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## Fed. Circ. Should Revive Bed Bath & Beyond IP Suit: Atty

By **Erin Coe**

Law360, San Diego (November 09, 2011, 10:20 PM ET) -- An attorney representing an inventor urged the Federal Circuit during oral arguments on Wednesday to reinstate his case alleging Bed Bath & Beyond Inc. and West Point Home Inc. infringed his patent covering a towel, arguing that the inventor met the pleading requirements under the U.S. Supreme Court's 2007 ruling in *Bell Atlantic Corp. v. Twombly* and its 2009 decision in *Ashcroft v. Iqbal*.

Mitchell Shelowitz of Pearl Cohen Zedek Latzer LLP, who represents the plaintiff, argued that the New York federal court had improperly imposed a heightened pleading requirement for inventor Roger Hall's design patent suit.

The dispute is significant because the pleading standard for design patent infringement is an issue of first impression before the Federal Circuit, and it is the first case since the Supreme Court decision in *Iqbal* to present the issue of any patent pleading standard.

Another potential issue in the case is what the pleading standard is for inducing infringement. While the lower courts have been divided over that issue, the Federal Circuit has yet to rule on any standard.

According to the suit, Hall met with Bed Bath & Beyond in March 2009 to discuss a possible business arrangement for distributing his exercise tote towel with zippered pockets and a hanging loop, but after it declined the proposal, he discovered about a year later that the retailer was selling a towel by West Point Home that was alleged to be "virtually identical."

Hall filed his suit in June 2010, alleging the defendants infringed his design patent, which was granted in July 2009. He also claimed unfair competition under the Lanham Act and New York's general business law, and that the defendants engaged in misappropriation under New York common law.

The district court in December tossed Hall's nonpatent claims, and while it sua sponte dismissed the infringement claim against Bed Bath & Beyond and West Point Home after finding that the plaintiff alleged infringement without showing what aspects of the towel merited design patent protection or how each defendant infringed the patent, it gave the plaintiff an opportunity to replead the patent claim.

The ruling prompted Hall to appeal, and Shelowitz said at the Wednesday hearing that his client viewed the chance to replead as futile.

Shelowitz asserted that Hall satisfied the pleading requirements under the *Twombly* and *Iqbal* rulings by pleading the existence of the patent, the interactions between the plaintiff

and Bed Bath & Beyond, and the substantial similarity between the patented towel and the accused towel.

He claimed the allegations in the complaint were sufficient to put the defendants on notice, but that the judge had applied a circuitous analysis that was not based on any controlling case law.

The judge found "not only was there no infringement, but that we didn't even put the other side on notice, and [the complaint] was confused and it was hard to follow, and we view that as plainly incorrect," Shelowitz said. "We view it as the court not understanding the appropriate standards. ... The court is not in the seat of the patent examiner."

He contended the judge was asking the wrong questions, such as requesting that the plaintiff flesh out what it was about the towel that was "new, original and ornamental" that merited the protection of a design patent.

"That's not an infringement inquiry; that's a patentability inquiry," he said.

But the defendants' attorney Laura Wytsma of Loeb & Loeb LLP asserted that nothing described in the pleadings put the defendants on fair notice of what ornamental aspects of the patent they were alleged to have infringed.

"What the district court asked the plaintiff to do was to identify those aspects of the patent that are ornamental," she said.

When asked by one of the Federal Circuit judges whether it should revisit the pleading standard for infringement of a utility patent, Wytsma said it should.

"I do believe it's appropriate for this court to revisit whether there is fair notice in light of *Iqbal* when a patentee can identify a patent that has hundreds of claims," she said. "Honestly, that doesn't provide fair notice for any defendant of what they're supposed to defend and more importantly, what it is they're supposed to be preserving in terms of evidence."

She said the *Iqbal* decision reinforced that the pleading standard was context specific and that judges should use their common sense and judicial experience in deciding what is the appropriate level of pleading. She also noted that there was something different about a design patent compared to a utility patent.

"There is something about a design patent that is unique and that does not provide the fair notice that *Iqbal* contemplates," she said.

West Point Home also cross-appealed that the district court was wrong to dismiss its false advertising and false marking counterclaims, but the plaintiff's attorney argued the false marking claim was moot in light of the America Invents Act, and that Hall's statements to Bed Bath & Beyond that he had a patent while the patent application was still pending before the U.S. Patent and Trademark Office did not constitute false advertising.

The patent-at-issue is U.S. Patent Number D596,439S.

Hall is represented by Mitchell Shelowitz of Pearl Cohen Zedek Latzer LLP.

Bed Bath & Beyond and West Point Home are represented by Laura Wytsma and Jordan Sigale of Loeb & Loeb LLP.

The case is *Roger Hall v. Bed Bath & Beyond Inc.*, case number 11-1165, in the U.S. Court of Appeals for the Federal Circuit.

--Editing by Elizabeth Bowen.

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