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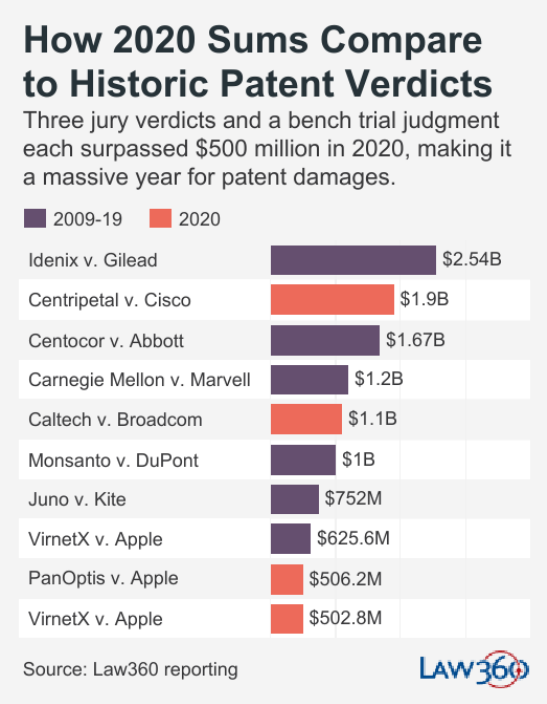
The Few Patent Jury Trials In 2020 Led To Enormous Verdicts

By **Dani Kass**

Law360 (December 22, 2020, 8:04 PM EST) -- The COVID-19 pandemic saw patent trial after patent trial delayed and ultimately pushed into 2021, but the few jury trials that did go forward across the nation had some of the largest verdicts of the last decade.



This year featured three jury verdicts that surpassed $500 million, along with a nearly $2 billion judgment from a bench trial. On top of that, Apple paid off a judgment worth nearly a half-billion dollars, and a $752 million verdict against Kite Pharma from 2019 surpassed $1 billion when final judgment was entered in April.

The cases stretched from Virginia to California, with predictable stops in Texas.

"They were across the nation, literally coast to coast, and they involved different technologies," said McKool Smith PC partner Ashley Moore. "I think this evidence points out that you can get a big verdict anywhere."

Experts had mixed feelings on whether the dollar figures were so high this year because of a trend or the luck of the draw, but they agreed such huge verdicts could affect how companies and litigation funders view the trial landscape.

"Patent owners seeing these kinds of verdicts right now are encouraged that they'll get their fair shot in court, and juries aren't afraid to award big numbers when the technology is worth that much," Moore said. "I realize that's pretty encouraging for patent owners. I realize it may not be for companies like Apple."

Apple was on the losing end of each of the large verdicts in 2020.

In January, a California federal jury said Apple and Broadcom infringed three data transmission patents

owned by the California Institute of Technology through Wi-Fi chips used in hundreds of millions of iPhones and other devices. The trial judge in August upheld the $1.1 billion verdict in his final judgment, which placed more than $837 million of the damages on Apple and $270 million on Broadcom.

Then in August, an Eastern District of Texas federal jury said Apple should pay PanOptis and related companies more than $506 million for willfully infringing patents covering 4G LTE technology. The case was the first in-person patent jury trial conducted since the pandemic began.

In the latest of several trials between Apple and VirnetX, an Eastern Texas jury in October said Apple owed $502.8 million for infringing VirnetX's network security patents. Months before, Apple had paid VirnetX a $454 million judgment in another prong of the decadelong litigation over Apple's VPN on Demand and FaceTime services.

Moore said the technology at issue in the Apple cases was in devices and apps people use regularly and that jurors could understand its importance, which makes it seem more valuable to them. And because of the sheer number of products Apple sells, damages will inherently be high. Even a tiny royalty rate will be multiplied by a legion of products, especially if there are a decade's worth of sales, as with VirnetX.

"You don't necessarily have to have a big royalty rate or price per device for the damages to increase substantially if you're having 2, 3, 4, 500 million products sold in the relevant time frame," she said.

Apple representatives didn't respond to a request for comment.

Juries increasingly have issues with large corporations, and they sometimes take that distrust with them into the courtroom, according to Rachel York Colangelo, the national managing director of jury consulting at Magna Legal Services. For example, if jurors believe corporations engage in unethical conduct to increase their profits, then they're likely to assume any infringement was willful, she said.

"Jurors are quick to jump to the worst assumptions. 'They infringed intentionally.' 'They think they can take advantage of a smaller company,'" Colangelo said. "It becomes about, in order to really make an impact, to slap the defendant in a way that gets their attention. It has to be a big number."

Mark Stallion, who leads Greensfelder Hemker & Gale PC's intellectual property practice, agreed that "big tech has taken a lot of black eyes in the media recently," but said it's hard to assess the exact impact that has had on jurors.

Juries aren't the only ones fed up with large tech companies. A Virginia federal judge handed down a massive $1.9 billion bench trial judgment against Cisco Systems Inc. in October. The judge called the matter an "egregious case of willful misconduct beyond typical infringement."

Mintz Levin Cohn Ferris Glovsky and Popeo PC's IP division chair Michael Renaud said the high dollar value was meant to send Cisco a clear message about deliberately copying a smaller company's technology.

Cisco representatives didn't immediately return a request for comment.

Such high verdicts from juries and judges will likely encourage litigation-averse companies that are

accused of infringement to settle early, Stallion said. The suing companies are then able to leverage those early settlements to fund bigger trials against other alleged infringers, he said.

"That allows these entities to build an early war chest with some of these folks who roll over early so that when they fight the more difficult battle against Apple or whoever, they have the funding to do so," Stallion said. "If you get a pay-up license agreement for $50 million, that will never make the headlines, but that will fund a lot of litigation for the bigger case."

The high verdicts are also catching the eyes of litigation funders, who see these cases as a great place to invest. But those funders also have a say in how far a case goes.

"Even if the plaintiff thinks, 'This is a good settlement; let's take it,' if you've got investors, they have to weigh in and decide, 'Well, no, I need a return on my investment, and this return is not high enough,'" said Magna's Colangelo. "That could potentially be driving more of these cases to trial because they're just not able to settle because of these other obligations that they have to the litigation funders."

On the other hand, Haynes and Boone LLP partner Eugene Goryunov said that funders take on a risk that the patents at issue will face the other element of patent litigation — a validity challenge at the Patent Trial and Appeal Board.

"Litigation funders have a really interesting economic situation in front of them," Goryunov said. "They have to be even more vigilant in evaluating the cases before they invest because you still have that dual dynamic where on the one hand, you may have good merits, but on the other hand, there's also the risk of the patent being invalidated at the PTAB."

While the promise of such high damages can be tempered by the fact that many awards do get slashed by judges and appellate courts — as has happened to many of the other top verdicts of the last 10 years or so — Stallion said there's still an enormous amount of money on the table.

"Those that would like to throw cold water on the trend and suggest collecting damages is different than winning [them] at the district court level are not taking into consideration that these are huge dollar amounts from the standpoint of even if you get a fraction of it, let's say half, you still have a significant windfall," he said. "Any university, if you get a $500 million judgment as opposed to a billion-dollar judgment, I think you would count it as a win. I think any small entity would do the same."

--Additional reporting by Craig Clough and Ryan Davis. Editing by Jill Coffey and Alanna Weissman.