

CASE COMMENT

BY ROSALIE TEN WOLDE



DUTCH SUPREME COURT REJECTS STRICT LIABILITY FOR PATENT ENFORCEMENT VIS-A-VIS HEALTH CARE INSURERS IN IMPORTANT WIN FOR ASTRAZENECA AND HOYNG ROKH MONEGIER.

In the present proceedings a Dutch health insurance company, Menzis, took pharmaceutical company AstraZeneca to the District Court in The Hague. Menzis claimed that AstraZeneca had acted unlawfully towards Menzis, or had at least been unjustly enriched at the expense of Menzis because of initial enforcement of a patent subsequently found to be invalid. The underlying case concerned AstraZeneca's patent for Seroquel®, a medicament for the treatment of schizophrenia and bipolar disorder. According to Menzis, as a result of the market exclusivity wrongfully granted, the health insurance company had to reimburse more for the protected Seroquel® than it would have if generic variants had previously entered the market at a lower price.

The District Court in The Hague followed Menzis' reasoning and ruled that AstraZeneca had been unjustly enriched at the expense of Menzis. However, this decision was annulled by the Court of Appeal. The Court of Appeal referred to previous jurisprudence of the Supreme Court from which it appears that in the relationship between a patentee and his competitors, there is no strict liability of a patentee on the sole ground of invoking a patent that is subsequently nullified. Some form of culpability on the part of the patentee is required for assuming liability after the nullification of a patent. The Court of Appeal held that, contrary to what Menzis argued, there is no legal basis to assume strict liability in the patent holder's relationship with non-competitors such as Menzis. According to the Court of Appeal there was no culpability on the part of AstraZeneca. The position of AstraZeneca that the patent was valid was not untenable, in view of (amongst others) the judgment of the District Court of The Hague in which it was decided that the patent was valid, on which AstraZeneca could rely.

The Advocate-General agreed with the Court of Appeal and rejected Menzis' attempt at creating an erga omnes strict liability regime for patent enforcement on the basis of tort or unjust enrichment of the patent holder. Such liability would potentially have far-reaching consequences, which the Court of Appeal had already held could dampen innovation incentives. The Supreme Court followed the Advocate-General and dismissed Menzis' appeal.

AstraZeneca was represented in the proceedings before the Supreme Court by Willem Hoyng and Frank Eijsvogels of the Amsterdam office of HOYNG ROKH MONEGIER.

HRM TAKE-AWAY

The Supreme Court's judgement confirms that liability for enforcement of a patent which is subsequently found to be invalid does not extend to non-competing third parties.

