.*

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