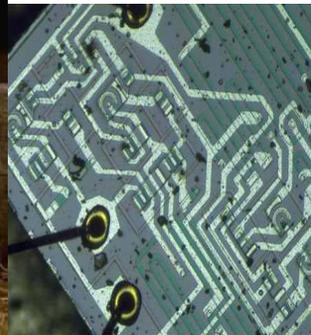
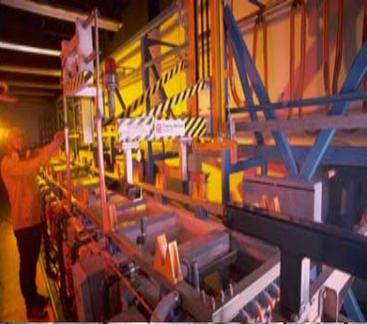


HOW ANTITRUST LAWS IMPACT PATENT DRAFTING AND PROSECUTION:

UNDERSTANDING THE ELEMENTS OF A WALKER PROCESS CLAIM

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**How Antitrust Laws Impact Patent Drafting and
Prosecution:
Understanding the Elements of a Walker Process Claim**

By

David B. Kagan

Kagan Binder, PLLC
www.kaganbinder.com

I. Enforcement of a patent procured by fraud may violate the antitrust laws.

A *Walker Process* claim entangles the patent and antitrust laws in the realm of patent procurement, i.e., patent drafting, filing, prosecution, and issuance. The cause of action represents a bane to some patent owners but a gain to some accused infringers. Section 2 of the Sherman Act¹ and Section 4 of the Clayton Act² are at issue. Section 2 makes it a felony to monopolize or attempt to monopolize, either individually or with others, any part of trade or commerce. Section 4 creates a civil cause of action for the wrong and authorizes recovery of treble damages and attorney fees.

A. The *Walker Process* decision.

¹ 15 USC §2.

² 15 USC §15.

The Supreme Court applied these provisions of the antitrust laws to patent procurement for the first time in the now classic *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*³ The cause of action, whether asserted by claim or counterclaim, is now widely referred to as a *Walker Process* claim.

The *Walker Process* litigants arrived at the Supreme Court on appeal from a motion to dismiss so that the Court took all allegations of fraudulent procurement as being true. From this perspective, the patent owner was a bad actor. During prosecution of the patent at issue, the patent owner knowingly and willfully misrepresented facts to the Examiner in order to gain issuance of its tainted patent. These ugly facts came to light when the patent owner attempted to enforce the patent against an accused infringer. Boldly and creatively, the accused infringer counter-claimed that procurement of this fraudulently procured patent constituted improper monopolization or attempted monopolization under Section 2 of the Sherman Act. An influential and interested third party, namely the Department of Justice, cast strong support for the accused infringer through its appearance as *amicus curiae*. According to these two parties, enforcement of a fraudulently procured patent constitutes a per se violation of Section 2. Patent law had not seen such a claim before, and the surprised patent owner found itself reeling backwards. The patent owner weakly countered that patent procurement activities were outside the purview of the antitrust laws.

Much to the chagrin of this patent owner and future, similarly situated patent owners, the Supreme Court embraced

³ 147 USPQ 404 (US Sup. Ct. 1965).

the new claim, at least to some degree. The Supreme Court did rule that the antitrust laws encompassed fraudulent procurement, but the Court declined to make such misconduct a per se violation of Section 2. Fraudulent procurement was only one element of the new cause of action. That is, fraudulent procurement is a necessary element of a *Walker Process* claim, but Section 2 requires more, namely:

- Fraudulent procurement of a patent;
- Enforcement of the patent; and
- Monopolization or attempted monopolization.

B. Open questions after Walker Process.

The *Walker Process* decision made certain aspects of the new claim clear, but it also raised questions to challenge future litigants. For example, affirmative misrepresentations are actionable, but what other misconduct triggers antitrust liability? We know from the *Walker Process* decision that intentional misconduct is actionable, but conduct associated with good faith or honest mistakes is not. Apart from intentional misconduct, is there a lesser degree of culpability that also creates antitrust risk? Bringing an infringement action under the tainted patent constitutes enforcement, but what other kinds of conduct also constitute enforcement? How are monopolization and attempted monopolization to be proved in the patent procurement context?

