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Investigating Patent Law's Presumption of Validity—An Empirical Analysis¹

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Abstract: The author analyzed empirical data from patent invalidity determinations at the Federal Circuit. The presumption of validity, and the clear and convincing standard for rebutting it, did not affect thirty-eight of forty-five (84%) Federal Circuit invalidity determinations made between April 2008 and June 2009. They may have affected the remaining seven of forty-five (16%) determinations.

Introduction

Patents issued by the United States Patent and Trademark Office (“PTO”) are presumed valid.³ The Patent Act places the burden of rebutting the presumption on the challenging party, but it does not set forth the evidentiary standard for rebutting it.⁴ The Court of Appeals for the Federal Circuit (“Federal Circuit”) requires clear and convincing evidence of the factual predicates of invalidity.⁵ The Federal Trade Commission,⁶ scholars,⁷ and members of the patent community⁸ advocate changing the evidentiary standard to a preponderance of the evidence standard, explaining that patents do not deserve a presumption of validity—let alone one requiring clear and convincing evidence to rebut—because patents are insufficiently

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examined. They explain that the clear and convincing standard burdens the patent system by making it too difficult to invalidate a patent that the PTO should not have granted. In *KSR Int'l Co. v. Teleflex Inc.*,⁹ the Supreme Court also questioned the wisdom of the Federal Circuit's jurisprudence.¹⁰

Some commentators have predicted that litigation challenges to the clear and convincing standard for rebutting the presumption of validity are forthcoming.¹¹ Against this background, it is useful to investigate how a

³ 35 U.S.C § 282 (2006) ("A patent shall be presumed valid.").

⁴ *See id.* ("The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.").

⁵ *See, e.g.*, *Schumer v. Lab. Computer Sys.*, 308 F.3d 1304, 1315 (Fed. Cir. 2002) (citing *Apotex USA, Inc. v. Merck & Co.*, 254 F.3d 1031, 1036 (Fed. Cir. 2001), *cert. denied*, 534 U.S. 1172 (2002)); *Ryco, Inc. v. Ag-Bag Corp.*, 857 F.2d 1418, 1423 (Fed. Cir. 1988) ("[A] patent is presumed valid, and the party attacking validity has the burden of proving facts supporting a conclusion of invalidity by clear and convincing evidence.").

⁶ *See* FTC, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY 8-10 (2003), <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>.

⁷ *See, e.g.*, Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn From Administrative Law*, 95 GEO. L.J. 269 (2007); Doug Lichtman & Mark A. Lemley, *Rethinking Patent Law's Presumption of Validity*, 60 STAN. L. REV. 45 (2007); Matthew Sag & Kurt Rohde, *Patent Reform and Differential Impact*, 8 MINN. J.L. SCI. & TECH. 1 (2007).

⁸ *See, e.g.*, Dennis Crouch, *Challenging Patent Validity: Microsoft Asks Supreme Court to Reduce "Clear and Convincing" Standard*, PATENTLY-O, <http://www.patentlyo.com/patent/2008/04/challenging-pat.html> (last visited Sep. 14, 2008) (comments).

⁹ 550 U.S. 398 (2007).

¹⁰ *See id.* at 426 (where the court "th[ought] it appropriate to note that the rationale underlying the presumption—that the PTO, in its expertise, has approved the claim—seems much diminished" when pertinent prior art was not disclosed during prosecution).

¹¹ *See e.g.*, HAROLD C. WEGNER'S TOP TEN PATENT CASES 13, Feb. 3, 2010, <http://www.grayonclaims.com/storage/TopTen2010Feb3.pdf>; Dennis Crouch, *Microsoft Questions Strong Presumption of Patent Validity over Newly Found Prior Art*, PATENTLY-O, <http://www.patentlyo.com/patent/2009/10/microsoft-questions-strong-presumption-of-patent-validity-over-newly-found-prior-art.html> (last visited March 1, 2010).

change in evidentiary standard would affect invalidity determinations.¹² Two advocates for change have noted this need, stating, “[w]e know far less than we should about how presumptions affect litigation decisions” because of an “endemic” lack of empirical evidence.¹³

Methodology

Data Set

The data set consists of post-*KSR* Federal Circuit cases¹⁴ from April 2008¹⁵ through June 2009 involving three types of invalidity challenges: (1) lack of written description;¹⁶ (2) anticipation (including by prior public use);¹⁷ and (3) obviousness.¹⁸ Only invalidity challenges where the Federal Circuit reached a final decision on the merits are included—remanded and precluded challenges are excluded. The lower court docket is further considered when necessary to collect data.

Analysis

The invalidity determinations were reviewed to determine whether the Federal Circuit: (1) upheld an invalidity challenge; (2) discussed if the

¹² See Etan S. Chatlynne, *The Burden of Establishing Patent Invalidity: Maintaining a Heightened Evidentiary Standard Despite Increasing “Verbal Variances,”* 31 CARDOZO L. REV. 297, 318 (2009).

¹³ Lichtman, *supra* note 7, at 69. While Professors Lichtman’s and Lemley’s suggestions for altering the evidentiary standard could ultimately prove useful, they admit that the basis of their analysis is lacking: “[w]hile we can’t prove that presumptions matter, we believe that they likely do.” *Id.* To this, a quality engineer would respond: “In God we trust; all others must bring data.” This is the motivation for the instant investigation.

¹⁴ *KSR* has affected invalidity determinations. See, e.g., *Friskit Inc. v. Real Networks, Inc.*, 306 Fed. Appx. 610, 611 (Fed. Cir. 2009) (where the district court initially denied a motion for summary judgment that claims were invalid for obviousness, but following *KSR*, the court granted a renewed motion, which the Federal Circuit affirmed); *Ball Aerosol & Specialty Container, Inc. v. Limited Brands, Inc.*, 555 F.3d 984, 988-89 (Fed. Cir. 2009).

¹⁵ This date is one year after *KSR*. The data set begins here in an attempt to avoid introducing potential non-steady state case-law effects into the analysis.

¹⁶ See 35 U.S.C. § 112 (2006).

¹⁷ See 35 U.S.C. § 102 (2006).

¹⁸ See 35 U.S.C. § 103 (2006).

evidentiary standard might be a preponderance of the evidence; (3) mentioned the presumption and/or evidentiary standard in its statement of law; (4) expressly applied the presumption and/or evidentiary standard; and (5) reversed the lower court. Using this information, a determination was made as to whether (6) the invalidity determination might have been different had a preponderance of evidence standard been applied.

The following guidelines were further used in determining whether the evidentiary standard may have affected the determination. *First*, where an invalidity challenge was upheld by clear and convincing evidence, the result is evidentiary-standard independent. By definition, when a clear and convincing standard is satisfied, a preponderance of evidence standard is satisfied too. *Second*, grants of motions for summary judgment or judgment as a matter of law (“JMOL”) were presumed evidentiary-standard independent because the standard for summary judgment and JMOL—viewing facts in the light most favorable to a non-moving party—is more stringent than either evidentiary standard in the patent context.¹⁹ *Third*, where a patent challenge was rejected and the lower court reached its judgment following a bench or jury trial, such determination was initially assumed evidentiary-standard dependent because the opposite could not be assumed.

Thirty-three cases²⁰ involving forty-five invalidity challenges were analyzed to collect the empirical data. Data are compiled according to the variables defined above using the spreadsheet provided in Appendix A. Invalidity determination summaries are provided in Appendix B. The completed data sheet is provided in Appendix C.²¹

¹⁹ See Intellectual Property Colloquium: A Conversation with Chief Judge Michel, <http://www.ipcolloquium.com/Programs/4.html>, at 44 minutes, 9 seconds (last visited April 21, 2009) (where Chief Judge Michel doubted that lowering the evidentiary standard would affect case outcomes); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 267 (1986) (Brennan, J., dissenting) (disbelieving that a “judge might plausibly hold that the evidence on motion for summary judgment was sufficient to enable a plaintiff bearing a mere preponderance burden to get to the jury . . . but insufficient for a plaintiff bearing a clear-and-convincing burden to withstand a defendant’s summary judgment motion).

