

UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE PATENT TRIAL AND APPEALS BOARD

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LIBERTY MUTUAL INSURANCE CO.,

Petitioner,

vs.

Cases: CBM2013-00009

CBM2012-00003

Patent 8,140,358

PROGRESSIVE CASUALTY INSURANCE CO.,

Patent Owner.

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Telephonic Hearing

MARCH 25, 2014

4:30 p.m.

Taken at:

Jones Day

901 Lakeside Avenue

Cleveland, Ohio

Todd L. Persson, Notary Public

1 APPEARANCES:

2  
3 On behalf of the Petitioner (via  
4 teleconference):

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14 On behalf of the Patent Owner:

15 Jones Day, by  
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1 APPEARANCES, Continued:

2

3 ADMINISTRATIVE PATENT TRIAL AND APPEALS BOARD

4 (Via Teleconference):

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6 Joni Y. Chang

7 Michael R. Zecher

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1 JUDGE LEE: Okay. Is the Patent  
2 Owner on the line?

3 MR. WAMSLEY: Yes, Your Honor. For  
4 Patent Owner, James Wamsley and Calvin  
5 Griffith.

6 JUDGE LEE: Thank you. And is the  
7 Petitioner on the line?

8 MR. BAUGHMAN: Yes, Your Honor.  
9 For Petitioner, Steve Baughman and Jim Myers.

10 JUDGE LEE: Thank you. Do we have  
11 the court reporter on the line as well?

12 MR. WAMSLEY: Yes, Your Honor. The  
13 court reporter is here in the conference room  
14 with Mr. Griffith and me.

15 JUDGE LEE: Thank you. Will you be  
16 able to submit a copy?

17 MR. WAMSLEY: Absolutely, yes.

18 JUDGE LEE: Thank you. So the  
19 Patent Owner asked for the call. We'll let Mr.  
20 Wamsley or Mr. Griffith start.

21 MR. WAMSLEY: Very well. Thank you  
22 very much, Your Honor, for taking the call  
23 today, time out of your busy schedule.

24 The reason for our request for the  
25 call is we would like to request the Board's

1 permission to file a motion to strike directed  
2 at the papers that Liberty Mutual filed in Case  
3 CBM2012-00003 and CBM2013-00009 on March 13,  
4 2014. The reason for this is because we  
5 believe that Liberty has abused the Board's  
6 rehearing request procedures. They have titled  
7 their papers "requests for rehearing," but in  
8 reality they do not ask or request that any  
9 decision of the Board be reheard at all. They  
10 do not seek reconsideration of any decision of  
11 the Board. In fact, they state at page 4 of  
12 their papers that they make the requests solely  
13 to preserve the status quo.

14 This Board's rule, Section 42.71,  
15 relating to rehearing requests, specifies that  
16 those requests may be filed in those instances  
17 where a party is dissatisfied with the decision  
18 of the Board, and that the request must  
19 specifically identify the matters that the  
20 party believes that the Board misapprehended or  
21 overlooked in issuing a decision. We feel that  
22 neither of these things were done by Liberty.  
23 They do not indicate they're dissatisfied with  
24 any decision of the Board. Indeed, they ask at  
25 page 2 of their papers that their own request

1 be denied if our requests are denied.

2 We think that's really an abuse of  
3 the Board's rehearing request procedures, and  
4 it's for that reason we'd like to seek  
5 permission to file a motion to strike those  
6 requests.

7 The balance of their papers  
8 constitutes really an opposition to  
9 Progressive's rehearing requests in  
10 CBM2013-00009, and that, too, is not allowed  
11 under the Board's procedures in the Trial  
12 Practice Guide, section Roman Numeral II-P. It  
13 provides that no opposition may be filed  
14 without the Board's prior approval. And for  
15 that reason, we would also seek to file a  
16 motion to strike.

17 And in the alternative, if the  
18 Board believes a motion to strike is not  
19 proper, we would ask for the right to file an  
20 opposition to their papers. That's all for the  
21 Patent Owner at this time, Your Honor.

22 JUDGE LEE: Well, we understand  
23 that the circumstances here are a little bit  
24 unusual, in part because of Progressive's own  
25 request for a rehearing. If we adopt a similar

1 standard of looking at these papers, do you  
2 think that Progressive's own rehearing request  
3 actually satisfied the requirements for a  
4 request for rehearing?

5 MR. WAMSLEY: We do, Your Honor.  
6 And we explained that in the requests  
7 themselves. We believe, first of all,  
8 obviously, we are dissatisfied with the  
9 decision of the Board in --

10 JUDGE LEE: I don't mean for you to  
11 have to defend yourself here. I just want to  
12 say that isn't it all a matter of degree;  
13 perhaps your paper is a little more justified  
14 than theirs, but when you compare even your own  
15 paper with what is typically a rehearing  
16 request, don't you at least see a big, big gap?  
17 Essentially, what you're complaining of has all  
18 happened after the Board's decision.