Upon the creation of the Court of Appeals for the Federal Circuit in 1982, still yet another question surfaced. A *Walker Process* claim involves interpretation of both patent and antitrust laws. Yet, among the federal courts of appeal,

patent law is uniquely the province of the Federal Circuit, while antitrust law is within the provinces of the regional circuits. Whose law, then, governs when adjudicating these claims? Is it regional circuit law or Federal Circuit law?

These questions and others are answered in the following sections, each of which respectively discusses the elements of a *Walker Process* claim and their proofs. The first two sections dealing with acts of misconduct and intent are components of the fraud element, but nonetheless merit separate discussion.

II. A wide variety of procurement misconduct carries antitrust risk under Section 2 of the Sherman Act.

Misconduct presented to support *Walker Process* claims has included, for instance, false statements in the oath that the invention had not been in public use prior to the critical date,⁴ failure to disclose material prior art,⁵ failure to disclose best mode,⁶ back-dating an extension of time,⁷ misrepresenting the prior art to the Examiner,⁸ and false designations of

⁴ *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*, 147 USPQ 404 (US Sup. Ct. 1965); *Unitherm Food Systems Inc. v. Swift-Eckrich Inc.*, 71 USPQ2d 1705 (Fed. Cir. 2004); *Baxa Corp. v. McGaw Inc.*, 45 USPQ2d 1504 (D. Col. 1997), *aff'd*, 185 F.3d 883 (Fed. Cir. 1999).

⁵ *Nobelpharma AB v. Implant Innovations Inc.*, 46 USPQ2d 1097 (Fed. Cir. 1097); *Arcade Inc. v. Minnesota Mining and Manufacturing Co.*, 24 USPQ2d 1578 (E.D. Tenn. 1991), *aff'd*, 1993 U.S. App. Lexis 14976 (Fed. Cir. June 16, 1993); *Baxa Corp. v. McGaw Inc.*, 45 USPQ2d 1504 (D. Col. 1997).

⁶ *Buehler AG v. Ocrim SpA*, 29 USPQ2d 1001 (N.D. Tex. 1993); *Baxa Corp. v. McGaw Inc.*, 45 USPQ2d 1504 (D. Col. 1997).

⁷ *Abbott Laboratories v. Brennan*, 21 USPQ2d 1192 (Fed. Cir. 1991).

⁸ *Baxa Corp. v. McGaw Inc.*, 45 USPQ2d 1504 (D. Col. 1997).

inventorship.⁹ Questionable misconduct also would involve false statements in responses or affidavits, paying a maintenance fee for a fatally flawed patent, and the like. It is also possible that a *Walker Process* claim could be supported by misconduct that involves pursuing claim scope for repugnant reasons even if drafting and prosecution are carried out without mistake.¹⁰

Accused infringers have been quite creative in drawing misconduct from seemingly empty misconduct wells in attempts to support a *Walker Process* claim. For example, the patent owner in *Abbott Laboratories v. Brennan*¹¹ continued to prosecute an interference after knowingly committing inequitable conduct. The inequitable conduct was enough to jeopardize the enforceability of the patent, but was not sufficiently culpable for purposes of *Walker Process*. Unable to directly use the inequitable conduct to support its *Walker Process* claim, the accused infringer nonetheless claimed that the patent owner's continued pursuit of the interference in the face of such inequitable conduct was actionable. The viability of such a theory was never fully tested inasmuch as the court dismissed the antitrust claim on other grounds, i.e., a failure to properly plead market power. The opportunity thus remains for an argument that continuing to prosecute a patent after becoming aware of a fatal flaw can be actionable under *Walker Process*, even if the conduct that led to the flaw is not actionable.

⁹ *Unitherm Food Systems Inc. v. Swift-Eckrich Inc.*, 71 USPQ2d 1705 (Fed. Cir. 2004); *Conceptual Eng. Assoc. Inc. v. Aelectronic Bonding Inc.*, 11 USPQ2d 1497 (D.R.I. 1989); *Baxa Corp. v. McGaw Inc.*, 45 USPQ2d 1504 (D. Col. 1997).