²⁰ Lexis search terms used were: (valid! or invalid!) and patent and COURT (Federal Circuit).

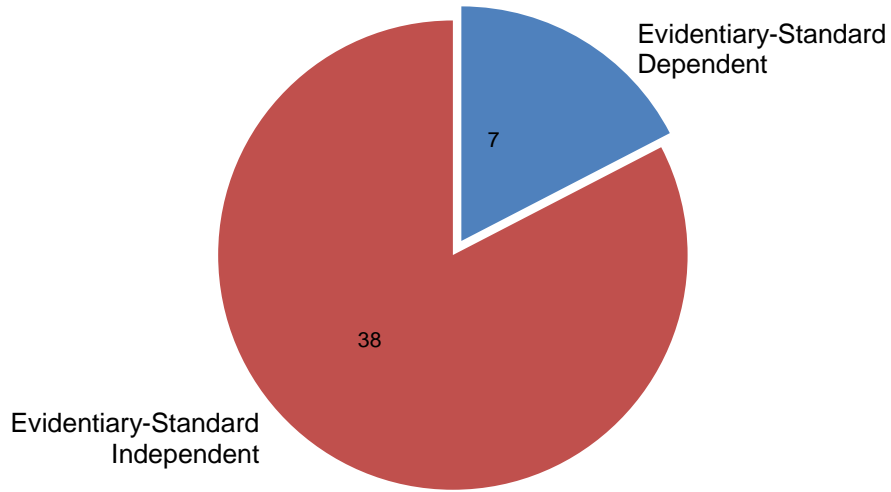
²¹ The data is also available in text format at <http://tinyurl.com/post-ksr-text>.

Results

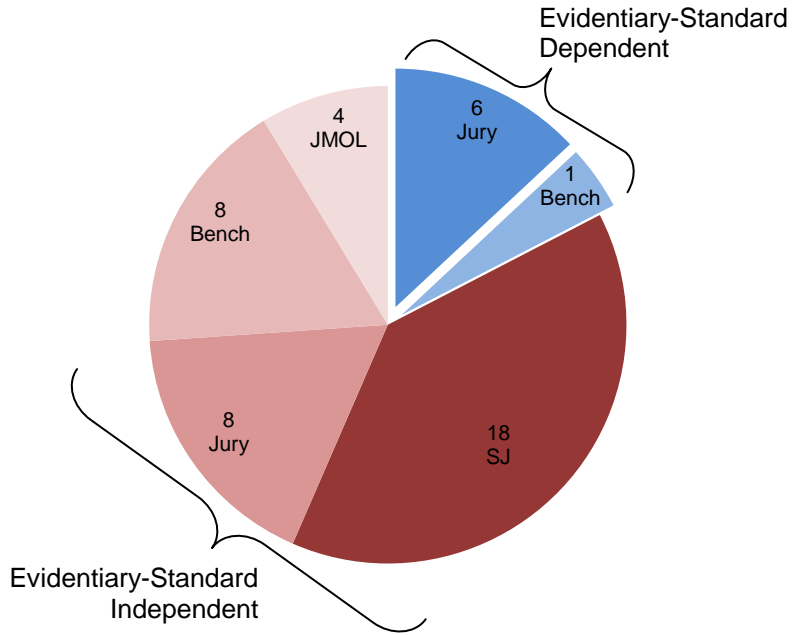
At least thirty-eight out of the forty-five (84%) patent challenges studied were evidentiary-standard independent. Of these determinations, eighteen (47%) were based on a granted motion for summary judgment, four (11%) were based on a granted motion for JMOL, eight (21%) resulted from a jury trial, and eight (21%) resulted from a bench trial. All but ten of the thirty-eight (26%) resulted in invalidation. Seven (18%) of these challenges were reversals of the lower courts' determinations that the patents at issue were not invalid, but none were reversals of determinations of invalidity. The Federal Circuit mentioned the presumption and the evidentiary standard for rebutting it fifteen times in its statements of law and six times in its analyses. One time, the Federal Circuit mentioned the parties' arguments concerning an adjustable evidentiary standard for rebutting the presumption, but it did not discuss the issue.

At most, seven out of forty-five (16%) patent challenges may have been evidentiary standard dependent. Of these determinations six (86%) resulted from a jury trial and one (14%) resulted from a bench trial. None of these challenges resulted in invalidation, and each was upheld at the Federal Circuit. The Federal Circuit mentioned the presumption and the evidentiary standard two times in its statements of law. In its analyses, it applied the presumption three times and the evidentiary standard twice. It did not discuss whether the evidentiary standard might be adjusted to a preponderance of evidence.

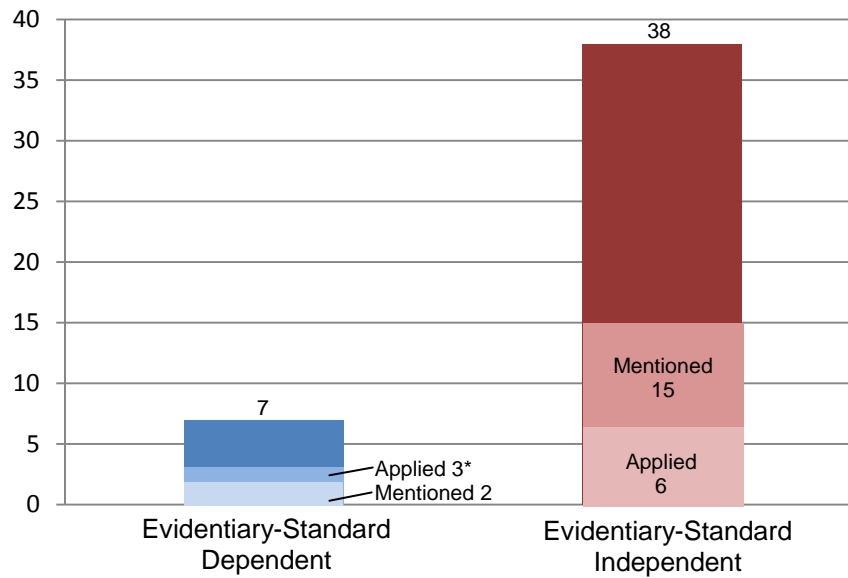
Results are provided visually in the following charts.



Role of the Evidentiary Standard for Rebutting the Presumption of Validity in Federal Circuit Invalidity Determinations



Role of Judgment Type on Federal Circuit Invalidity Determinations



*Evidentiary standard applied two times.

Frequency with which the Federal Circuit Mentions and Applies the Presumption and Evidentiary Standard

Observations

While the sample size is too small to draw firm conclusions, a few observations may be noted. In at most seven of forty-five invalidity determinations, the evidentiary standard for rebutting the presumption of validity may have affected the result. This relatively small percentage suggests that the evidentiary standard is not, in itself, a substantial driver in invalidity determinations.

The evidentiary standard may have affected the final outcome in fewer than these seven determinations. It is unclear how factfinders weigh evidence,²² and it is often unclear whether juries understand underlying technical information sufficiently to reach rational conclusions.²³ Furthermore, this

²² See Ehud Guttel & Doron Teichman, THE PROBATIVE FUNCTION OF PUNISHMENT: CRIMINAL SANCTIONS IN THE DEFENSE OF INNOCENT DEFENDANTS 4-9, EUROPEAN ASSOCIATION OF LAW AND ECONOMICS, Aug. 6, 2009, <http://www.eale09.eu/ocs2/index.php/EALE/roma09/paper/viewPaper/292>.