19 MR. WAMSLEY: With deference, Your  
20 Honor, I don't agree with that. We think that  
21 we are seeking rehearing of the Board's final  
22 decision as a result of the application of the  
23 statute to it. And we don't believe that it's  
24 a matter of degree for a paper such as  
25 Liberty's in which they admittedly seek no --

1 do not seek to rehear any particular decision  
2 of the Board, but rather prospectively want  
3 some sort of relief, including the denial of  
4 the very request they filed, contingent on what  
5 the Board does in response to our request. We  
6 don't believe that that in any way, shape or  
7 form can qualify as a valid rehearing request.  
8 And that's the reason why we're seeking the  
9 relief we are today.

10 JUDGE LEE: Thank you. We  
11 appreciate that explanation. You certainly  
12 don't have to defend your own paper here, but  
13 we just wanted to know your view, which is that  
14 you think your own paper is sufficient and  
15 proper, but theirs is not.

16 The next question I have for you  
17 is; what about the -- is there any precedent  
18 for a motion to strike? Why is that not simply  
19 a file management tool of the Board, of the  
20 Panel, and also a tool of the Panel to impose  
21 certain sanctions, if you will, that's entirely  
22 within the discretion of the Board? Why is  
23 that something that can even be requested by a  
24 party to have something expunged?

25 MR. WAMSLEY: Well, Your Honor, I



1 believe that the practice of motions to strike  
2 is well-established in most administrative  
3 tribunals and courts, that the Board certainly  
4 has the power to strike. And I think your  
5 comments seem to suggest that you had the power  
6 to strike papers that do not comply with your  
7 rules, for example, in the exercise of your  
8 discretion. For that reason, it strikes me  
9 that a party has the right to request that  
10 relief from the Board. And, obviously, it's  
11 within the Board's authority to decide whether  
12 or not it's appropriate in any given instance.  
13 But we think that it is a customary power that  
14 the Board would be able to exercise, and  
15 therefore, that a party could request its  
16 exercise.

17 JUDGE LEE: I understand. We're  
18 just suggesting that it may just be something  
19 the Board at its own discretion would exercise,  
20 but perhaps not something a party could have  
21 the Board do or not do. Why wouldn't it be  
22 sufficient for you simply to just ask to reply,  
23 to respond to their paper?

24 MR. WAMSLEY: Well, that was the  
25 alternative that I requested at the end of my

1 presentation, Your Honor. If that is the  
2 Board's preference to receive a paper that is,  
3 in fact, an opposition, that would be the  
4 alternative relief we would seek. And we  
5 thought the motion to strike was more fitting  
6 given the circumstances. But, obviously,  
7 that's for the Board to decide.

8 JUDGE LEE: But you would be  
9 satisfied if you get an opportunity to respond  
10 to their paper then?

11 MR. WAMSLEY: Correct.

12 JUDGE LEE: Okay. Let me put you  
13 on mute while I confer with my colleagues.

14 MR. BAUGHMAN: Your Honor, this is  
15 Steve Baughman for Petitioner. Would we have  
16 an opportunity to respond?

17 JUDGE LEE: Yes, you will.

18 MR. BAUGHMAN: Thanks, Your Honor.  
19 As Your Honor noted, these are unusual  
20 circumstances, and we indicated to the Patent  
21 Owner that we would raise concerns about --

22 JUDGE LEE: I'm sorry,  
23 Mr. Baughman. I wanted to confer before we  
24 hear from you.

25 MR. BAUGHMAN: I understand. I

1 apologize, Your Honor.

2 JUDGE LEE: Okay. I'll put you on  
3 mute.

4 (Discussion off the record.)

5 JUDGE LEE: Hello. The judges are  
6 back. Do I have lawyers for the parties?

7 MR. WAMSLEY: Yes, Your Honor.

8 MR. BAUGHMAN: Yes, Your Honor.

9 JUDGE LEE: All right. I  
10 apologize, Mr. Baughman. We didn't mean to cut  
11 you off. We do want to give you an opportunity  
12 to speak. So go ahead.

13 MR. BAUGHMAN: Thanks, Your Honor.  
14 I wanted to just address a few points that were  
15 made by counsel for Patent Owner. First, our  
16 paper does indeed seek rehearing relief. Our  
17 motion is for a contingent relief if the Board  
18 decides to rehear CBM2013-00009, which argues  
19 the Board's ability to enter decisions  
20 concurrently depends on the timing a paralegal  
21 uploads the documents to PRPS. We request  
22 that the Board reconsider the form in which it  
23 rendered its final written decisions in both  
24 that matter and CBM2012-00003, and enter them  
25 either as a final written decision in the

1 consolidated action, or in a combined final  
2 written decision covering both of the two  
3 actions. This would preserve the concurrent  
4 issuance, the status quo intended by the Board.

