

Wiley Rein *Amicus* Brief Urges Supreme Court Review of Federal Circuit Ruling on Patent Litigation Attorney Fees

April 29, 2013

Wiley Rein has filed an *amicus* brief on behalf of client Blue Cross Blue Shield Association (BCBSA), urging the U.S. Supreme Court to overturn a ruling by the U.S. Court of Appeals for the Federal Circuit in *Highmark Inc. v. AllCare Health Management Systems Inc.*

The brief supports Highmark's certiorari petition seeking Supreme Court review of a sharply divided Federal Circuit's August 2012 and December 2012 decisions that attorney's fees awarded in patent cases deemed "exceptional" under 35 U.S.C. § 285 are reviewed by the Federal Circuit *de novo* as to whether the case was objectively baseless, rather than with deference to the entirety of the trial court's findings.

The *amicus* brief, filed April 24, argues that this is an issue of national importance that warrants the Supreme Court's attention in light of the rising cost and number of patent lawsuits—particularly those filed by non-practicing entities. The proper application of Section 285—the law allowing the shifting of attorney's fees to the prevailing party in exceptional cases—is necessary to rein in such litigation, according to the brief authored by a team led by Brian H. Pandya, a partner in Wiley Rein's Intellectual Property and Litigation Practices.

"Section 285 incentivizes patent holders and accused infringers to litigate only legitimate, good faith disputes over patent infringement and validity," according to the brief. "If this new *de novo* review standard is upheld, the deterrent effect of Section 285 will be weakened, and parties will be more likely to roll the dice on bad claims or defenses, knowing that if the claim fails and attorney's fees

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are awarded by the district court, they will get a clean slate at the Federal Circuit and will have the ability to make a *post hoc* rationalization of their positions and conduct.”

James H. Wallace, Jr., chair of Wiley Rein’s Patent Group, litigation partners John B. Wyss and Michael L. Sturm, and appellate partner Thomas R. McCarthy co-authored the brief. Paul M. Kim, an associate in the Intellectual Property Practice, also contributed to the brief.

To read the *amicus* brief Wiley Rein filed on behalf of BCBSA, [click here](#).