²³ See *Monolithic Power Sys., Inc. v. O2 Micro Int'l, Ltd.*, 558 F.3d 1341, 1325 (Fed. Cir. 2009) (where the district court judge told the parties' attorneys that the notion a jury could understand the facts of the patent case was "foolishness" and suggested that the

potential jury confusion is likely exacerbated when jury instructions include different standards for different issues—preponderance of evidence for infringement, and clear and convincing evidence for invalidity and willful infringement. Accordingly, those advocating a preponderance of evidence standard to reduce the likelihood of a party asserting a patent that the PTO erroneously granted should consider whether a change will achieve their goal. This is especially true given other options that may assist in the same goal, but which may be hampered by reducing the standard.²⁴

decision would depend more on “a jousting contest rather than on the actual scientific merits of who is right and who is wrong”).

²⁴ Consider post-grant review. *See, e.g.*, Patent Reform Act of 2009 S. 515, 111th Cong. § 5(f) (2009) (as reported by Mr. Leahy, with amendments, Apr. 2, 2009). Professor Mark Janis explains that because “the presumption of validity operates as a channeling mechanism, directing validity disputes towards or away from the courts,” lowering the burden of proof “may encourage patent challengers to resolve validity disputes in court and correlatively discourage use of” post-grant review. Mark D. Janis, *Reforming Patent Validity Litigation: The “Dubious Preponderance,”* 19 BERKELEY TECH. L.J. 923, 939 (2004)

Appendix A—Spreadsheet Template

Case Name				
Patent No.				
Challenge Type (Nov, Obv, WD)				
Challenge upheld? (Y/N)				
Result from: SJ, Jury, Bench, JMOL (if taken away from Jury)				
Possibly Different Result?				
Presumption mentioned, explicitly or implicitly?				
Evidentiary standard mentioned, explicitly or implicitly				
Presumption explicitly discussed or applied in the analysis?				
Evidentiary standard explicitly discussed or applied in the analysis?				
At least an allusion to whether new evidence may alter the invalidity analysis?				

Appendix B—Post-KSR Invalidity Determination Summaries

Ariad Pharms., Inc. v. Eli Lilly & Co., 560 F.3d 1366 (Fed. Cir. 2009)

Challenger contended the patent was invalid for lack of written description. Challenger sufficiently established that the description did not fully disclose the invention because: (1) it did not describe the specific molecules and (2) a person having ordinary skill in the art (“PHOSITA”) would not know what these molecules are. Although the patent included an example of a molecule, this example was new matter and could not support the written description requirement as of the critical date in 1989. Additionally, Ariad submitted a 1990 publication to show what a PHOSITA knew, but this also post-dated the critical date. Thus, the court invalidated the patent for insufficient written description.

Asyst Techs., Inc. v. Empak, Inc., 544 F.3d 1310 (Fed. Cir. 2008)

Challenger contended the patent was invalid for obviousness. Based on a jury verdict, the district court denied a motion for JMOL. Subsequently, the Supreme Court decided KSR, which convinced the district court to grant a renewed motion for JMOL. The Federal Circuit affirmed, explaining that there was one material difference between the reference and the asserted claim and that a second reference addressed this difference. Even though the jury found there was not a motivation to combine these references, the district court and Federal Circuit determined that this conclusion was not supported by substantial evidence. The solutions in the two references were both well known.

Ball Aerosol & Specialty Container, Inc. v. Limited Brands, Inc., 555 F.3d 984 (Fed. Cir. 2009)

The Federal Circuit reversed the district court’s grant of summary judgment of non-invalidity for obviousness. The district court found that two references disclosed all of the claim limitations, but held the patent was not obvious because the challenger did not show that there was an explicit motivation to combine the references. Interpreting *KSR*, the Federal Circuit explained that there is no requirement that a motivation to combine be explicit. Finding that the combination invention was obvious to try, the court held the patent was invalid.

Broadcom Corp. v. Qualcomm, Inc., 543 F.3d 683 (Fed. Cir. 2008)

Challenger challenged two patents: ‘686 and ‘317. The jury found both patents were not invalid. The Federal Circuit reversed in part, finding that the ‘317 patent was not invalid but that the ‘686 patent was invalid for anticipation. Regarding the ‘686 patent, the district court erroneously imported an additional limitation into the claim. A prior art limitation disclosed all of the claim’s limitations except for the additional erroneous limitation. Accordingly, the Federal Circuit found the reference anticipated the claim. Regarding the ‘317 patent, the Federal Circuit affirmed that the patent was not invalid for anticipation. The patentee nullified the challenge by antedating the reference using lab notebooks demonstrating conception and reduction to practice. At trial, the patentee’s expert provided a detailed testimony explaining that these lab notebooks disclosed all of the claim’s limitations. Challenger did not cross-examine patentee’s expert, nor did

challenger ask its own expert to testify on this subject. Therefore, the district court found that challenger provided un rebutted evidence that the reference did not anticipate. Because the evidence was un rebutted, this outcome is independent of which evidentiary standard for rebutting the presumption of validity may have been applied.

Carnegie Mellon Univ. v. Hoffmann-La Roche, Inc. 541 F.3d 1115 (Fed. Cir. 2008)

Challenger contended that three patents were invalid for lack of written description. The district court agreed. The Federal Circuit affirmed, but corrected the district court's reasoning for one of the patents. The upshot was that each patent was invalid for lack of written description because the specification provided a narrow disclosure that was not representative of, and failed to support, the claimed genus.

Clock Spring, L.P. v. Wrapmaster, Inc., 560 F.3d 1317 (Fed. Cir. 2009)

Challenger argued that the patent was invalid for anticipation by public use and obviousness. The district court granted challenger's summary judgment motion that the patent was invalid for obviousness but denied the motion with respect to anticipation, having found an issue of fact regarding whether the public use was experimental. The Federal Circuit affirmed, but found invalidity for anticipation by public use, and did not reach the question of obviousness. *First*, the court found that the demonstration included all the limitations in the claim, including one as an obvious variant of what was actually performed (likening filling "pinholes" in the demonstration to filling "cavities" in the claim). *Second*, explaining that the experimentation exception exists to allow an inventor to perfect the invention prior to applying for a patent, the court found that the exception was inapplicable because the inventor filed the patent application before the studies of the demonstration were complete.

Cordis Corp. v. Boston Sci. Corp., 561 F.3d 1319 (Fed. Cir. 2009)

Both Cordis and Boston Scientific asserted stent patents against each other and both defended with invalidity arguments. Regarding Cordis's challenge, Cordis supplied a reference that post-dated the provisional's filing date but preceded the patent's filing date. Cordis argued that the patent was not entitled to claim priority to the provisional application because the provisional's written description did not support the patent's claims. Boston Scientific's expert provided uncontradicted testimony that the written description satisfactorily supported the patent. The jury relied on this testimony to find that the patent was not invalid for an insufficient written description. Cordis next argued that other prior art references showed that the Boston Scientific's patent was obvious. Again, Boston Scientific's expert provided uncontradicted testimony that the references would likely not be combined and that the prior art taught away from the questioned claim limitations. For both challenges, it is likely that the court would have reached the same result for either evidentiary standard. The court explained that the jury relied on uncontradicted testimony to reach its findings.

Regarding Boston Scientific's challenge, Boston Scientific first argued that the inventor's monographs that pre-dated the patent application were printed

publications that anticipated the patent because the inventor showed these monographs to other doctors and to two commercial entities. The court found that the monographs were not printed publications because the inventor disclosed them while having a reasonable expectation of confidentiality. Thus, the court did not use these monographs in its anticipation analysis. Boston Scientific also asserted that the patent was anticipated by another reference, which the jury found did not anticipate the patent. The court explained that the jury had substantial evidence for this finding because, at trial, there was expert testimony that the reference did not anticipate the patent.