5 We did point out that relief that  
6 we sought, the basis for seeking it in our  
7 papers, and as part of our rehearing request we  
8 also asked that the Board resolve these motions  
9 together to avoid any de-linking that might be  
10 argued to change the time the final written  
11 decision is issued with respect to one another.

12 This is respectfully not an attempt  
13 to reply to the 16-page brief that Progressive  
14 submitted, and we did discuss with Progressive  
15 our view that that paper was improper, and that  
16 we would raise that in this call if they sought  
17 the relief that they have sought today. We are  
18 not asking the Board to consider our papers and  
19 ruling on Progressive's motion. If we had  
20 opposed that motion, we would have discussed  
21 why we believe that paper is improper, as  
22 resting on something that occurred after the  
23 final written decisions, that is the upload  
24 time to PRPS.

25 We would have pointed out that

1     their paper appears to seek rehearing of the  
2     Board's February 20th decision, Paper 69, about  
3     the PRPS posting, and the time for that kind  
4     of rehearing has passed under Rule 4271 D-1.  
5     That would have been due March 6th. And we  
6     strongly disagree with the substance of their  
7     paper, from their reliance on the Federal Rules  
8     of Civil Procedure and precedent that does not  
9     apply to the Board, and their misreading of the  
10    statute. We did not present that material in  
11    our paper. We simply presented the factual  
12    predicate for our request for contingent  
13    relief, asking the Board to reconsider the form  
14    in which it issued the two final written  
15    decisions in these two matters, if it decided  
16    that rehearing was justified in CBM2013-00009.

17             Our request here, Your Honor, is  
18    that if Progressive is granted further briefing  
19    on our motion, we simply be accorded the same  
20    on their motion. And we're happy to address  
21    any questions the Board may have.

22             JUDGE LEE: All right. Give us a  
23    few minutes, please.

24             (Discussion off the record.)

25             JUDGE LEE: Good afternoon. The

1 judges are back. Do I have the lawyers for the  
2 parties, please?

3 MR. WAMSLEY: Progressive is here,  
4 Your Honor, yes.

5 MR. BAUGHMAN: Petitioner is here,  
6 Your Honor, yes.

7 JUDGE LEE: All right. The Panel  
8 has conferred. It seems like both parties are  
9 now asking for an opportunity to respond to the  
10 other party's rehearing requests. We are going  
11 to authorize only three pages in that regard.  
12 So Progressive gets to file a three-page  
13 response to each of Liberty's rehearing  
14 requests in the two cases, 2012-00003 and  
15 2013-00009. And Liberty gets to file a  
16 three-page response to Progressive's rehearing  
17 request in 2013-00009. I think that takes care  
18 of all the requests today.

19 MR. WAMSLEY: Your Honor, this is  
20 Jim Wamsley for Progressive. Thank you for  
21 your decision. Can you clarify the timing for  
22 us to make that filing?

23 JUDGE LEE: Since you're only  
24 authorized three pages, how long do you need?

25 MR. WAMSLEY: We could file it by

1 the end of the week.

2 JUDGE LEE: That will be fine with  
3 us. And, Liberty, can you do that?

4 MR. BAUGHMAN: Yes, Your Honor.

5 JUDGE LEE: And we are cognizant of  
6 our own power to manage the record in the  
7 cases, so we really don't need the parties to  
8 call us or tell us whether we should strike a  
9 paper or expunge a paper. If you want an  
10 opportunity to respond, just make a request in  
11 that regard. But as far as what we would do in  
12 managing our own records, I think we would  
13 appreciate it if that were to be left just for  
14 the Board's own exercise of discretion.

15 So today Progressive said that it  
16 would be satisfied with just an opportunity to  
17 respond, and we've authorized that.

18 MR. WAMSLEY: Thank you, Your  
19 Honor.

20 JUDGE LEE: Okay. Thank you. We  
21 are adjourned. Thank you.

22 MR. BAUGHMAN: Thanks, Your Honor.

23 (The hearing was adjourned at 5:08 p.m.)

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1 REPORTER'S CERTIFICATE

2  
3  
4 I, Todd L. Persson, do hereby  
5 certify that as such Reporter I took down in  
6 Stenotypy all of the proceedings had in the  
7 foregoing transcript; that I have transcribed  
8 my said Stenotype notes into typewritten form  
9 as appears in the foregoing transcript; that  
10 said transcript is the complete form of the  
11 proceedings had in said cause and constitutes a  
12 true and correct transcript therein.  
13  
14  
15



*Todd L. Persson*  
\_\_\_\_\_  
Todd L. Persson, Notary Public  
within and for the State of Ohio

21 My commission expires August 1, 2017.  
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