

- VOLUME B -

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

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THE JOHNS HOPKINS UNIVERSITY, : CIVIL ACTION
A Maryland Corporation, :
BAXTER HEALTHCARE CORPORATION, :
A Delaware Corporation, :
and BECTON DICKINSON AND :
COMPANY, A New Jersey :
Corporation, :

Plaintiffs

v.

CELLPRO, A Delaware
Corporation,

Defendant

: NO. 94-105 (RRM)

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Wilmington, Delaware
Wednesday, March 5, 1997
8:50 o'clock, a.m.

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BEFORE: RODERICK R. McKELVIE, U.S.D.C.J.

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APPEARANCES:

POTTER, ANDERSON & CORROON
BY: WILLIAM J. MARSDEN, JR., ESQ.

Counsel for Plaintiffs

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1 we indicated that we would not refer to the Bigoal Act and
2 we have not and did not intend to.

3 There is a case that I might call the Court's
4 attention to with respect to the appropriateness of
5 courts considering, among other things, research
6 investment in connection with determining a reasonable
7 royalty rate. Perhaps I should spell it or pass up a
8 bench memorandum, if your Honor would think that
9 advisable.

10 The first name is Ristvedt-Johnson v. Brandt.
11 It's at 805 F. Supp., 557 and 568. The decision was by
12 Judge Radar (phonetic) of the Federal Circuit.

13 MR. WARE: I assume any such case related
14 to research and development investment by the
15 hypothetical licensor. And we reiterate our request that
16 the jury be instructed that they should disregard all --
17 all evidence and all opening statement that made any
18 reference to NIH funding, which does not have any
19 conceivable relationship to the hypothetical negotiation
20 or determination that a reasonable royalty as between
21 Baxter and CellPro.

22 MR. WEISS: Your Honor, there are two other
23 reasons why it's relevant.

24 One is that CellPro, at the time of the
25 hypothetical negotiation, would consider what

1 relevant.

2 MR. JANSEN: Your Honor, if I might...

3 Furthermore, with regard to the license
4 agreement between Becton Dickinson and Baxter under
5 which they granted sub-licenses, in Article 3 it says,
6 Government rights: Paragraph 3.1: All rights granted
7 by Becton to Baxter under this agreement are subject to
8 the requirement of Public Law 96-517 as amended and any
9 applicable implementing regulations. Baxter acknowledges
10 that if a conflict arises between the conditions of this
11 agreement and the rights of the Federal Government,
12 Baxter's right may be supported to the legitimate rights
13 of the Federal Government.

14 THE COURT: And what is that relevant to?

15 MR. JANSEN: It has to do, as Mr. Weiss
16 indicated, your Honor, what CellPro, as a potential
17 licensee, would consider in evaluating what royalty to
18 pay. In other words, if the Federal Government has
19 potentially some rights, that would be one of the
20 factors that a negotiator would consider.

21 THE COURT: What are the rights the Federal
22 Government has got that are being considered by CellPro
23 at the time?

24 MR. WEISS: They are the rights set forth in
25 the agreement. In other words --

1 restrictions, if any, were part of the Civin patents
2 in determining how much they would pay for those
3 patents. And these patents do carry the NIH
4 restrictions.

5 The other thing is the is that part of our
6 position in this case is that the 5.5 or royalty that
7 Baxter was paying, at least at the time of the
8 hypothetical negotiation, was too high, and that the
9 parties, which would have been to the benefit of all the
10 parties, would have been to have Baxter go back to BD.
11 They had to get permission from BD anyway to license
12 CellPro.

13 They would go back to BD and say, Look, this
14 is a party who can get their product on the market. It
15 makes sense to -- for us to license them at some lesser
16 rate than the 5.5. In the same regard, it makes sense
17 for you to charge us less, because at least there will
18 be some stream of money for you at that time.

19 And then BD would go back to John Hopkins and
20 say to them, Look, we have someone that can be a licensee,
21 that can provide a money stream. It makes sense for you
22 to do that. And one of the reasons it does make sense
23 for you to do that is because you do not have a high
24 investment in your original research and development.

25 So those were all other reasons why this is

1 THE COURT: What proof will there be about
2 those rights that the jury will be able to take into
3 consideration?

4 MR. WEISS: I think what's set forth in the
5 license agreement: That there were certain limitations
6 with regard to these patents, and that some other party,
7 i.e., the Government, could come in at some point in time
8 and exercise their rights.

9 THE COURT: I guess what I'm trying to figure
10 out is, do you know what those rights are?

11 MR. WEISS: I think they are the rights set
12 forth in the -- Bigoal.

13 MR. JANSEN: Applicable regulations.
14 There's section C.F.R. 37401.14, I think, sets forth
15 various things, including what is known as marching
16 rights, your Honor. And effectively, what the
17 Government says is that if we review a grant, we retain
18 the right, while you may have the right to license, we
19 maintain the right to consider the conditions for the
20 licensing of the technology that was paid for by
21 Government funds.

22 THE COURT: And will there be evidence at the
23 trial that that was a matter that would have been taken
24 into consideration by CellPro at the time?

25 MR. WEISS: Yes, I believe there will be.