UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LIBERTY MUTUAL INSURANCE CO.
Petitioner

v.

PROGRESSIVE CASUALTY INSURANCE CO.
Patent Owner

Case CBM2013–00009
Patent 8,140,358

Before Honorable JAMESON LEE, JONI Y. CHANG, and
MICHAEL R. ZECHER, *Administrative Patent Judges*.

PETITIONER'S REQUEST FOR REHEARING SEEKING CONDITIONAL RELIEF PURSUANT TO 37 C.F.R. § 42.71

Pursuant to 37 C.F.R. § 42.71(d), Petitioner Liberty Mutual Insurance Company ("Petitioner") makes the following Request for Rehearing Seeking Conditional Relief ("Request") in connection with the Final Written Decisions entered February 11, 2014, (Case CBM2013–00009, Paper 68; CBM2012-00003, Paper 78) by the Patent Trial and Appeal Board ("Board") in Cases CBM2012-00003 and CBM2013-00009.

On March 12, 2014, Progressive Casualty Insurance Co. ("Progressive") filed Patent Owner's Request for Rehearing Pursuant to 37 C.F.R. § 42.71 in this case. (Case CBM2013-00009, Paper 71.)

In the event that this Board denies Progressive's rehearing request in Case CBM2013-00009, Petitioner respectfully requests that the Board deny Petitioner's rehearing requests concurrently for both CBM2012-00003 and CBM2013-00009. In the event that the Board grants rehearing in Case CBM2013-00009, Petitioner requests that the Board issue a single combined final decision for both CBM2012-00003 and CBM2013-00009, effective February 11, 2014.

This Request seeks to address the potential de-linking of the two concurrent proceedings, for purposes of appellate review, created by Progressive's Request for Rehearing in **only** CBM2013-00009. If the Board denies Progressive's request for rehearing in CBM2013-00009 and also denies Petitioner's requests for rehearing for both CBM2012-00003 and CBM2013-00009 (all effective at the same time), then the Board's original intent that the CBMs proceed concurrently will be preserved. Thus,

appeals from the two CBM proceedings to the United States Court of Appeals for the Federal Circuit will automatically proceed on the same timeline.

The Board has clearly stated that both proceedings related to the '358 patent—this case and Case CBM2012–00003—were resolved by Final Written Decisions issued "concurrently." (Case CBM2013–00009, Paper 68 at 2; Case CBM2012–00003, Paper 78 at 3.) As a consequence, neither decision was rendered before the other (and, *inter alia*, neither should be argued to have any preclusive effect on the other). In issuing these Final Written Decisions, the Board understandably misapprehended that Progressive, following the December 2, 2013 telephone conference with the Board and the Board's December 4 Order (Case CBM2013–00009, Paper 64; Case CBM2012–00003, Paper 75), would take the position that the time of day each paper was uploaded to the Board's electronic Patent Review Processing System ("PRPS") could affect the Board's stated "concurrent[]" resolution of these matters. Nonetheless, in this proceeding, Progressive claimed that because the Final Written Decision in CBM2012–00003 appeared to have been posted to PRPS slightly before the Final Written Decision in CBM2013–00009, the decisions were not entered concurrently. (Case CBM2013-00009, Paper 71 at 4-5.) As a consequence, Progressive claimed, the earlier decision in CBM2012–00003 mooted the issues decided in CBM2013-00009 and rendered that decision an advisory opinion unauthorized by statute as to claims 2-18. (*Id.* at 14–15.) Further, by filing the request

for rehearing in only one of the two proceedings, Progressive appears to have undertaken to frustrate the Board's clear intent that the matters be resolved together, with the apparent hope that the two cases would be de-linked for purposes of appeal to the United States Court of Appeals for the Federal Circuit.

Petitioner makes this request solely to preserve the current status, intended by the Board, that both proceedings be resolved at the same time. (Case CBM2013–00009, Paper 68 at 2, Paper 69 at 2; Case CBM2012-00003, Paper 78 at 3, Paper 79 at 2.) If the Board considers a request for rehearing in one case, it should simultaneously consider rehearing in the other, so that any new decisions can again be entered in both concurrently, in keeping with the Board's stated intent and maintaining the synchronization of the case schedules.

In the alternative, Petitioner respectfully requests—again, only if the Board considers a request for rehearing in one case—that the Board reconsider the form in which it has rendered its Final Written Decisions in these two trials and, upon reconsideration, that the Board issue one combined final decision so as to maintain the status quo established in the Board's already-rendered Final Written Decisions, in which neither decision was entered nor intended to be entered before the other. If Progressive's anticipated request for reconsideration were to succeed in de-linking the two proceedings, then the Board's stated intent could be frustrated. If the technical impossibility of simultaneous upload to PRPS were somehow found to make

concurrent entry of the final decisions legally impossible, Petitioner would ask that the Board reconsider the form in which it rendered its Final Written Decisions and, upon reconsideration, consolidate the two actions and/or enter a combined single Final Written Decision, and thereby preserve its stated intent to resolve both at once.

CONCLUSION

Petitioner requests: (1) that the Board consider and resolve the requests for rehearing concurrently for both CBM2012-00003 and CBM2013-00009, and/or (2) in the alternative, that if the Board rehears CBM2013-00009 that the Board also rehear CBM2012-00003 and issue one combined Final Written Decision for both CBM2012-00003 and CBM2013-00009.

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