¹⁰ See *C.R. Bard Inc. v. M3 Systems Inc.*, 48 USPQ2d 1225 (Fed. Cir. 1998).

¹¹ 21 USPQ2d 1192 (Fed. Cir. 1991).

The accused infringer in *Southern Clay Products Inc. v. United Catalysts Inc.*¹² argued that settlement of an interference by a cross-license constituted illegal patent pooling. The court ruled that this conduct did not raise antitrust concerns, but the outcome was based upon the facts. It is conceivable that in the right factual context a settlement of an interference or other action taken before the PTO could invoke antitrust concerns.

III. Only reckless or intentional misconduct is actionable under a Walker Process claim.

A. Only intentional misconduct actionable in early cases.

Walker Process itself involved an *intentional* misrepresentation. Taking the fraud allegations as being true, the patent owner there knowingly misrepresented facts to the Examiner. At issue is what other states of mind, if any, would also support a *Walker Process* claim. *Walker Process* gives us only two data points, both being at extremes on the spectrum of culpability. Specifically, the Court stated that its decision only related to “a special class of patents, i.e., those procured by intentional fraud. . . . By the same token, [the patent owner’s] good faith would furnish a complete defense. This includes an honest mistake[.]”¹³

¹² 61 USPQ2d 1297 (S.D. Tex. 2001), *rev'd in part, vacated in part, remanded*, 64 USPQ2d 1606 (Fed. Cir. 2002).

¹³ *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*, 147 USPQ at 406-407.

In short, intentional misconduct carries antitrust risk, while good faith and honest mistakes constituting negligence do not. Knowing how to assess risk at these two extremes does not explain how other states of mind between these two extremes should be treated. In other words, what antitrust risk under *Walker Process* might exist for states of mind involving gross negligence or recklessness?

Until very recently, the Federal Circuit had slammed the *Walker Process* hammer only upon intentional misconduct. In the relatively early *American Hoist & Derrick Co. v. Sowa & Sons, Inc.*, the Federal Circuit emphasized “that a specific intent, greater than an intent evidenced by gross negligence or recklessness, is an indispensable element.”¹⁴ A few years later, *Argus Chemical Corp. v. Fibre Glass-Evercoat Co. Inc.*¹⁵ reinforced the intentional standard by expressly refusing to extend *Walker Process* to encompass a wider range of culpability. There, the failure to disclose prior sales to the PTO did not constitute an antitrust violation because the nondisclosure was based upon what was believed in good faith to be a proper interpretation of the law existing at the time. The requirement for intentional misconduct was still the state of the law in 1998, when the Federal Circuit in the *Nobelpharma* case still required proof “that the asserted patent was obtained through knowing and willful fraud within the meaning of *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.* . . .”¹⁶

¹⁴ 220 USPQ 763, 777 (Fed. Cir. 1984).

¹⁵ 1 USPQ2d 1971 (Fed. Cir. 1987).

¹⁶ *Nobelpharma AB v. Implant Innovations Inc.*, 46 USPQ2d at 1104.

A question repeated many times is whether all acts of inequitable conduct should raise antitrust concerns. The *Argus* and *Nobelpharma* cases represent two instances in which antitrust claimants requested that the Federal Circuit extend *Walker Process* to encompass all acts of inequitable conduct. The court refused to do so on both occasions. Inequitable conduct includes misconduct perpetrated with a wide range of culpability, ranging from negligent to intentional. Yet, at least based upon the standards endorsed by the Federal Circuit through the *Nobelpharma* case, only intentional inequitable conduct poses *Walker Process* risk. Consequently, even a substantial inventory of misconduct is not actionable if the acts are due to incompetence rather than evil intent.¹⁷

B. Federal Circuit makes reckless conduct actionable.

A marked shift in this jurisprudence occurred just this past summer. The Federal Circuit definitively expanded culpability standards in the recent *Unitherm Food Systems Inc. v. Swift-Eckrich Inc.*¹⁸ This shift is apparent from at least two aspects of the decision. The first aspect concerns the manner in which the court defines a *Walker Process* claim at the highest level. Previously, *Walker Process* claims had been couched in terms of “fraudulent procurement” or similar terminology. But here, the Federal Circuit announced that *Walker Process* liability involves an “inappropriate attempt to procure a

¹⁷ See, e.g., *Western Electric Co., Inc. v. Piezo Technology Inc.*, 15 USPQ2d 1401 (M.D. Fla. 1990).