Cygnus Telecommc'ns Tech, LLC v. Telesys Commc'ns, LLC, 536 F.3d 1343 (Fed. Cir. 2008)

Challenger attacked both patents as being invalid for prior public use. The district court agreed and the Federal Circuit affirmed.

Dickson Indus., Inc. v. Patent Enforcement Team, LLC, 333 Fed. Appx. 514 (Fed. Cir. 2009)

The district court upheld a jury verdict that the patent was anticipated or obvious. The jury instructions required that anticipation be established by clear and convincing evidence, but stated that, as to obviousness, the patent was not entitled to a presumption of validity. *See* Jury Instructions, *Dickson Indus., Inc. v. Patent Enforcement Team, LLC*, No. 02-0467, Docket No. 253, at 22-34, 46 (W.D. Okla. Apr. 3, 2008). The Federal Circuit found there was substantial evidence for the jury to determine the patent was anticipated—it did not address obviousness or the elimination of the presumption.

Ecolab, Inc. v. FMC Corp., 569 F.3d 1335 (Fed. Cir. 2009).

Challenger attacked one patent as being invalid as anticipated and another as being invalid as obvious. Regarding anticipation, the district court relied on the jury's finding that the patent was not anticipated by the Labadie reference. The Federal Circuit reversed finding that the jury did not have substantial evidence to find non-anticipation following the challenger's presentation of "expert testimony . . . that addressed each claim element and showed how each element was disclosed in Labadie." Thus, the court found the claim invalid for anticipation. In its analysis, the court suggested it is not difficult to establish clear and convincing evidence of anticipation using expert testimony in non-frivolous validity challenges, saying "testimony from one skilled in the art [that] identif[ies] each claim element, state[s] the witnesses' interpretation of the claim element, and explain[s] in detail how each claim element is disclosed in the prior art reference" is typically clear and convincing evidence of the factual predicates of anticipation.

Regarding obviousness of the other patent, the district court relied on the jury's finding that the patent was not invalid. The Federal Circuit reversed, finding that two references contained the limitations and that there was "an apparent reason to combine" them.

Eisai Co. v. Dr. Reddy's Labs., Ltd., 533 F.3d 1353 (Fed. Cir. 2008)

Challenger contended the patent was invalid for obviousness. The district court found the patent was not invalid. The Federal Circuit affirmed, explaining that to show a chemical compound's obviousness, the challenger needs to identify a lead compound in the prior art. The court reasoned, *first*, that challenger did not support its lead compound assertions and, *second*, that the record gives no reason why a skilled artisan would have considered modifying the lead compound in the manner proposed. Because the court found no support for either of these arguments, these arguments would have failed in establishing invalidity under a preponderance standard.

Friskit Inc. v. Real Networks, Inc., 306 Fed. Appx. 610, 611 (Fed. Cir. 2009)

Challenger moved for summary judgment contending that the patent was invalid for obviousness. The district court originally denied the motion, but following *KSR*, the challenger renewed the motion, which the court granted. The Federal Circuit affirmed explaining that predictable use of elements from the prior art according to their established functions is likely to be obvious. The court then explained how the patent disclosed such a combination.

Golden Bridge Tech., Inc. v. Nokia, Inc., 527 F.3d 1318 (Fed. Cir. 2008)

The district court granted challenger's summary judgment motion that the patent was invalid as anticipated. On appeal, the only argument the patentee advanced was whether the prior art reference disclosed one of the claim limitations, an issue of fact not presented to the district court. The Federal Circuit declined hearing this argument and affirmed.

ICU Med., Inc. v. Alaris Med. Sys., Inc., 558 F.3d 1368 (Fed. Cir. 2009)

Challenger argued that the patent was invalid for insufficient written description. The claims did not include a limitation addressing whether the claimed medical valves could operate with or without a spike. The specification explicitly disclosed valves that operate with a spike. The only mention of spikeless valves came via an amendment including claims directed to spikeless valves. The court rejected the patentee's argument that the specification demonstrated that the inventor possessed, as of the filing date, a medical valve that operated without a spike because a PHOSITA would not understand from the specification that the inventor invented a spikeless medical valve.

Impax Labs., Inc. v. Aventis Pharms., Inc., 545 F.3d 1312 (Fed. Cir. 2008)

Challenger contended that the patent was invalid for anticipation. In a bench trial, the district court determined that patent was not invalid because the patent reference was not enabling; the district court found undue experimentation was needed. The district court had found that the prior art provided "hundreds or thousands" of options and that nothing in the reference suggested that a PHOSITA should begin her experimentation with the challenger's "suggested" option. The Federal Circuit affirmed. It noted that a validity challenger who asserts an anticipating *patent* reference "enjoys a presumption that the anticipating disclosure also enables the claimed invention," which the patentee may overcome with

“persuasive evidence” that the patent reference is not enabling. Here, the patentee rebutted the presumption of enablement, preventing the patent reference from anticipating. This case is an example where the invalidity outcome was independent of the evidentiary standard for rebutting the presumption of validity. The court applied a separate, threshold presumption of enablement *against the patentee*, which the patentee rebutted, and thereby prevented the patent reference from being used as an anticipating reference against the patent. In essence, the challenger was left without a prior art reference to support its anticipation challenge.

Kinetic Concepts, Inc. v. Blue Sky Med. Group, Inc., 554 F.3d 1010 (Fed. Cir. 2009)

Challenger contended the patent was invalid for obviousness. After a jury trial, the patents were held not invalid. In a split panel decision, the Federal Circuit upheld the district court. The result turned on claim construction of the term “wound,” which the district court did not define. Under the court’s construction, the court found that the patentee provided the jury with substantial evidence to distinguish the challenger’s primary prior-art reference.

Kyocera Wireless Corp. v. ITC, 545 F.3d 1340 (Fed. Cir. 2008)

Challenger claimed the patent was invalid for anticipation. The ITC disagreed, and the Federal Circuit affirmed. The ITC said three references did not anticipate based on claim interpretation. The remaining “reference” was the GSM standard, which comprised twelve individual references. The ITC said that this standard could not count as a single reference, and thus, could not anticipate within the meaning of 35 U.S.C. § 102. This not being an evidentiary issue, the result is independent of which evidentiary standard applied.

Leggett & Platt, Inc. v. VUTEk, Inc., 537 F.3d 1349 (Fed. Cir. 2008)

Challenger asserted that some of a patent’s claims were invalid as anticipated and others were invalid for obviousness. The district court agreed. The Federal Circuit explained that the claims were functional, and that functions are prone to being inherent in the prior art. Even though the prior art patent may not have expressly disclosed the key limitation, the Federal Circuit said that it inherently disclosed this limitation. Accordingly, it found the first set of claims invalid for anticipation. Because challenger’s obviousness appeal depended on an erroneous finding of anticipation, the court affirmed the remaining claims’ obviousness without further comment.

Lexion Med., LLC v. Northgate Techs., Inc., 292 Fed. Appx. 42 (Fed. Cir. 2008)

Challenger asserted that two patents were invalid for obviousness. Before submitting the case to the jury, the district court granted a motion for JMOL that one of the patents was invalid. The jury found the other patent was not invalid. The Federal Circuit affirmed both determinations with little comment or analysis.

Linear Tech. Corp. v. ITC, 292 Fed. Appx. 52 (Fed. Cir. 2008)

Challenger contended a patent was invalid for anticipation. The ITC agreed and the Federal Circuit affirmed.

