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TOP INTELLECTUAL PROPERTY LAWYERS 2018

Douglas Carsten

FIRM	CITY	SPECIALTY
Wilson Sonsini Goodrich & Rosati	**San Diego**	**Litigation**

"Figures can't lie," Carsten's father used to say. "But liars can figure."

The saying has come to mind in more than a few trials Carsten's handled over the years, where having all the facts on your side doesn't guarantee victory. Litigants lacking evidence in intellectual property disputes can twist narratives and skew facts to leave even the most attentive jurors and jurists second-guessing themselves.

That was the case in a recent patent battle over Restasis, an eye drop formula that rakes in roughly $1 billion a year. Plaintiff Allergan LLC filed a lawsuit against a number of global pharmaceutical companies that had produced their own variants of the eye drops, including Carsten's client Mylan N.V.

Allergan employed a novel legal defense, transferring its patent rights to a Native American tribe in New York in order to use the tribe's sovereignty to block interparty review. Carsten said that Allergan, which paid the tribe $13.5 million up-front to hold the patents, had transferred the patents knowing they were likely too weak to survive review.

Carsten said Allergan's in-court argument relied heavily on skewed statistical analyses, requiring Carsten and his team to dedicate much of their cross-examination to dispelling the misinformation. But they also had to do so in a way that would be easy for the court to digest. *Allergan Inc. v. Teva Pharmaceuticals USA Inc. et al.*, 15-CV01455 (E.D. Tex., filed Aug. 24, 2015).

"We had to get a statistician and the right expert on the medical side to unravel the gamesmanship we saw in the argument they were making," Carsten said. "Our goal was to just keep things simple enough to make the points we were trying to make."

After a one-week bench trial, a circuit judge sitting by designation in the Eastern District of Texas blasted Allergan's sovereignty strategy and found that Mylan and the other companies had shown clear and convincing evidence that the patents weren't valid due to the obviousness of the formula being patented.

Carsten scored another high-profile victory last year when a federal jury in Massachusetts found in favor of his client Amphastar in a billion-dollar lawsuit brought by two other pharmaceutical companies. In cross-examination, Carsten once again sought to counter the plaintiff's misleading narrative. He laid out an analogy for the jury comparing the patents that had allegedly been infringed to a maze where every turn leads to a dead end. *Momenta Pharmaceuticals, Inc., et al. v. Amphastar Pharmaceuticals, Inc., et al.*, 11-cv-11681 (D. Mass., filed Sept. 21, 2011).

"When he finally wins his way out of the maze, by hook or by crook, it would turn out he had found himself in a second maze," Carsten said. "That did seem to stick with the jury. We were really pleased they had paid so close attention."

— Steven Crighton