¹⁸ 71 USPQ2d 1705 (Fed. Cir. 2004).

patent[.]”¹⁹ The use of the terminology “inappropriate attempt” in lieu of terms like “fraudulent procurement” is rather conspicuous. In the context of the opinion as a whole, the new terminology signals a desire by the Federal Circuit to expand *Walker Process* to a wider range of “inappropriate” misconduct beyond merely intentional wrongdoing.

The second aspect of the *Unitherm* case that signals a broadening of *Walker Process* concerns the new standard for finding intent itself. Quoting from *In re Spalding Sports Worldwide, Inc.*, which was not substantively a *Walker Process* case, the Court announced that *Walker Process* fraud involves “the intent to deceive, or, at least a state of mind so reckless as to the consequences that it is held to be the equivalent of intent (scienter)[.]”²⁰ Clearly, recklessness is now at play, and intentional misconduct is no longer the only game in town. Indeed, applying this standard to the facts at hand, and again quoting *Spalding*, the court ruled that the patent owner’s “behavior exhibited a ‘state of mind so reckless as to the consequences that it is held to be the equivalent of intent.’”²¹

In sum, *Unitherm* extends *Walker Process* to encompass reckless misconduct as well as intentional misconduct. The new standard will ensnare more wrongdoing, and some earlier cases would not be decided the same way today. Certainly, some reckless patent owners who escaped *Walker Process* liability under the intentional-only standard likely would not have been as fortunate if their conduct were to have been scrutinized under the new standard. The reckless

conduct at issue in *Unitherm*, for instance, might not have been actionable under the former, more rigorous intent standard. Perhaps, the patent owner from *Western Electric Co., Inc. v. Piezo Technology Inc.*²² is another example of this. That patent owner escaped antitrust liability even in the face of a substantial inventory of misconduct on grounds that the misconduct arose from incompetence, not evil motives. However, there were so many acts of misconduct and so much incompetence, there is a strong likelihood this conduct would be deemed to be reckless under the *Unitherm* standard.

IV. Establishing antitrust fraud is a key element of proving a *Walker Process* claim.

A. Federal Circuit recipes for proving *Walker Process* fraud.

Proof of misconduct and intent, in turn, are aspects of establishing fraud in the *Walker Process* sense. What else might be required to complete proof of such a fraud? The good news is that each of the *Nobelpharma* and *Unitherm* cases presents a fraud recipe. The bad news is that the two Federal Circuit cases are not entirely consistent with each other. The *Nobelpharma* recipe is the more rigorous of the two. According to *Nobelpharma* (citations omitted and bold emphasis added):

Such a misrepresentation or omission
must evidence a clear intent to deceive

¹⁹ *Id.* at 1717.

²⁰ *Id.* at 1718.

²¹ *Id.* at 1719.

²² 15 USPQ2d 1401 (M.D. Fla. 1990).

the examiner and thereby cause the PTO to grant an invalid patent. . . . [A] finding of *Walker Process* fraud may not be based upon and equitable balancing of lesser degrees of materiality and intent. Rather it must be based on independent and clear evidence of deceptive intent together with a clear showing of reliance, i.e., that the patent would not have issued **but for** the misrepresentation or omission.²³

Restated, *Nobelpharma* requires misconduct, clear intent to deceive the Examiner, and so-called “but for” reliance by the Examiner. Other courts also have used a similar “but for” standard.²⁴

Proving materiality subject to a “but for” standard can be somewhat rigorous and makes it tougher from a practical perspective to establish a *Walker Process* claim. The use of such a standard in *Nobelpharma* makes it appear as if the Federal Circuit at that time wanted to restrict the scope and applicability of the doctrine to some degree. It comes somewhat as a surprise, therefore, that the Federal Circuit restated the fraud recipe using a much broader, expansive perspective in the more recent *Unitherm* case:

²³ *Nobelpharma AB v. Implant Innovations Inc.*, 46 USPQ2d at 1106.

