



Supreme Court, AIA Gutted Patents, Ex-Fed. Circ. Chief Says

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Law360, Washington (October 19, 2017, 7:57 PM EDT) -- The combination of recent Supreme Court decisions and congressional action has “seriously hobbled our vaunted patent system,” former Federal Circuit Chief Judge Paul Redmond Michel said in an impassioned speech at an intellectual property conference Thursday, citing a 60 percent drop in patent values and vanishing investments in research and development.

Judge Michel, who led the patent appeals court from 2004 to 2010, delivered a wake-up call to a packed audience at the [American Intellectual Property Law Association’s](#) annual meeting. He said that, as a result of anti-patentee rulings from the top court and the 2011 America Invents Act, the U.S. patent system now ranks 10th in the world alongside Hungary, “a country better known for goulash than patents,” he joked.

“We are now experiencing the effects of this perfect storm,” Judge Michel said in his keynote speech, which took place in Washington, D.C. “The combined impact of them has seriously hobbled our vaunted patent system, as seen in just the last three years.”

Judge Michel called out the Supreme Court’s 2006 ruling in [eBay Inc. v. MercExchange LLC](#), which made it harder to obtain injunctions in patent cases, and [Alice Corp. v. CLS Bank International](#), which raised the bar for Section 101 patent eligibility, for contributing to the weakening of patents.

Dueling concurrences from Chief Justice John Roberts Jr. and Justice Anthony Kennedy in the eBay case “sowed instability by offering completely opposing views of the law,” while Alice and its predecessor “greatly constricted the scope of what may be patented” and “imposed massive uncertainty under countless thousands, maybe tens of thousands,

maybe hundreds of thousands of issued patents,” said Michel.

“Uncertainty abounds, and of course uncertainty is exactly what business cannot abide,” he said.

The judge also set his sights on the changes adopted through the AIA, which went into effect after he stepped down from the court. Inter partes reviews — which allow an accused infringer to challenge the validity of a patent in an expedited proceeding in the Patent Trial and Appeal Board — created by the AIA “were far more numerous” than predicted, Judge Michel said.

“The most worrisome impact of all this has been to discourage investment, R&D and commercialization,” he said.

Judge Michel said venture capitalists are now investing overseas, where patent rights are stronger, and independent inventors now make up just a fraction of total patent applicants. Patent licenses are similarly down because of how weak patent rights are, he said.

“Nowadays, outside counsel routinely advise clients not to license technology they are using that is covered by another companies’ patents,” he said. “And this is irrespective of whether they think it’s valid and whether they acknowledge that they are infringing. Why is this? Because IPRs and [Section] 101 challenges have so altered the risk calculus.”

For Judge Michel, the issue hits close to home. The declining value of patent licenses, he said, doomed [Intellectual Property Exchange International Inc.](#), a financial exchange for licensing and trading IP rights whose board of managers he joined in 2013. “It completely collapsed because nobody wanted to take any licenses, even to major well-vetted portfolios,” he recounted.

Judge Michel said one of the reasons for the current state of affairs is that patent policy is driven by “propaganda campaigns” and “false narratives” about patent trolls, litigation explosions and so-called bad patents, rather than experts. He then encouraged the conference attendees, who represent a broad swath of the intellectual property community, to take political action to strengthen the system.

--Editing by Adam LoBelia.

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