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Multiple complaints bring higher cost risk for defendant

In a nullity suit before the German Federal Patent Court (BPatG) and Federal Supreme Court (BGH) the court and attorney fees are calculated from a fictitious “value in dispute”, which is determined by the court as the value of the patent upon filing of the suit plus the sum of damages accrued. As a matter of law, the losing party has to absorb the costs of the other party. If more than one nullity suit is independently brought forward against a patent, this results in a multiple cost risk for the patentee.

In a recent case where the patent had been nullified by the BPatG, there were four plaintiffs in total. Upon a separate request by the patentee, the BGH had to decide on a reduction of the value in dispute for each of the plaintiffs, for example by dividing the value in dispute among the plaintiffs (BGH X ZR 83/10).

The request was generally dismissed by the BGH, which argued that the value of the patent is necessarily the same for each party. The BGH ruled that if a patent is attacked by multiple plaintiffs to the same extent, dividing the value in dispute among the plaintiffs is not an option. The fact that the defendant’s cost risk is higher in the case of multiple complaints is a consequence of the applicable law and does not violate the principles of a fair lawsuit and equality of the parties.

A reduction of the value in dispute for one of the parties can only be justified if the scope of its requests in the suit is less than that of the other parties. Thus, as an exception, in the case in question, the value in dispute for one of the plaintiffs was reduced by one-third because the plaintiff only requested nullification of the patent, whereas all the other plaintiffs additionally requested nullification of the supplementary protection certificate (SPC).