²⁴ *Al-Site Corp. v. Opti-Ray Inc.*, 28 USPQ2d 1058 (E.D.N.Y. 1993)(antitrust claim failed because, under “but for” test patents would have issued even if references at issue had been disclosed to the Examiner); *Minnesota Mining and Manufacturing Co. v. Research Medical Co.*, 9 USPQ2d 1548 (D. Utah 1988); *Rohm & Haas Co. v. Dawson Chemical Co., Inc.*, 2 USPQ2d 1081 (S.D. Tex. 1986).

(1) a representation of a material fact, (2) the falsity of that representation, (3) the intent to deceive or, at least, a state of mind so reckless as to the consequences that it is held to be the equivalent of intent (scienter), (4) a justifiable reliance upon the misrepresentation by the party deceived which induces him to act thereon, and (5) injury to the party deceived as a result of his reliance on the misrepresentation.²⁵

This fraud recipe differs from that of *Nobelpharma* in several respects, but notably in terms of a materiality requisite. It is true that, without further guidance from the court, one might read a “but for” materiality standard à la *Nobelpharma* into the reliance element of the *Unitherm* recipe. But, this is not what the Federal Circuit had in mind. Reliance under *Unitherm* is much easier to establish. Namely, “[t]he best evidence of the fourth element of the alleged fraud, the PTO’s justifiable reliance on [the patent owner’s] deception that induced the PTO action, is that the PTO issued the patent.”²⁶ This is a simple proof. As a practical matter, reliance by the PTO is presumed merely from the issuance of the patent. Clearly, the kind of “but for” reliance required by *Nobelpharma* is not required by the *Unitherm* court, not even close.

²⁵ *Unitherm Food Systems Inc. v. Swift-Eckrich Inc.*, 71 USPQ2d at 1718.

²⁶ *Id.* at 1720.

B. The importance of piling on the facts to prove your *Walker Process* claim.

The difference between fraud recipes presented by *Nobelpharma* and *Unitherm* could leave a litigant in a quandary if not sure which approach the Federal Circuit will follow in the future. A conservative approach for an antitrust claimant would be to introduce enough evidence to satisfy the more stringent *Nobelpharma* standard while still arguing the *Unitherm* standard and perhaps arguing both standards.

Presenting a solid body of evidence, sometimes referred to as “piling on the facts,” generally is a preferred approach in causes of action like these that are adjudicated under the totality of the circumstances. Indeed, many *Walker Process* claimants have discovered that failing to pile on the facts has been fatal to their claims.²⁷

No doubt, piling on the facts in *Walker Process* claims is beneficial. *Arcade Inc. v. Minnesota Mining and Manufacturing Co*²⁸ is a good example of a case in which the antitrust claimant piled on sufficient facts to establish its *Walker Process* claim. *Buehler AG v. Ocrim SpA*²⁹ is a good

²⁷ See, e.g., *Environmental Instruments Inc. v. The Sutron Co.*, 8 USPQ2d 1897 (E.D. Va. 1988), *aff'd in part and vacated in part*, 11 USPQ2d 1132 (Fed. Cir. 1989); *Koepnick Medical & Education Research Foundation LLC v. Alcon Laboratories, Inc.*, 69 USPQ2d 1391 (D. Az. 2003); *K-Lath v. Davis Wire Corp.*, 49 USPQ2d 1161 (C.D. Cal. 1998); *Baxa Corp. v. McGaw Inc.*, 45 USPQ2d 1504 (D. Col. 1997); *Grid Systems Corp. v. Texas Instruments Inc.*, 20 USPQ2d 1207 (N.D. Cal. 1991).

²⁸ 24 USPQ2d 1578 (E.D. Tenn. 1991).

²⁹ 29 USPQ2d 1001 (N.D. Tex. 1993).

example of a case in which the patent owner piled on sufficient facts to successfully defend against a *Walker Process* claim.

