

How Direct Purchasers Fit Into Walker Process Landscape

Law360, New York (January 16, 2013, 12:06 PM ET) -- More than 45 years ago, the U.S. Supreme Court held in *Walker Process Equipment Inc. v. Food Machinery & Chemical Corp.*,^[1] that a patent holder who acquires a patent through intentional fraud can be held liable under the antitrust laws. Since that landmark ruling, competitors in patent cases have frequently asserted Walker Process claims, seeking an affirmative recovery for harm caused by patents acquired through fraud and/or inequitable conduct before the U.S. Patent and Trademark Office.



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The Supreme Court left unresolved, however, the question of whether a direct purchaser has standing to bring a Walker Process claim, even where the purchaser lacks standing to bring a declaratory judgment action challenging the enforceability of the patent.

With its recent decision in *Ritz Camera & Image LLC v. SanDisk Corp.*, the Federal Circuit has decisively held that such standing exists under the antitrust laws, opening the door to direct-purchaser claims based on fraud on the patent office. Yet, as review of SanDisk case and general Walker-Process jurisprudence reveal, direct purchasers who wish to pursue a Walker Process claim still face multiple challenges. This article discusses the background of the Federal Circuit's holding in *Ritz Camera* and how direct-purchaser litigation may fit into the Walker Process landscape.

SanDisk and its Patents

SanDisk owns key patents that cover NAND flash memory — an erasable, reprogrammable computer memory used in wide range of consumer products including cellphones, digital cameras, mobile phones and USB drives.

SanDisk sought to enforce its patent rights through infringement litigation against one of its key competitors, STMicroelectronics (“STM”). In response to SanDisk's suit, STM alleged that SanDisk had obtained its patents fraudulently by intentionally failing to disclose invalidating prior art and making affirmative misrepresentations to the USPTO.

On SanDisk's motion for summary judgment, the district court found that STM had raised a triable issue of fact as to whether SanDisk has procured its patents wrongfully. SMS and SanDisk then reached a settlement and SMS left the market. As a result of the settlement, SanDisk was left with as much as a 75-

percent share of the U.S. market for flash-memory drives.

Retailer Ritz Camera purchases flash-memory products from SanDisk and its licensees. In June of 2010, Ritz brought suit against SanDisk alleging violations of the Sherman Act. Using Walker Process as a guide, Ritz alleged that SanDisk had procured its patents through fraud and then enforced patents it knew to be invalid through actions like the one it brought against STM.

SanDisk moved to dismiss Ritz's claim arguing that as a direct purchaser not under threat of an infringement action, Ritz lacked standing to assert a Walker Process claim. The district court denied the motion and allowed the case to proceed. It did, however, certify an interlocutory appeal on the question of Ritz's Walker Process standing.

The Federal Circuit's Ritz Camera Decision

On appeal, the Federal Circuit agreed with district court and held that a direct purchaser has standing to pursue an antitrust claim under Walker Process, even when the purchaser does not face threat of an infringement suit and lacks standing to directly challenge enforceability of the patent.

The Federal Circuit specifically rejected SanDisk's argument that requirements for standing in a patent unenforceability suit should be imported into an antitrust case "simply because one element of the antitrust claim requires proof of the improper procurement of a patent." Rather, the appeals court concluded the Supreme Court had specifically rejected that notion in Walker Process, noting that the Supreme Court had found little merit to an argument that rules defining who may bring suit "to cancel or annul a patent" should also control antitrust standing.

The Federal Circuit similarly rejected SanDisk's argument that allowing direct purchasers to bring antitrust claims under Walker Process undermines well-recognized limitations on standing or creates an unjustifiable expansion of the doctrine. Instead, the Federal Circuit reasoned that confirming a direct purchaser's right to bring a Walker Process claim was in line with established jurisprudence. The court rejected SanDisk's argument that granting standing to direct purchasers would result in an innovation-limiting "avalanche" of litigation. The court said that the demanding proof requirements of a Walker Process claim left it unconvinced of the likelihood of a litigation flood.

Proof and Prospects for Direct-Purchaser Claims Under Ritz Camera

Even after the Federal Circuit's decision green-lighting direct-purchaser Walker Process claims, not every finding of inequitable conduct will lead to a viable direct-purchaser action. First, direct purchasers must be able to satisfy Rule 9's requirement to plead fraud with specificity, which may be difficult without access to discovery. Secondly, unlike a competitor, a purchaser plaintiff must show both exclusion of a market competitor and also that the exclusion resulted in supracompetitive prices in order to recover monetary damages.

Finally, after the Supreme Court's holding in *Illinois Tool Works* that patents do not necessarily confer market power on patent holders, direct purchasers must present evidence to define the relevant market and prove that the defendant possesses monopoly power in that market. Nevertheless, the Ritz Camera decision substantially expands the scope of Walker Process claims, and places those claims on the same footing as other Sherman Act § 2 claims that provide remedies both to competitors and customers.

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[1] 382 U.S. 172 (1965).

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