Monolithic Power Sys., Inc. v. O2 Micro Int'l, Ltd., 558 F.3d 1341 (Fed. Cir. 2009)

Challenger argued that the patent was invalid for obviousness. Before trial, at a case management conference, the court “expressed its frustration with the technical complexities of the ‘722 patent” and said that “the notion that a jury is going to understand [the technical issues] . . . is foolishness.” Subsequently, the court appointed an independent expert under Rule 706 in addition to the parties’ experts. At trial, some experts testified that a reference disclosed various features of the patent. The jury relied on this evidence to conclude that the patent was invalid for obviousness. The Federal Circuit affirmed the judgment of the district court, explaining that the jury had substantial evidence to find the patent was invalid for obviousness.

Muniauction, Inc. v. Thomson Corp., 532 F.3d 1318 (Fed. Cir. 2008)

Challenger argued that the patent was invalid for obviousness. After a jury trial, the patent was held not invalid. The district court denied challenger’s motion for JMOL. The Federal Circuit reversed. The prior art system performed every step of the invention but one, as the patentee’s expert conceded. From this testimony, the Federal Circuit determined that no reasonable juror could have concluded the opposite. Then, based prior art references, the court determined that addition of this limitation was well known in the art—the patent itself called the addition of the limitation “conventional.”

In re Omeprazole Patent Litigation, 536 F.3d 1361 (Fed. Cir. 2008)

Challenger asserted that two patents were invalid for prior public use. The contended public use was Phase II clinical trials. Following a bench trial, the district court found the patents were not invalid for prior public use because: (1) the studies constituted experimental uses, and (2) the formulations were not ready for patenting until after the studies were completed. The Federal Circuit affirmed on the latter reasoning alone. For a use to count as a prior use under 35 U.S.C. § 102(b), there must be proof of a reduction to practice one year before the critical date. For there to be a reduction to practice, the inventor must have: (1) constructed an embodiment or performed a process that meets all the limitations and (2) determined that the invention worked for its intended purpose. Because the inventors were seeking to invent a stable form of the drug, they could not have known that the invention worked for its intended purpose—that it was stable—until after they analyzed the test results. Likely, a lower evidentiary standard for rebutting the presumption of validity would not have affected the result. The court explained that stability and shelf life were the key characteristics of the invention’s patentability, which characteristics the inventors could not have determined worked as intended until after stability testing.

Procter & Gamble Co. v. Teva Pharms. USA, Inc., 566 F.3d 989 (Fed. Cir. 2009)

Challenger contended that the structural similarities between the claimed compound and a prior art compound rendered the challenged claims obvious. The district court disagreed. Based on expert testimony, the Federal Circuit affirmed. The court reviewed the district court’s findings of the underlying facts of

obviousness for clear error, and explained that these findings must be supported by clear and convincing evidence to rebut the presumption of validity. The court found that the district court did not clearly err in determining that the compounds' structures were not sufficiently similar and that structural modification would not have been routine. The court did not address whether the evidence bearing on these issues was clear and convincing, likely because the court found the district judge discredited the only witness who described the modification as routine.

Proveris Sci. Corp. v. Innovasystems, Inc., 536 F.3d 1256 (Fed. Cir. 2008)

Challenger attempted to attack a patent as being anticipated and obvious by relying on testimony from two experts regarding prior art references. The district court excluded the testimony of one expert because he had not prepared or submitted an expert report. The court limited the other expert's testimony to a discussion of the contents of the prosecution history and the general subject matter of the invention. Correspondingly, the challenger could not introduce testimony regarding the prior art references, which left its invalidity defenses unsubstantiated. The court granted a motion for JMOL that the patents were not invalid. The Federal Circuit affirmed, finding that the evidentiary rulings were not an abuse of discretion.

Revolution Eyewear, Inc. v. Aspex Eyewear, Inc., 563 F.3d 1358 (Fed. Cir. 2009)

Challenger contended the patent was invalid for lack of written description because the claims did not address both prior art deficiencies identified in the patent—it only addressed one. The court explained that when “the specification sets out two different problems present in the prior art, it is unnecessary for each and every claim in the patent to address both problems.” Therefore, based solely on a matter of law, the court found that the patent was not invalid.

Ricoh Co. v. Quanta Computer, Inc., 550 F.3d 1325 (Fed. Cir. 2008)

Challenger asserted the patent was invalid for obviousness. On a motion for summary judgment, the district court found patent was obvious. The Federal Circuit applied a presumption of invalidity for obviousness because the prior art was the same except for a different—but overlapping—set of ranges in a limitation. The patentee could not rebut this presumption.

Rothman v. Target Corp., 556 F.3d 1310 (Fed. Cir. 2009)

After a jury trial, the patent was found invalid as anticipated and obvious. The district court, discussing anticipation but not obviousness, denied the patentee's motion for JMOL that the patents were not invalid. On appeal, the Federal Circuit affirmed for obviousness, not anticipation, explaining that challengers presented the jury with an “evidentiary cornucopia” sufficient for sustaining an obviousness verdict. The patentee contended that challengers' expert's testimony showed that the jury's verdict was unreasonable because the expert said that the invention was “not imaginable.” The court disposed with this argument explaining that the jury likely understood the expert's testimony to be a “concession that [the expert] did not beat [plaintiff] to the inventive punch, rather than an admission that the invention would not have been obvious to an ordinary artisan.”

Sanofi-Synthelabo v. Apotex, Inc., 550 F.3d 1075 (Fed. Cir. 2008)

Challenger claimed the patent was invalid for obviousness and anticipation. In a bench trial, the district court held the patent was not invalid. The Federal Circuit affirmed. The challenger provided non-enabling references that disclosed the genus, but not the species, so the court found the references did not anticipate. Regarding obviousness, the court began its analysis applying a presumption of invalidity for obviousness because the reference showed there was a “close structural similarity between a new chemical compound and prior art compounds.” The court said that the patentee rebutted the presumption by showing that the references did not suggest obviousness because of the “unpredictable and unusual properties of [the species] and the therapeutic advantages thereby provided.” This is a case where a lower evidentiary standard may have produced a different result. The challenger had argued that even though experimentation was required to bridge the gap between the prior art and the invention, this experimentation was not undue. They provided references showing that the successful investigation techniques were well known in the art. The district court found that a PHOSITA would not have been motivated to try the investigations. Even though this finding cannot be reasonably attacked for clear error, the court did not address that Sanofi methodically performing the investigation was itself evidence of motivation. Accordingly, the court may have reached a different result if applying a lower evidentiary standard.

Scanner Techs. Corp. v. ICOS Vision Sys. Corp., 528 F.3d 165 (Fed. Cir. 2008)

Challenger attacked the patent as being invalid for obviousness. The district court agreed. The Federal Circuit affirmed, explaining that the record supported the district court’s obviousness determination.

Sundance, Inc. v. Demonte Fabricating Ltd., 550 F.3d 1356 (Fed. Cir. 2008)

Challenger claimed the patent was invalid for obviousness in light of two prior art patent references—Cramero and Hall. The district court granted the patentee’s motion for JMOL, reasoning that Hall was outside the scope of the invention even though the disclosure stated it was inside the scope of the invention. The Federal Circuit reversed, finding the patent was invalid for obviousness. Pointing out that patentee did not dispute that the district court erred in finding that Hall was outside the scope of the invention, the Federal Circuit found that Hall disclosed the only limitation missing from Cramero. Relying on *KSR*, the Federal Circuit explained that the combined limitations each performed the same function they had been known to perform, and yielded the expected result. Although Hall was not cited in prosecution, the court did not address this, nor did the challenger base any arguments thereon.