V. A *Walker Process* claim requires some effort by the patent owner to enforce the tainted patent.

A *Walker Process* claim requires some effort by the patent owner to enforce the tainted patent.³⁰ Additionally, the patent owner must be aware of the taint when enforcing the patent.³¹

Enforcement within the meaning of a *Walker Process* claim certainly occurs when a patent owner actually files and pursues an infringement action against an accused infringer. In *Cygnus Therapeutics Systems v. Alza Corp.*,³² the Federal Circuit has also clarified other conduct that constitutes enforcement. This case came before the Federal Circuit on appeal from a Declaratory Judgment action in which the Declaratory Judgment plaintiff, the putative infringer, asserted claims for invalidity and noninfringement of the patent at issue. The DJ plaintiff also asserted a *Walker Process* claim. The lower court dismissed the entire action for lack of jurisdiction due to a failure to prove an actual controversy. The Federal Circuit affirmed the dismissal. The standards by which the Federal Circuit reviewed the dismissal of the invalidity and noninfringement claims are key to understanding how it

³⁰ *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*; *Cygnus Therapeutics Systems v. Alza Corp.*, 39 USPQ2d 1666 (Fed. Cir. 1996); *K-Lath v. Davis Wire Corp.*, 49 USPQ2d 1161 (C.D. Cal. 1998).

³¹ *Nobelpharma AB v. Implant Innovations Inc.*, 46 USPQ2d 1097 (Fed. Cir. 1097).

³² 39 USPQ2d 1666 (Fed. Cir. 1996).

handled the *Walker Process* claim. As to the declarations of invalidity and noninfringement, the Federal Circuit stated the following well-known standard:

In a patent context, an actual controversy exists if there is (1) an explicit threat or other action by the patentee, which creates a reasonable apprehension on the part of the declaratory plaintiff that it will face an infringement suit, and (2) present activity which could constitute infringement or concrete steps taken with the intent to conduct such activity. . . . In undertaking this inquiry, we “look for any express charges of infringement, and if none, then to the ‘totality of the circumstances.’”³³

On the facts before it, the Federal Circuit ruled that there was no actual controversy, as the patent owner had done nothing to create a reasonable apprehension that the putative infringer would face an infringement suit.

The court then turned to the *Walker Process* claim and stated that “the same facts that compel the conclusion that the [putative infringer] failed to establish declaratory judgment jurisdiction for the district court also compel the conclusion that no reasonable fact finder could find that [the patent owner] has acted to enforce the [tainted] patent.”³⁴ In other words, the

³³ *Id.* at 1670.

³⁴ *Id.* at 1673.

same facts that establish an actual controversy for purposes of a DJ action also may be used to show enforcement for a *Walker Process* claim. This in turn means that *Walker Process* enforcement occurs when there is an explicit threat or other action by the patentee that creates a reasonable apprehension on the part of the putative infringer that it will face an infringement suit. The body of case law that assesses DJ jurisdiction in patent cases should thus be very helpful in assessing enforcement conduct.

VI. Federal Circuit law governs some aspects of a Walker Process claim, while regional circuit laws govern other aspects.

A. Choice of law favors regional circuits prior to Nobelpharma.

A *Walker Process* claim includes an element of fraud whose assessment to a significant degree involves construing patent laws within the exclusive jurisdiction of the Federal Circuit. Yet, other aspects of the claim involve elements of antitrust law whose construction is within the authority of the various regional circuits. Whose law governs?

In 1987, a relatively young and timorous Federal Circuit completely deferred to the regional circuits as to choice of law in *Argus Chemical Corp. v. Fibre Glass-Evercoat Co. Inc.*³⁵ In choosing a body of law that would guide its assessment of a *Walker Process* claim, the court stated that “we look to the law of the regional circuit in which this case was

³⁵ 1 USPQ2d 1971 (Fed. Cir. 1987).

brought – here the Ninth Circuit.”³⁶ This was still the state of the law in 1996.³⁷

B. Federal Circuit splits the choice of law baby in *Nobelpharma*.

Eleven years later, a bolder, more mature Federal Circuit was not so deferential to the other circuits. In *Nobelpharma AB v. Implant Innovations Inc.*, the Federal Circuit announced that the fraud assessment thereafter would be governed by Federal Circuit law:

Whether conduct in the prosecution of a patent is sufficient to strip a patentee of its immunity from the antitrust laws is one of those issues that clearly involves our exclusive jurisdiction over patent cases. It follows that whether a patent infringement suit is based on a fraudulently procured patent impacts our exclusive jurisdiction. . . . Because most cases involving these issues will therefore be appealed to this court, we conclude that we should decide these issues as a matter of Federal Circuit law, rather than rely on various regional precedents. We arrive at this conclusion

³⁶ *Id.* at 1974.

