

Fed. Circ. In March: Forfeiting Claim Construction On Appeal

By **Jeremiah Helm and Sean Murray** (April 22, 2025)

This article is part of a monthly column that highlights an important patent appeal from the previous month. In this installment, we examine the Federal Circuit's ruling in Wash World Inc. v. Belanger Inc.

In the recently issued opinion Wash World Inc. v. Belanger Inc., the U.S. Court of Appeals for the Federal Circuit **considered** the line between mere elaboration on an argument presented to the district court, which is properly raised on appeal, and a substantially new position, which is forfeited on appeal because it was not previously raised.

The court, in an opinion written by U.S. Circuit Judge Leonard Stark and joined by U.S. Circuit Judges Alan Lourie and Sharon Prost, specifically addressed the forfeiture issue in the context of claim construction.

During patent litigation, a key aspect of any case is determining the meaning of, or construing, disputed claim terms. That process typically occurs earlier in the litigation; by trial, any disputes as to the meaning of disputed claim terms are usually resolved.

The problem the Federal Circuit faced in Wash World was that the appellant and adjudged infringer, Wash World, presented a claim construction that differed from the claim construction it had advocated at the U.S. District Court for the Eastern District of Wisconsin.

The district court held that the claim terms "outer cushioning sleeve" and "predefined wash area," both were understandable under their plain and ordinary meaning. Thus, neither claim term required further construction.

In concluding that no construction was needed, the district court rejected Wash World's proposed construction for each term. At trial, a jury applied the plain and ordinary meaning of these claim terms and found Wash World infringed Belanger's patent.

After trial, Wash World moved for judgment as a matter of law, arguing that, instead of allowing the jury to apply the terms' plain meaning, "outer cushioning sleeve" should have been construed to require "a thick sleeve of extruded foam plastic," and "predefined wash area" should have been construed to require that the "spray arm move in a manner established by the location of the equipment."

The district court rejected Wash World's claim construction arguments and denied its motion seeking judgment as a matter of law.

On appeal, Wash World advocated a construction for "outer cushioning sleeve" that focused on the idea that the sleeve must be soft or resilient so that it can be compressed and spring back into shape. Wash World's proposed construction did not include the requirement that the sleeve be a thick sleeve of extruded foam plastic.



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The Federal Circuit noted that Wash World had not previously presented the district court with a "soft and resilient" construction, and that the district court therefore could not have previously evaluated that position. Thus, the Federal Circuit held that Wash World forfeited that claim interpretation argument and could not pursue it on appeal.

The forfeiture analysis does not turn solely on whether the same words were presented to the district court. On appeal, a party may present new or additional arguments to support its claim construction so long as that claim construction reflects the parties' dispute, as it was developed over the course of the district court litigation.

The Federal Circuit acknowledged that Wash World had mentioned the idea that the cushioning sleeve needed to be soft, but the court found that Wash World never asked the district court to include the "soft and resilient" requirement in a claim construction of "outer cushioning sleeve."

The Federal Circuit held that ambiguous statements in the record, such as those cited by Wash World, would not suffice to preserve a claim construction argument on appeal.

Forfeiture may also be excused under exceptional circumstances. As the Federal Circuit explained, Wash World chose the construction to propose to the district court, was fully heard on that proposed construction, and never indicated the claim construction dispute required addressing the need for soft and resilient material.

The Federal Circuit noted that the case proceeded through trial without a construction imposing such a requirement, and emphasized the strong requirement of timely raising of distinct objections to jury instructions. Because Wash World's claim construction on appeal was not raised in a timely manner, no exceptional circumstances excused forfeiture.

The Federal Circuit also concluded Wash World had forfeited the construction of "predefined wash area" that it advanced on appeal because that construction was materially different from the construction presented to the district court.

Again, the Federal Circuit considered whether the argument presented to the district court was sufficient to put the court on notice of the construction advanced on appeal. The Federal Circuit concluded it had not put the court on notice because, among other things, Wash World's proposed construction on appeal added new requirements that were not the focus of the district court dispute. As a result, the construction presented on appeal was forfeited.

In contrast, the Federal Circuit concluded that Wash World had not forfeited its appellate argument that Belanger's damages award should have been reduced, even though Wash World never plainly and expressly requested a reduction of the specific damages amount or identified the lost profits per unit that it wanted deducted from the jury's verdict.

The Federal Circuit held that Wash World had preserved the issue for appeal by challenging the methodology and evidence used to calculate damages for certain sales. That challenge put the district court on notice that Wash World believed that lost profits damages were not warranted as to some specific sales.

In particular, Wash World's appeal requesting remittitur relied on the data cited in Wash World's judgment-as-a-matter-of-law brief at the district court. Thus, the Federal Circuit concluded Wash World's appellate argument, which specifically requested remittitur, was a

proper elaboration on its prior arguments.

The Federal Circuit also concluded that exceptional circumstances would also have merited consideration of the remittitur argument. This is because Belanger, in opposing Wash World's judgment as a matter of law at the district court, specifically adopted its expert's testimony and calculations as the basis for the jury's damages award.

The Federal Circuit held Belanger was judicially estopped from arguing a different basis for the jury's damages award. Accordingly, the Federal Circuit concluded that the appeal presented an exceptional circumstance: Belanger's expert's testimony allowed the appellate court to discern the precise amount of damages improperly awarded by the jury.

The Federal Circuit's opinion in Wash World provides litigants with important guidance regarding the scope of arguments that can be made on appeal. Mere elaboration or recharacterization of a position presented to the district court, even if presented using different terms, is allowed. But the appellant must adequately preserve any arguments by presenting them to the district court and allowing the district court the opportunity to weigh in on the merits.

This is why the Federal Circuit rejected the modified claim constructions on appeal as forfeited. These new positions represented a shift in the core dispute from the corresponding positions presented at the district court, which unfairly prevented the district court from addressing the merits.

Wash World underscores that practitioners must present a complete set of arguments to the district court or be ready to explain, on appeal, why extraordinary circumstances prevented them from doing so.

Wash World also provides examples of acceptable elaboration that emphasize the role of fairness in the forfeiture analysis. When an appellant presented the factual basis for an argument to the district court and argued for the ultimate result sought on appeal — as Wash World did for reduced damages — forfeiture is less likely.

If an issue was fairly raised and considered by the district court, some refinement of the argument on appeal is likely acceptable, even if it involves using new words to further define a legal theory.

Wash World confirms the importance of fair notice to the district court when determining forfeiture of an argument on appeal. Wash World thus allows appellants to better gauge the appropriate framing of arguments that may be presented on appeal.

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