

Federal Circuit Upholds ITC Ruling that Chinese Agribusinesses Can Import Lysine

By Alison Frankel

Today will henceforth be known as Farm Animal Digestion Day here at the Litigation Daily. First we had this story about a jury verdict against a hog farm operator allegedly perfuming northern Missouri with the end product of the pigs' digestive systems. Now we've got a ruling from the U.S. Court of Appeals for the Federal Circuit on the patentability of a process for producing a livestock feed additive with genetically engineered bacteria. Mmmm. Who would have thought that writing about litigation would make us seriously consider the benefits of veganism?

Lysine, as we learned from Monday's 20-page federal circuit ruling, is an essential amino acid that animals must acquire through their diet, so it's a nearly ubiquitous livestock feed additive. In the late 1990s a Japanese company called Ajinomoto obtained two patents on a method of harvesting lysine from *E. coli* microorganisms genetically engineered to overproduce the amino acid. A few years later, Ajinomoto filed a complaint at the U.S. International Trade Commission alleging that a group of interrelated Chinese feed makers infringed its patents. The complaint called for a ban on U.S. imports of the Chinese lysine.

The defendants' Foley Hoag lawyers came up with an interesting defense: The Chinese companies claimed the Ajinomoto patents were invalid not just for inequitable conduct, but also because Ajinomoto concealed critical

information about its lysine production process in its patent application, in violation of the U.S. Patent and Trademark Office's "best mode" requirement. The ITC eventually found that Ajinomoto committed inequitable conduct by submitting fictitious data on one patent claim, and that it violated the best mode requirement on both. The commission ruled that the Chinese companies could continue selling their lysine products in the U.S.

Ajinomoto appealed to the Federal Circuit, but its lawyers from Orrick, Herrington & Sutcliffe fared no better with a three judge appellate panel than they had with the ITC. The Federal Circuit concluded that the ITC correctly applied the law in finding that Ajinomoto scientists concealed key preferences in the company's patent applications. (It also found that Ajinomoto did not properly appeal the ITC's inequitable conduct finding.) We called Joseph Malkin of Orrick, who argued at the Federal Circuit for Ajinomoto, but didn't hear back.

Claire Laporte of Foley Hoag argued for the feed producer defendants. She told us the "best mode" defense is relatively unusual, because most patent applicants comply with the requirement. "It's not difficult to comply with if you're not trying to hold something back," she said.

Adduci, Mastriani & Schaumberg lawyers were also on the briefs for the Chinese companies.