

Policy Issues Alert

Update On *Bilski*

The Editor interviews *Steven Bauer* of Proskauer's Patent Law Group on the current status of *Bilski* and *Warsaw v. Kappos*, now before the Supreme Court.

Editor: Clearly this case has drawn significant interest, with nearly 70 amicus briefs having been filed. How big are the stakes here?

Bauer: The stakes are very high. Depending on what the court does, this could be a transforming event. Over the last 30 to 40 years, the patent system has evolved essentially to allow nearly anything to be patented. This case has brought the issue of business method patents into question, specifically a process that could make energy costs more predictable. Based on the justices' comments during oral arguments, the Supreme Court appears poised to scale back what should be considered patentable – the question is how far they'll go.

Editor: Having been in the courtroom, do you have a read?

Bauer: It's pretty clear that *Bilski* is not going to get his patent, but, beyond that, it's anyone's guess. The justices are looking to the government to help them come up with parameters that roll back the standard of patentability somewhat, but it's hard to say how far they'll go. They could be looking beyond just business methods, considering things such as methods of covering medical treatments – for example, whether it should remain possible to patent the administration of a drug with a specific dosage. Or they could be looking at software and seeking to put some guidelines around the question of whether – or when – writing a software program is more than a process and can be considered a technology. So, again, there are major implications and a lot of nuances to be considered.

Partners Notes

King & Spalding Advises Haddington CAES Development Company, Welcomes New Partners

King & Spalding advised CAES Development Company, LLC, and Norton Energy Storage, LLC, in the sale of all rights in Norton Energy Storage, a compressed air energy storage (CAES) project under development in Norton, Ohio, to FirstEnergy Generation Corp., a subsidiary of Akron, Ohio-based First Energy Corp. CAES Development Company, LLC, and Norton Energy Storage, LLC, are portfolio companies of Haddington Ventures LLC's managed funds.

King & Spalding has nearly a decade of experience in the development of CAES projects such as the Norton Energy Storage Project, is actively involved in other CAES projects developments and is engaged in government advocacy and outreach matters on behalf of the Coalition to Advance Renewable Energy Through Bulk Storage (CAREBS) – a government advocacy group comprised of CAES project developers, equipment manufacturers

Editor: Who are the possible winners and losers here?

Bauer: Depending on the outcome, the big winners could be technology companies that face a lot of lawsuits challenging what they believe to be obvious business methods. The losers could be non-operating companies – sometimes called “patent trolls” – that make patenting these types of things a significant part of their businesses.

Editor: What impact could a “no-*Bilski*” decision have on future litigation?

Bauer: Ninety percent of our work at Proskauer is defense oriented, and this will be a new defense – maybe the best defense.

Editor: Is there anything businesses can do now with respect to protecting their patent portfolios?

Bauer: If you are in the business of patenting business methods, there is not much you can do until the court provides more guidance. If the court says business method patents are invalid, there will be no grandfathering, as would happen if the issue were in the hands of Congress. Everything that happened in the past would be considered unconstitutional. We're probably looking at around 10 percent of the patents potentially being at risk. That's a lot of patents.

Editor: Are there cases hanging in the balance pending the outcome?

Bauer: Absolutely. In fact, we're involved in one of the biggest pending cases. After the *Bilski* decision, we may have one of the first decisions that comes out invalidating a patent. We're teed up and ready to go.

and other renewal energy industry stakeholders interested in the grid efficiency and reliability enhancements that CAES and other bulk energy storage projects offer.

The Houston-based King & Spalding legal team involved in this transaction consisted of Kenneth Culotta (global transactions partner), Peter M. Oxman (real estate partner), Juan-Pablo “John” Crespo (global transactions partner-elect) and Monica Hwang (global transactions associate).

King & Spalding has announced the expansion of its highly regarded energy litigation and international arbitration practices into California with the arrival of commercial litigation partner Charles C. Correll, Jr. Mr. Correll is focusing on energy and construction litigation, international arbitration matters and water contamination litigation.