Tech. Licensing Corp. v. Videotek, Inc. 545 F.3d. 1316 (Fed. Cir. 2008)

Challenger asserted the patent was invalid for anticipation. In a bench trial, the district court found the patent invalid for anticipation and the Federal Circuit affirmed. Although the patent was ultimately invalidated because of anticipation, the analysis focused on whether a parent application’s specification sufficiently

provided the written description for claims that ultimately issued from a continuation-in-part application. The patentee conceded that his patent would be invalid if not entitled to the filing date of the parent application. Accordingly, this case is properly considered a written description case. The district court found that upon the challenger producing a reference that anticipated as of the patent's filing date, the burden shifted to the patentee to show that it possessed the invention before the reference's publication date. It noted uncertainty as to whether the patentee needed to establish priority using clear and convincing evidence, but that this uncertainty did not matter because the result would be the same under a preponderance of evidence standard. The Federal Circuit clarified that only the burden of production shifted in this case, and that the job to convince the court of invalidity, based on all the produced evidence, remains with the challenger.

Tokyo Keiso Co. v. SMC Corp., 307 Fed. Appx. 446 (Fed. Cir. 2009)

The district court granted the challenger's summary judgment motion of invalidity for obviousness based on two prior art references. The Federal Circuit affirmed. In its discussion, the court described the parties' arguments regarding nonconsidered references weakening the presumption of validity, but did not address the issue. In fact, the court did not even recite the presumption of validity or the clear and convincing standard for rebutting it in the recitation of the law.

Voda v. Cordis Corp., 536 F.3d 1311 (Fed. Cir. 2008)

Challenger contended the patent was invalid as anticipated and obvious. The district court determined that the patents were not invalid. Regarding anticipation, the only argument between the parties was whether either of two references disclosed one of the patent's limitations. A jury determined that neither reference disclosed the limitation. The Federal Circuit affirmed, explaining that record contained substantial evidence for a reasonable jury to conclude that neither reference disclosed the limitation by clear and convincing evidence. The challenger provided evidence suggesting the references disclosed the limitation. Conceivably, a reasonable jury, applying a preponderance of evidence standard, may have found the references disclosed the limitation. Regarding obviousness, the Federal Circuit said that the challenger made a perfunctory argument but did not cite evidence to support it. Accordingly, even under a preponderance standard, the obviousness result would have been the same—the patent would be held not invalid.

Yingbin-Nature Wood Industry Co., Ltd. v. ITC, 535 F.3d 1322 (Fed. Cir. 2008)

Challenger attacked a patent for lack of written description because the concept of "clearances" was new matter in a child application. The ALJ found the patent was invalid. The Commission reversed, finding that the original disclosure's figures and their descriptions adequately supported the claims because the original disclosure included figures with voids and a discussion of these voids. The commission reasoned that "merely adding the generic word 'clearance' to describe those spaces did not constitute new matter." The Federal Circuit affirmed. As both the Commission and the Federal Circuit found that the original disclosure supported the challenged claims, and that the term "clearance" was not new matter, reducing the evidentiary standard likely would not have affected the outcome of this case.

Appendix C—Post-KSR Data²⁵

²⁵ Blue shading indicates reversal. Electronic spreadsheet is available at <http://tinyurl.com/post-ksr>. Data set in text format is available at <http://tinyurl.com/post-ksr-text>.

Case Name	Date	Patent No.	Challenge Type (Nov, Obv, WD)	Challenge upheld?	Judgment came from: SJ, jury, bench, JMOL	Presumption mentioned, explicitly or implicitly?	Evidentiary standard mentioned, explicitly or implicitly	Presumption explicitly discussed or applied in the analysis?	Evidentiary standard explicitly discussed or applied in the analysis?	At least an allusion to whether new evidence may alter the invalidity analysis?	Could the result be different with PoE?
Ariad Pharms., Inc. v. Eli Lilly & Co., 560 F.3d 1366 (Fed. Cir. 2009).	4/3/2009	6410516	WD	Y	jury	Y	Y	N	N	N/A	N
Ariad Pharms., Inc. v. Eli Lilly & Co., 529 F. Supp. 2d 106 (D. Mass. 2007)	7/26/2007	6410516	WD	N	jury	Y	Y	Y	Y	Y	Y
Asyst Techs., Inc. v. Empak, Inc., 544 F.3d 1310 (Fed. Cir. 2008)	10/10/2008	5097421	Obv	Y	JMOL	N	N	N	N	N	N
Asyst Techs., Inc. v. Empak, Inc., No. 98-20451, 2007 U.S. Dist. LEXIS 59100 (N.D. Cal. Aug. 3, 2007).	8/3/2007	5097421	Obv	Y	JMOL	Y	N	N	N	N	N
Ball Aerosol & Specialty Container, Inc. v. Limited Brands, Inc., 555 F.3d 984 (Fed. Cir. 2009)	2/9/2009	6457969	Obv	Y	SJ	N	N	N	N	N	N
Ball Aerosol & Specialty Container, Inc. v. Limited Brands, Inc., No. 05 C 3684, 2006 U.S. Dist. Lexis 97049 (N.D. Ill. June 28, 2006)	6/28/2006	6457969	Obv	N	SJ	Y	Y	Y	Y	N	N
Broadcom Corp. v. Qualcomm, Inc., 543 F.3d 683 (Fed. Cir. 2008)	9/24/2008	6847686	nov	Y	jury	N	N	N	N	N	N
		5657317	nov	N	jury	N	N	N	N	N	N
Broadcom Corp. v. Qualcomm, Inc., No. 8:05-467, 2007 U.S. Dist. LEXIS 62764 (C.D. Cal. Aug. 10, 2007)	8/10/2007	6847686	nov	N	jury	Y	Y	Y	Y	N	Y
		5657317	nov	N	jury	Y	Y	Y	Y	N	N
Carnegie Mellon Univ. v. Hoffmann-La Roche, Inc. 541 F.3d 1115 (Fed. Cir. 2008)	9/8/2008	4767708	WD	Y	SJ	N	N	N	N	N	N
		5126270	WD	Y	SJ	N	N	N	N	N	N
		6017745	WD	Y	SJ	N	N	N	N	N	N
Carnegie Mellon Univ. v. Hoffmann-La Roche, Inc., 148 F. Supp. 2d 1004 (N.D. Cal. 2001)	6/27/2001	4767708	WD	Y	SJ	Y	Y	Y	Y	Y	N
Carnegie Mellon Univ. v. Hoffmann-La Roche, Inc., No. 95-3524, 1999 WL 33298545 (N.D. Cal. Aug. 19, 1999)	8/19/1999	5126270	WD	Y	SJ	Y	Y	Y	Y	Y	N
Carnegie Mellon Univ. v. Hoffmann-La Roche, Inc., No. 01-0415 (N.D. Cal. Sept. 29, 2003)	9/29/2003	6017745	WD	Y	SJ	N/A	N/A	N/A	N/A	N/A	N
Clock Spring, L.P. v. Wrapmaster, Inc., 560 F.3d 1317 (Fed. Cir. 2009)	3/25/2009	5632307	nov	Y	SJ	Y	Y	N	N	N	N
Clock Spring, L.P. v. Wrapmaster, Inc., No. 4:05-CV-00082, slip op. at 18-20 (S.D. Tex. Dec. 19, 2007)	12/19/2007	5632307	obv	Y	SJ	Y	N	N	N	N	N
Cordis Corp. v. Boston Sci. Corp., 561 F.3d 1319 (Fed. Cir. 2009)	3/31/2009	5922021	Obv	N	Jury	N	N	N	N	N	Y
		5895406	nov	N	jury	N	N	Y	N	N	Y
Cordis Corp. v. Boston Sci. Corp., No. 03-027, 2006 U.S. Dist. LEXIS 28547	(D. Del. May 11, 2006)	5922021	Obv	N	Jury	Y	Y	N	N	N	Y
		5895406	nov	N	jury	Y	Y	Y	Y	N	Y
Cygnus Telecomm'ns Tech, LLC v. Telesys Commc'ns, LLC, 536 F.3d 1343 (Fed. Cir. 2008)	8/19/2008	5883964	nov	Y	SJ	N	N	N	N	N	N
		6035027	nov	Y	SJ	N	N	N	N	N	N
Cygnus Telecomm'ns Tech, LLC v. Telesys Commc'ns, LLC, (2007)	3/30/2007	5883964	nov	Y	SJ	N	N	N	N	N	N
		6035027	nov	Y	SJ	N	N	N	N	N	N
Dickson Indus., Inc. v. Patent Enforcement Team, LLC, No. 2008-1372, 2009 U.S. App. LEXIS 10779 (Fed. Cir. May 20, 2009).	5/20/2009	4701069	nov	Y	Jury	N	N	N	N	N	N

