

When ITC Excludes Later-Filed Expert Testimony

By **Bryan J. Vogel** and **Derrick J. Carman**

(September 26, 2018, 2:35 PM EDT)

A pair of recent decisions out of the U.S. International Trade Commission illustrate the potential importance of the consistency of early expert disclosures in an investigation. In the recent decisions, the administrative law judge ruled on the admissibility of opinions included in later-filed expert witness statements prepared for an evidentiary hearing.[1] Under the ALJ's ground rules, "[a]n expert's testimony at the trial shall be limited in accordance with the scope of his or her expert report(s), deposition testimony, or within the discretion of the Administrative Law Judge." [2] The ALJ's interpretation of this ground rule may inform how ALJs may interpret similar rules in their own investigations.[3]



Bryan J. Vogel

Respondents Feit Electric Company Inc., Feit Electric Company Inc. (China), Lowe's Companies Inc., LG Sourcing Inc. and Satco Products Inc. filed a motion in limine to exclude certain expert testimony submitted by complainants Philips Lighting North America Corp. and Philips Lighting Holding BV.[4] The complainants relied on two experts to support their allegations of infringement of the accused products. In their direct witness statements, the experts analyzed several accused products and contended that these analyzed products are representative of numerous other accused products. The respondents contended that this testimony was not previously disclosed in the experts' reports. Specifically, the respondents contended that one of the complainants' experts' witness statement explained, for the first time, why he believed certain products to be representative and what he understood "substantially similar" to mean.



Derrick J. Carman

With respect to the respondents' first expert, the ALJ ruled that testimony in his witness statement relating to a summary of the representative products was "consistent with the scope of" his expert report even though it "provide[d] more detail than was disclosed in his expert report." [5] Under this interpretation, an expert witness statement may not need to be identical to an earlier expert report, and may provide additional detail in some circumstances, so long as "the information is not new." [6] With respect to testimony pertaining to the definition of "substantially similar," however, the ALJ determined that this section was not supported by the prior expert report, and the ALJ therefore struck the testimony related to the definition of "substantially similar" from the witness statement.[7]

Regarding the complainants' second expert, the respondents contended that the witness statement was

inconsistent with his prior testimony because, during deposition, he refused to state whether infringement of all accused products would stand or fall with infringement of the representative products.[8] In his witness statement, however, the expert stated that his analysis would not be materially affected by differences in the accused products.[9] The ALJ denied the respondents' motion, holding that any inconsistencies between the witness statement and the deposition testimony went to the credibility of the expert, but did not warrant exclusion of his testimony.[10]

The complainants also filed a motion in limine to strike portions of the respondents' expert's rebuttal witness statement as untimely disclosed expert testimony.[11] To satisfy the domestic industry requirement, the complainants identified several categories of products they contended practice the asserted claims. For each category, the complainants' expert analyzed a single product that is allegedly representative of all the domestic industry products in that category. The respondents' expert contended in his rebuttal witness statement that the analyzed domestic industry products are not, in fact, representative of any unanalyzed domestic industry products. According to the complainants, the expert's opinions regarding the representativeness of the analyzed products was never raised in his expert report or his deposition.[12] Specifically, the complainants acknowledged that the expert had presented theories as to why the representative products did not infringe the asserted claims, but failed to address why the representative products were not, in fact, representative.[13] These arguments, claimed the complainants, were new and, therefore, improper in a rebuttal witness statement.[14]

To defend the challenged testimony, the respondents pointed to portions of the rebuttal expert report in which the expert opined that the complainants had failed to show that the products proffered as representative of the accused products (as opposed to the domestic industry products) were actually representative.[15] The respondents argued that the rebuttal expert report incorporated by reference opinions regarding representativeness of the accused products into the opinions regarding the domestic industry products.[16]

The ALJ agreed with the complainants and struck portions of the rebuttal expert witness statement. Specifically, the ALJ concluded:

[The expert] never raises the issue of representativeness in the context of the domestic industry products. Instead, [he] opines that [Complainants] ha[ve] not shown that [their] domestic industry products satisfy particular claim limitations. In support of this opinion, [the expert] refers back to his earlier non-infringement analysis. Accordingly, [he] did not incorporate by reference his opinions concerning the representativeness of the accused products into his analysis of the domestic industry products.[17]

The above decisions from the ALJ illustrate the potential importance of consistency in early expert disclosures. New testimony offered in a witness statement for the evidentiary hearing may be excluded unless supported by the record, and vague incorporations by reference may be insufficient to provide the necessary support. On the other hand, where the witness statement is supported by and consistent with prior testimony, it may still be admissible, even if it offers more detail than the prior testimony.

While informative, the above represents only a single ALJ's interpretation of their own ground rules. ALJs may interpret their own ground rules more broadly or narrowly, depending on the particular factual circumstances at issue. Moreover, admissibility determinations are case-by-case determinations and highly fact-specific. The above circumstances dictated the results in this investigation, but different factual circumstances may result in different outcomes in the future.

Bryan J. Vogel is a founding partner of the New York office of Robins Kaplan LLP.

Derrick J. Carman is an associate at the firm.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Certain LED Lighting Devices, LED Power Supplies, and Components Thereof. Inv. No. 337-TA-1081, Order Nos. 62 and 70 (U.S.I.T.C. Aug. 16 and 17, 2018).

[2] Inv. No. 337-TA-1081, Order No. 2.

[3] See, e.g., Certain Carburetors and Products Containing Such Carburetors, Inv. No. 337-TA-1123, Order No. 2, R. 11.5.5 (U.S.I.T.C. Jul. 20, 2018) (ALJ Bullock); Certain Height Adjustable Desk Platforms and Components Thereof, Inv. No. 33-TA-1125, Order No. 2, R. 14.7.6 (U.S.I.T.C. Aug. 6, 2018) (ALJ Pender); Certain Powered Cover Plates, Inv. No. 337-TA-1124, Order No. 2, R. 9.5.6 (U.S.I.T.C. Aug. 1, 2018) (ALJ McNamara); Certain Convertible Sofas and Components Thereof, Inv. No. 337-TA-1122, Order No. 2, R. 13.7.6 (U.S.I.T.C. Jul. 19, 2018) (ALJ Cheney)

[4] Inv. No. 337-TA-1081, Order No. 62.

[5] Id. at 3.

[6] Id.

[7] Id.

[8] Id.

[9] Id. at 3-4.

[10] Id. at 4.

[11] Inv. No. 337-TA-1081, Order No. 70 at 1.

[12] Complainants' Motion in Limine No. 4, Inv. No. 337-TA-1081, 2-3 (Jul. 31, 2018).

[13] Id. at 2.

[14] Id.

[15] Respondents' Opposition to Philips Lighting's Motion in Limine No. 4, Inv. No. 337-TA-1081, 1-2 (Aug. 6, 2018).

[16] Id.

[17] Inv. No. 337-TA-1081, Order No. 70 at 2.