

Reading The Blackberry Tea Leaves

Wednesday, March 01, 2006 --- By now most of the world has heard that the fate of the Blackberry wireless e-mail system rests in the reluctant hands of United States District Judge James R. Spencer of Richmond, Va. On Feb. 24, 2006, Judge Spencer held a four-hour hearing, which addressed the remaining issues of the Blackberry patent infringement suit. Without a doubt, the main issue on the minds of the attorneys for RIM, the Blackberry maker, NTP, the victor in the patent suit, the United States Government and the 200+ observers from the media, financial community and legal community was this question:

“Would Judge Spencer impose a permanent injunction on Blackberry service?”

At the end of the hearing, Judge Spencer did not rule from the bench. This was entirely expected by knowledgeable observers. Remarkably, some in the financial markets took this as a good sign for RIM. RIM’s stock rose several points by the end of the day on Feb. 24, 2006.

What Judge Spencer did do at the end of the hearing was offer a brief summary of his views. It seems that few in the investment community heard what he had to say. The authors (attorneys who do not represent either party and who have no financial interest in the case) offer our thoughts on the future based on our interpretation of Judge Spencer’s closing remarks. Here are Judge Spencer’s remarks (verbatim from the transcript) and our commentary:

Transcript: “THE COURT: All right. The hallmark of
19 sanity is that one remains firmly tethered to reality.
20 And one unfortunate reality for RIM, and one that they
21 would just as soon forget or ignore, is that in this
22 very courtroom there was a trial, a jury was selected,
23 a trial was carried out for a period of weeks, and
24 evidence was received, and the jury heard arguments
25 from some of the best legal talents that money can buy.
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01 And when all was said and done, they decided that RIM
02 had infringed NTP's patent, and that the
03 infringement was willful.
04 The jury consisted of 12 men and women, tried
05 and true citizens of this district, and I can assure
06 you that the citizens of this judicial district and the
07 Commonwealth of Virginia are not foolish or frivolous
08 when it comes to the matter of fixing legal liability.”

Commentary: Here Judge Spencer is reminding the parties that RIM lost this case and that the findings of fact were made by a jury of peers. Both parties asked for a jury trial and RIM received what it wanted. Courts extend tremendous deference to jury verdicts. Trial by jury for civil cases is a right enshrined in the Constitution. Judge Spencer has two decades of trial experience as a Federal Judge and even more as a lawyer. He probably believes that juries “get it right” most of the time. His comments are a very ominous sign for RIM, whose arguments and positions were roundly rejected by both the jury and Judge Spencer. Also note the reference to the “judicial district.” The Eastern District of Virginia, Richmond Division, draws some of the most conservative, pro-business jurors in the nation. They do not lightly award high damages. The authors believe that this statement by the Court refers to complaints, in some quarters, that jurors are free with other people’s money. While that may be true in some jurisdictions, it is not true in the “judicial division” where Judge Spencer sits.

Transcript: “ 09 After all of the appeals, the petitions, the politics,
10 the lobbying, this central truth, this reality of the
11 jury verdict has not changed in any essential or
12 substantive way.

Commentary: Judge Spencer harks back to “reality” and the “reality” is that RIM lost the case, was found a willful infringer and those facts were not altered by the United States Court of Appeals for the Federal Circuit or the United States Supreme Court. The implicit theme in these remarks is vindication. Note that Judge Spencer pointedly refers to “politics” and “lobbying.” This is not good for RIM, which has waged a very public campaign against NTP, the jury verdict and, by implication, the judicial process supervised by Judge Spencer.

Transcript: “ 13 So here we are on remand with very clear
14 direction from the Federal Circuit. Two legal issues
15 to be resolved, damages in light of the Federal
16 Circuit's opinion, and whether or not injunctive relief
17 is appropriate; and a sub-issue was is what is the
18 appropriate scope of such injunctive relief.
19 And I think at least every lawyer sitting in
20 here today understands the rules and standards that
21 must be applied by the Court to come to a legal
22 conclusion regarding these legal issues.
23 And I have been doing this for almost 20
24 years, and my approach will be no different in this
25 case than any other cases I have had to similarly
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01 resolve.”