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Dickson Indus., Inc. v. Patent Enforcement Team, LLC, No. 02-0467 (W.D. Okla. Sept. 28, 2007) (Jury Instructions).		4701069	nov	Y	Jury	Y	Y	N/A	N/A	Y	N
Ecolab, Inc. v. FMC Corp., ___ F.3d ___, No. 2008-1228, 2009 U.S. App. LEXIS 12390 (Fed. Cir. June 9, 2009)	6/9/2009	6010729	nov	Y	Jury	Y	Y	Y	Y	N	N
		6113963	Obv	Y	Jury	N	N	N	N	N	N
Order, Ecolab, Inc. v. FMC Corp., No. 05-CV-831 (D. Minn. Feb. 22, 2008); Special Verdict Form, Ecolab, Inc. v. FMC Corp., No. 05-CV-831 (D. Minn. Nov 6, 2007)	2/22/2008	6010729	nov	N	Jury	N	N	N/A	N/A	N	N/A
		6113963	Obv	N	Jury	N	N	N/A	N/A	N	N/A
Eisai Co. v. Dr. Reddy's Labs., Ltd., 533 F.3d 1353 (Fed. Cir. 2008).	7/21/2008	5045552	Obv	N	SJ	Y	Y	N	N	N	N
Eisai Co. v. Teva Pharms. USA, No. 03-9053, 2006 U.S. Dist. LEXIS 73516 (S.D.N.Y. Oct. 5, 2006)		5045552	Obv	N	SJ	Y	Y	Y	Y		N
Friskit Inc. v. Real Networks, Inc., 306 Fed. Appx. 610, 611 (Fed. Cir. 2009)	1/12/2009	6389467	Obv	Y	SJ	N	N	N	N	N	N
		6725275	Obv	Y	SJ	N	N	N	N	N	N
		6735628	Obv	Y	SJ	N	N	N	N	N	N
Friskit Inc. v. Real Networks, Inc., 499 F. Supp. 2d 1145 (N.D. Cal. 2007)	7.26.2007	6389467	Obv	Y	SJ	Y	Y	N	N	N	N
		6725275	Obv	Y	SJ	Y	Y	N	N	N	N
		6735628	Obv	Y	SJ	Y	Y	N	N	N	N
Golden Bridge Tech., Inc. v. Nokia, Inc., 527 F.3d 1318 (Fed. Cir. 2008).	5/21/2008	6574267	nov	Y	SJ	N	N	N	N	N	N
Golden Bridge Tech., Inc. v. Nokia, Inc., No. 2:05-151, 2007 WL 294176 (E.D. Tex. Jan. 29, 2007)	1/29/2007	6574267	nov	Y	SJ	Y	Y	Y	Y	N	N
ICU Med., Inc. v. Alaris Med. Sys., Inc., 558 F. 3d 1368 (Fed Cir. 2009)	3/13/2009	6682509	WD	Y	SJ	Y	Y	Y	Y	N/A	N
		6572592	WD	Y	SJ	Y	Y	Y	Y	N/A	N
ICU Med., Inc. v. Alaris Med. Sys., Inc., No. 04-00689, 2007 U.S. Dist. LEXIS 13156 (C.D. Cal. January 22, 2007).	1/22/2007	6682509	WD	Y	SJ	Y	Y	Y	Y	N/A	N
			WD	Y	SJ	Y	Y	Y	Y	N/A	N
Impax Labs., Inc. v. Aventis Pharms., Inc., 545 F.3d 1312 (2008)	10/3/2008	5527814	nov	N	bench	Y	Y	N	N	N	N
Impax Labs., Inc. v. Aventis Pharms., Inc., 496 F. Supp. 2d 428 (D. Del. 2007)	7/19/2007	5527814	nov	N	bench	N	N	N	N	N	N
Kyocera Wireless Corp. v. ITC, 545 F.3d 1340 (Fed. Cir. 2008)	10/14/2008	6714983	nov	N	bench	N	N	N	N	N	N
In the Matter of CERTAIN BASEBAND PROCESSOR CHIPS AND CHIPSETS, TRANSMITTER AND RECEIVER (RADIO) CHIPS, POWER CONTROL CHIPS, AND PRODUCTS CONTAINING SAME, INCLUDING CELLULAR TELEPHONE HANDSETS 337-TA-543 (Oct. 10, 2006)	10/10/	6714983	nov	N	bench	Y	Y	Y	Y	N	N
Kinetic Concepts, Inc. v. Bule Sky Med. Group, Inc., 554 F.3d 1010 (Fed. Cir. 2009)	2/2/2009	5636643	Obv	N	jury	N	N	N	N	N	Y
		5645081	Obv	N	jury	N	N	N	N	N	Y

