

Kostelnik, Summer

From: Frank H. Foster <ffoster@ohiopatent.com>
Sent: Wednesday, December 19, 2012 8:48 PM
To: IP Policy
Subject: Small Claims Request for Comments.

Great idea. Good luck with it. Patents are often worthless to smaller companies that can not afford to enforce them.

Here are some suggestions:

(a) What the possible venues for a small claims proceeding should be.

The venue should be the location of any U.S. District court. In addition to being heard by a Federal District Court judge or magistrate, the parties should additionally be given an alternative option to agree upon any registered patent attorney to hear the case.

(c) Whether parties should agree to waive their right to a jury trial as a condition of participating in a small claims proceeding;

Jury waiver is highly desirable. The absence of a jury reduces cost and the impact of emotion and lawyer skill. I doubt there has ever been a jury that really understood the science or the law of a patent case.

(d) Whether there should be certain required pleadings or evidence to initiate a small claims proceeding

Pleadings are necessary to allow early evaluation of a case by the parties. But it would be desirable to require more facts to be initially pleaded.

(j) Whether a small claims proceeding should include *attorney's fees* or some form of a "loser pays" system

Absolute loser pays all is unfair in most cases. The judge should be given the power to apportion fee payment based upon the judge's perception of how reasonable the claim and the defense were. Another desirable characteristic would be that an attorney fee award would be limited to the amount that the paying party paid for its attorney services. That would drive down expenses and risk but at each party's discretion and judgment.

(k) Whether a small claims proceeding should include *mediation* and whether mediation should be mandatory or permissive;

Mandatory mediation is highly desirable because the settlement of many disputes is often prevented by personality problems of the humans that have authority to settle. If there are sensible business people on BOTH sides, there will usually be a settlement, even before any enforcement action.

(n) How should a decision in a small claims proceeding be *enforced*;

A judgment could be taken to any U.S. District Court for enforcement like any other judgment.

Thanks,

Frank

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