³⁷ See *Cygnus Therapeutics Systems v. ALZA Corp.*, 39 USPQ2d 1666 (Fed. Cir. 1996).

because we are in the best position to create a uniform body of federal law on this subject and thereby avoid the ‘danger of confusion [that] might be enhanced if this court were to embark on an effort to interpret the laws’ of the regional circuits.³⁸

Regional circuit law would still play a role, however:

[W]e will continue to apply the law of the appropriate regional circuit to issues involving other elements of antitrust law such as relevant market, market power, damages, etc., as those issues are not unique to patent law, which is subject to our exclusive jurisdiction.³⁹

In changing the choice of law rules for *Walker Process* claims, the court expressly overruled its earlier precedents to the extent they are contrary. Interestingly, three overruled precedents are expressly identified, but *Argus* is not one of these.

VII. In addition to fraud and enforcement, a *Walker Process* claim requires proof of monopolization or attempted monopolization.

³⁸ 46 USPQ2d 1097, 1104 (Fed. Cir. 1998) quoting *Forman v. U.S.* 767 F.2d 875, 880 n.6 (Fed. Cir. 1985).

³⁹ *Id.* at 1104.

Proof of monopolization or attempted monopolization is another essential aspect of a *Walker Process* claim, and without such proof, there can be no antitrust violation.⁴⁰ The antitrust laws of the regional circuit from which a dispute originates governs assessment of monopolization or attempted monopolization.⁴¹ These laws tend to differ to some degree among the circuits. Nonetheless, there are some common principles that are generally widely applicable.

Generally, the elements of monopolization and attempted monopolization include a relevant market; market power in the relevant market (Sometimes this element is presented as “a dangerous probability of success in the relevant market.” In other cases, similar proofs are cast as an “intent to monopolize.”); and antitrust standing (Sometimes this element is presented as “antitrust damages.”).

⁴⁰ *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*, 147 USPQ 404 (US Sup. Ct. 1965); *Unitherm Food Systems Inc. v. Swift-Eckrich Inc.*, 71 USPQ2d 1705, 1715 (Fed. Cir. 2004); *American Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 220 USPQ 763 (Fed. Cir. 1984); *Buehler AG v. Ocrim SpA*, 29 USPQ2d 1001 (N.D. Tex. 1993);

⁴¹ *Unitherm Food Systems Inc. v. Swift-Eckrich Inc.*, 71 USPQ2d 1705 (Fed. Cir. 2004); *Nobelpharma AB v. Implant Innovations Inc.*, 46 USPQ2d 1097 (Fed. Cir. 1097).

A. Relevant market.

An antitrust claimant must introduce proof of the relevant market, and a failure to do so is fatal to the claim:

Interpretation of this case as dispensing with a showing of relevant market is not plausible, for it would preclude analysis of “monopoly” – that market position alleged to have been attempted, and as to which there must be a “dangerous probability of success.” Allegations of monopolization or attempt to monopolize cannot be resolved without determining the subject of the supposed or desired monopoly[.] . . . Accordingly, we hold that proof of relevant market is requisite to a holding that 15 USC 2 has been violated.⁴²

The definition of the relevant market hinges on economic evidence showing the presence or absence of suitable market substitutes, products whose price and demand are interrelated, and the geographic area of effective competition.⁴³ Whether products are market substitutes depends upon factors such as

⁴² *American Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 220 USPQ 763, 775-776 (Fed. Cir. 1984). See also *Unitherm Food Systems Inc. v. Swift-Eckrich Inc.*, 71 USPQ2d at 1721.