Mr. Correll, who relocated to San Francisco from King & Spalding's

Partners Notes

Business Leaders Urge Increased Compensation For Judges

The Atlantic Legal Foundation and the Partnership for New York City have applied for “friend of the court” status in the New York Court of Appeals in a case in which the Appellate Division, First Department, ruled that the legislature had abused its power by depriving the judiciary of any increase in compensation for approximately 10 years.

Their brief points out that the current level of judicial compensation is lower than for federal judges and practically all other state judges, and lags far behind amounts earned by lawyers in other public service positions and in private practice – even by new lawyers in large urban firms not yet admitted to the practice of law.

“Our judiciary is faced with the most complex and demanding caseload in the nation because of New York's status as a global business and financial center,” said Kathryn Wylde, President & CEO of the Partnership for New York City, the city's leading business organization. “Adequate compensation is critically important to attracting and retaining high-caliber judges who are capable of tackling these complicated cases.”

The Foundation and Partnership contend in their brief that:

Judicial compensation in New York is in no sense competitive and is not adequate to continue to attract and retain jurists of the highest skill and experience; most notably, seasoned commercial lawyers in private practice are no longer attracted to the judiciary in adequate numbers.

Lack of judicial experience and expertise in commercial matters can have a negative impact on the quality of decisions handed down in commercial cases, especially complex litigation. Thus, low compensation will likely reduce the quality of decisions in commercial cases and may increase the costs of litigation due to errors, appeals, and delays.

The business community needs an efficient, reliable judiciary to resolve controversies. Without an experienced, diverse and skilled judiciary, business activity will be diverted elsewhere, companies will incorporate or move elsewhere because they will lose faith in the ability of the State's judicial system to resolve commercial lawsuits promptly and competently, and New York State's economy will suffer.

Predictability of judicial decisions is essential to the business community because companies need to be able to anticipate the legal consequences of their business decisions to avoid litigation. If judges are not experienced and expert in commercial matters, the predictability of the judicial decision-making process will suffer and more lawsuits will result, diverting the time and attention of businesses from their primary objectives and hampering their ability to generate revenues and profits. Needless business litigation ultimately has a negative impact on the ability of businesses to pay taxes and to fund payrolls.

The Atlantic Legal Foundation, now in its 30th year, is a non-profit, non-partisan organization with a history of advocating for limited, effective government, free enterprise, individual liberty, school choice, and sound science in the courtroom. Its board of directors includes current and former general counsels of 16 major corporations. Other members of Atlantic Legal Foundation's board of directors and its advisory council have substantial responsibility for business litigation at major law firms.

The Partnership for New York City (www.pfnyc.org) is a network of business leaders dedicated to enhancing the economy of the five boroughs of New York City and maintaining the city's position as the center of world commerce, finance and innovation.

Houston, Texas, office, has 15 years experience in a broad range of domestic and international litigation matters, primarily for energy industry companies and service providers. He is a veteran of Operation Desert Storm.

King & Spalding, a leading international law firm, announced today it elected four partners to the firm's 10-person policy committee, effective January 1, 2010. They are Raymond E. Baltz, Jr. (Atlanta), Richard T. Marooney (New York), Robert E. Meadows (Houston) and W. Ray Persons (Atlanta).

King & Spalding's policy committee is responsible for firm policies, strategic initiatives and the overall enhancement of the firm. Members are elected by the partnership to a three-year term.

Raymond E. Baltz, Jr. is head of the firm's corporate practice group. He represents private equity funds in leveraged buyout transactions and corporations in

strategic merger and acquisition transactions.

Richard T. Marooney is a member of the firm's business litigation practice. He has 14 years' experience managing and trying complex commercial disputes, particularly in the financial services and energy industries.

Robert E. Meadows is managing partner of the firm's Houston and Austin, Texas, offices and a member of the litigation practice. His extensive trial experience includes general commercial litigation in addition to tort litigation defense. He is a fellow of the American College of Trial Lawyers.

W. Ray Persons is a member of the firm's tort and environmental litigation practice. A seasoned trial lawyer, he focuses his practice on complex litigation, including class actions, mass torts and product liability. He appears regularly in state and federal courts throughout the country. He is a fellow of the American College of Trial Lawyers.