Case Name	Date	Patent No.	Challenge Type (Nov, Obv, WD)	Challenge upheld?	Judgment came from: SJ, jury, bench, JMOL	Presumption mentioned, explicitly or implicitly?	Evidentiary standard mentioned, explicitly or implicitly	Presumption explicitly discussed or applied in the analysis?	Evidentiary standard explicitly discussed or applied in the analysis?	At least an allusion to whether new evidence may alter the invalidity analysis?	Could the result be different with PoE?
Kinetic Concepts, Inc. v. Bule Sky Med. Group, Inc., No. SA-03-CV-832, 2007 WL 1113085 (W.D. Tex. Apr. 4, 2007).	4/4/2007	5636643	Obv	N	jury	Y	Y	Y	Y	N	Y
		5645081	Obv	N	jury	Y	Y	Y	Y	N	Y
Leggett & Platt, Inc. v. VUTEK, Inc., 537 F.3d 1349 (Fed. Cir. 2008).	8/21/2008	6755518	nov	Y	SJ	N	N	N	N	N	N
			obv	Y	SJ	N	N	N	N	N	N
Leggett & Platt, Inc. v. VUTEK, Inc., No. 4:05cv788, 2006 U.S. Dist. LEXIS 93024 (E.D. Mo. Dec. 26, 2006).	12/26/2006	6755518	nov	Y	SJ	Y	Y	Y	Y	N	N
			obv	Y	SJ	Y	Y	N	N	N	N
Lexion Med., LLC v. Northgate Techs., Inc., 292 Fed. Appx. 42 (Fed. Cir. 2008).	8/28/2008	5411474	Obv	N	jury	N	N	N	N	N	Y
		6068609	Obv	Y	JMOL	N	N	N	N	N	N
Lexion Med., LLC v. Northgate Techs., Inc., No. 1:04-5705, (N.D. Ill. Feb. 12, 2007) (Order following jury trial that '474 is valid and '609 is invalid)	2/12/2007	5411474	Obv	N	jury	N/A	N/A	N/A	N/A	N/A	Y
		6068609	Obv	Y	JMOL	N/A	N/A	N/A	N/A	N/A	N
Linear Tech. Corp. v. ITC, 292 Fed. Appx. 52 (Fed. Cir. 2008)	8/28/2008	6411531	nov	Y	bench	N	N	N	N	N	N
In re Matter of Certain Voltage Regulators, Components Thereof and Products Containing Same ITC 337-TA-564 (2007)	5/22/2007	6411531	nov	Y	bench	Y	Y	Y	Y	Y	N
Monolithic Power Sys., Inc. v. O2 Micro Int'l, Ltd., 558 F.3d 1341 (Fed. Cir. 2009)	3/5/2009	6396722	Obv	Y	Jury	N	N	N	N	N	N
Monolithic Power Sys., Inc. v. O2 Micro Int'l, Ltd., No. C 04-2000, 2007 U.S. Dist. LEXIS 84755 (N.D. Cal. Oct. 30, 2007); Jury Instructions, Monolithic Power Sys., Inc. v. O2 Micro Int'l, Ltd., No. C 04-2000, (N.D. Cal. May 14, 2007)	10/30/2007	6396722	Obv	Y	Jury	Y	Y	N/A	N/A	N/A	N
Muniauction, Inc. v. Thomson Corp., 532 F.3d 1318 (Fed Cir. 2008).	7/14/2008	6161099	Obv	Y	jury	Y	Y	Y	Y	N	N
Muniauction, Inc. v. Thomson Corp., 502 F. Supp. 2d 477 (W.D. Pa. 2007)	7/31/2007	6161099	Obv	N	jury	Y	Y	Y	Y	N	Y
In re Omprazole Patent Litigation, 536 F.3d 1361 (Fed Cir. 2008).	8/20/2008	4786505	nov	N	bench	Y	Y	N	N	N	N
		4853230	nov	N	bench	Y	Y	N	N	N	N
In re Omprazole Patent Litigation, 490 F. Supp. 2d 381 (S.D.N.Y. 2007).	5/31/2007	4786505	nov	N	bench	Y	Y	Y	Y	N	N
		4853230	nov	N	bench	Y	Y	Y	Y	N	N
The Procter & Gamble Co. v. Teva Pharms. USA, Inc., No. 2008-1404, 2009 U.S. App. LEXIS 10475	5/13/2009	5538122	Obv	N	bench	Y	Y	N	N	N	N
The Procter & Gamble Co. v. Teva Pharms. USA, Inc., 536 F. Supp. 2d 476 (D. Del. 2008)	2/28/2008	5538122	Obv	N	bench	Y	Y	Y	Y	Y	N
Proveris Sci. Corp. v. Innovasystems, Inc., 536 F.3d 1256 (Fed Cir. 2008)	8/5/2008	6785400	Obv	N	JMOL	N	N	N	N	N	N

Case Name	Date	Patent No.	Challenge Type (Nov, Obv, WD)	Challenge upheld?	Judgment came from: SJ, jury, bench, JMOL	Presumption mentioned, explicitly or implicitly?	Evidentiary standard mentioned, explicitly or implicitly	Presumption explicitly discussed or applied in the analysis?	Evidentiary standard explicitly discussed or applied in the analysis?	At least an allusion to whether new evidence may alter the invalidity analysis?	Could the result be different with PoE?
Proveris Sci. Corp. v. Innovasystems, Inc., No. 05-CV-12424 (D. Mass.)		6785400	nov	N	JMOL	N	N	N	N	N	N
Revolution Eyewear, Inc. v. Aspex Eyewear, Inc., 563 F.3d 1358	2009	RE37545	WD	N	SJ	Y	Y	N	N	N/A	N
Revolution Eyewear, Inc. v. Aspex Eyewear, Inc., No. 02-01087, 2007 U.S. Dist. LEXIS 98392 (C.D. Cal. Apr. 30, 2007).	2007	RE37545	WD	N	SJ	Y	Y	Y	Y	N/A	N
Ricoh Co. v. Quanta Computer, Inc., 550 F.3d 1325 (Fed. Cir. 2008)	12/23/2008	6631109	Obv	Y	SJ	N	N	N	N	N	N
Ricoh Co. v. Quanta Computer, Inc., 579 F. Supp. 2d 1110 (W.D. Wis. 2007)	8/21/2007	6631109	Obv	Y	SJ	Y	Y	N	N	N	N
Rothman v. Target Corp., 556 F.3d 1310 (Fed. Cir. 2009)	2/13/2009	6855029	Obv	Y	Jury	N	N	N	N	N	N
Rothman v. Target Corp., No. 05-4829, 2008 U.S. Dist. LEXIS 33405 (Apr. 16, 2008).	4/16/2008	6855029	nov	Y	Jury	Y	Y	N	N	Y	N
Sanofi-Synthelabo v. Apotex, Inc. 550 F.3d 1075 (Fed Cir. 2008)	12/12/2008	4847265	Obv	N	Bench	Y	Y	Y	Y	N	Y
		4847265	Nov	N	Bench	N	N	N	N	N	Y
Sanofi-Synthelabo v. Apotex, Inc. 492 F. Supp. 2d 353 (SDNY 2007)	1/19/2007	4847265	Obv	N	Bench	Y	Y	Y	Y	Y	Y
		4847265	Nov	N	Bench	Y	Y	Y	Y	Y	Y
Scanner Techs. Corp. v. ICOS Vision Sys. Corp., 528 F.3d 165 (Fed. Cir. 2008).	6/19/2008	6064756	Obv	Y	Bench	Y	Y	Y	Y	N	N
Scanner Techs. Corp. v. ICOS Vision Sys. Corp., 486 F. Supp. 2d 330 (S.D.N.Y. 2007).	5/22/2007	6064756	Obv	Y	Bench	Y	Y	N	N	N	N
Sundance, Inc. v. Demonte Fabricating Ltd., 550 F.3d 1356	2008	5026109	Obv	Y	JMOL	N	N	N	N	N	N
Sundance, Inc. v. Demonte Fabricating Ltd., No. 02-73543 (E.D. Mich Sept. 20, 2006)	9/20/2006	5026109	Obv	N	JMOL	N	N	N	N	N	N
Tech. Licensing Corp. v. Videotek, Inc. 545 F.3d 1316 (Fed. Cir. 2008).	10/10/2008	5754250	WD	Y	Bench	Y	Y	Y	Y	n/a	N
Tech. Licensing Corp. v. Videotek, Inc., No. 01-04204, 2007 U.S. Dist. LEXIS 35521 (N.D. Cal. May 4, 2007)	5/4/2007	5754250	WD	Y	Bench	Y	Y	Y	Y	n/a	N
Tokyo Keiso Co. v. SMC Corp., 307 Fed. Appx. 446 (Fed. Cir. 2009)	1/9/2009	5458004	Obv	Y	SJ	N	N	N	N	Y	N
Tokyo Keiso Co. v. SMC Corp., 307 F. Supp. 2d 1047 (C.D. Cal. 2007)	10/18/2007	5458004	Obv	Y	SJ	Y	Y	Y	Y	Y	N
Voda v. Cordis Corp., 536 F.3d 1311 (Fed. Cir. 2008).	8/18/2008	6083213	Obv	N	jury	Y	Y	N	N	N	N
			nov	N	jury	Y	Y	Y	Y	N	Y
Voda v. Cordis Corp., No. 03-1512, slip. op. (W.D. Ok. June 8, 2006); Jury Instructions, May 25, 2006	6/8/2006	6083213	Obv	N	jury	Y	Y	N/A	N/A	N/A	N/A
			nov	N	jury	Y	Y	N/A	N/A	N/A	N/A
Yingbin-Nature Wood Industry Co., Ltd. v. ITC, 535 F.3d 1322 (Fed. Cir. 2008).	7/31/2008	6928779	WD	N	Bench	N	N	N	N	N	N
In re Matter of CERTAIN LAMINATED FLOOR PANELS, 337-TA-545 (ITC Jan 24, 2007)	1/24/2007	6928779	WD	N	Bench	Y	Y	Y	Y	N	N