⁴³ *Unitherm Food Systems Inc. v. Swift-Eckrich Inc.*, 71 USPQ2d at 1721. See also *Conceptual Eng. Assoc. Inc. v. Aelectronic Bonding Inc.*, 11 USPQ2d 1497, 1501 (D.R.I. 1989).

the functional interchangeability of the products, the response in sales of one product to changes in price of the other, the degree of competition with respect to the products, and differences or similarities between the products with respect to price, use, and quality.⁴⁴

B. Market power.

Market power may be defined from different, but similar, perspectives. It may be viewed as the ability to lessen or destroy competition,⁴⁵ conduct that is exclusionary, anti-competitive, or predatory,⁴⁶ and the ability to control prices.⁴⁷ Market power will not be presumed from the mere existence of a patent.⁴⁸ Market power is assessed at the time the acts occurred.⁴⁹ Dangerous probability of successful monopolization refers to the capacity to monopolize,⁵⁰ and thus may be established by essentially the same proofs as market power. Some courts have required that the patent must dominate the relevant market if market power is to be established.⁵¹

⁴⁴ *Buehler AG v. Ocrim SpA*, 29 USPQ2d at 1024.

⁴⁵ *Abbott Laboratories v. Brennan*, 21 USPQ2d at 1199; *Unitherm Food Systems Inc. v. Swift-Eckrich Inc.*, 71 USPQ2d at 1715.

⁴⁶ *Conceptual Eng. Assoc. Inc. v. Aelectronic Bonding Inc.*, 11 USPQ2d at 1501.

⁴⁷ *Buehler AG v. Ocrim SpA*, 29 USPQ2d at 1024.

⁴⁸ *Abbott Laboratories v. Brennan*, 21 USPQ2d at 1199.

⁴⁹ *Conceptual Eng. Assoc. Inc. v. Aelectronic Bonding Inc.*, 11 USPQ2d at 1502.

⁵⁰ *Id.*

⁵¹ See, e.g., *Consol; Rohm & Haas Co. v. Dawson Chem. Co. Inc.*, 2 USPQ2d 1081, 1086 (S.D. Tex. 1986); *Consolidated Aluminum Corp. v. Fosco International Ltd.*, 10 USPQ2d 1143, 1170 (N.D. Ill. 1988), *aff'd in part and rev'd in part*, 11 USPQ2d 1817 (N.D. Ill. 1989), *aff'd* 15 USPQ2d 1481 (Fed. Cir. 1990).

Evidence that the patented product is unique and the relevant market includes no suitable market substitutes indicates market power, whereas the existence of suitable market substitutes indicates no market power.⁵²

Evidence relating to market share is very relevant to establishing or disproving market power. For instance, market share of 87% left no doubt of market power in *Conceptual Eng. Assoc. Inc. v. Aelectronic Bonding Inc.*⁵³ However, market shares of 10% and 60% without other evidence was too little to show market power in *Buehler AG v. Ocrim SpA*.⁵⁴ Low market share, though, does not preclude establishing market power when coupled with other pertinent evidence. For instance, market power was established by evidence of a 30% to 40% market share in combination with evidence that the patent was the catalyst for obtaining this market share in *Agere Systems Guardian Corp. v. Proxim Inc.*⁵⁵

Evidence of market strength indicates market power, whereas market weakness does not. The patent owner in the *Buehler* case successfully defended against a *Walker Process* claim with evidence of market weakness, and hence no market power. That patent owner showed that its market position had been gained due to business acumen, not predatory intent, that there were many competitors in the relevant market, that new competitors were able to enter the market and gain market

share quickly, and that the patent owner was losing market share.

C. Standing.

Antitrust standing generally means that the claimant has suffered the kind of commercial damage cognizable under the antitrust laws. As a practical matter, this restricts the universe of potential *Walker Process* claimants for the most part to commercial entities doing business in the relevant market.

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⁵² *Unitherm Food Systems Inc. v. Swift-Eckrich Inc.*, 71 USPQ2d at 1715; *Abbott Laboratories v. Brennan*, 21 USPQ2d at 1199; *Conceptual Eng. Assoc. Inc. v. Aelectronic Bonding Inc.*, 11 USPQ2d at 1502; *Koepnik Medical & Education Research Foundation LLC v. Alcon Laboratories Inc.*, 69 USPQ2d 1391, 1396 (D. Az. 2003); *Buehler AG v. Ocrim SpA*, 29 USPQ2d at 1024.

⁵³ 11 USPQ2d 1497 (D.R.I. 1989).

⁵⁴ 29 USPQ2d 1001 (N.D. Tex. 1993).

⁵⁵ 69 USPQ2d 1429 (D. Del. 2002).