Commentary : Judge Spencer is telling the parties that, notwithstanding the high profile of this case, he will apply the Rules of Civil Procedure and settled law in a manner no different than any other case he has had since he took

the federal bench in 1986. He is also telling the parties that he will not allow political pressure or media limelight to sway his decision in any way.

Transcript: “ 02 I must say I am surprised, absolutely
03 surprised, that you have left this incredibly important
04 and significant decision to the Court. I've always
05 thought that this, in the end, was really a business
06 decision. And yet you have left the decision in the
07 legal arena, and that's what you're going to get, a
08 legal decision.
09 I can discern from reading the pleadings and
10 preparing for this hearing that a legal decision, a
11 Court imposed solution, will be imperfect. The legal
12 squabbling will continue, RIM's business will continue,
13 in plain words the case should have been settled. But,
14 it hasn't. So I have to deal with that reality.”

Commentary: This part of Judge Spencer's remarks made some news outlets. However, it is not an uncommon comment for him to make. It reflects his view, not uncommon among the judiciary, that business decisions should be worked out by business people, not lawyers and almost certainly not courts. Courts have a limited range of options for resolving disputes: damages, injunctions and so forth. Consequently, courts cannot craft nuanced and subtle resolutions as efficiently as business people. Judge Spencer is advising the parties that they missed an opportunity for the proverbial “win-win” resolution and, instead, they will get a legal decision which, by necessity, is “win-lose.” Finally, the comment that “RIM's business will continue” should not be considered a good omen. Instead, we consider it a backhanded rejection of RIM's argument that a Blackberry injunction will be calamitous. See below.

Transcript: “15 I must admit I was somewhat surprised at
16 RIM's argument, which seems to me to be inconsistent on
17 the one hand, that if the Court was to impose an
18 injunction, that it would have a catastrophic effect
19 and the very foundation of Western civilization would
20 be shaken by wireless e-mail or the absence of it.
21 And then, on the other hand, from some of the
22 stuff that I've read, it's a minor convenience they
23 have got a workaround. Nobody will even know that a
24 stone was cast into the sea.”

Commentary: This is probably the worst omen for RIM. The judge considers its arguments unworthy of credibility. Judge Spencer rarely engages in sarcasm, even this mild. So, the fact that the Court caricatures RIM's arguments as protecting “the very foundation of Western civilization” indicates that the Court does not accept the argument. Note also the biblical reference to “a stone cast into the sea.” The Court seems to suggest that, at the end of the day, Western civilization will survive a Blackberry injunction.

Transcript: “ 25 I'm going to take the matter under advisement
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01 and I will issue a decision as soon as reasonably
02 possible. I'm thinking that probably the damages order
03 may come out quicker than the decision on injunction.
04 That requires a little bit more thought.”

Commentary: As noted above, the fact that Judge Spencer took the matter under advisement is entirely predictable. Few if any judges would decide an issue of this magnitude at the end of an oral argument. The fact that he will likely issue first an order on damages is good for NTP and bad for RIM. During oral argument on the damages aspect of the case, Judge Spencer asked no questions of NTP. This may signal that he is more comfortable with NTP's damage argument. It also ties in with his earlier comment about the “reality” of the jury verdict. The jury awarded damages.

Transcript: “And if, I say
05 if because I have not decided, if an injunction is
06 ordered by the Court, I want to make very sure that
07 these exclusions and exemptions are appropriate. That
08 the government and its needs are met.”

Commentary: This comment and the comment above that an injunction “requires a little bit more thought” signal to the authors that the Court is leaning toward an injunction. The Court will give great deference to the United States Government. The Government cannot be enjoined under the Federal Code and, further, the Government offered very good arguments as to why a disruption in Blackberry service would harm the public interest.

One More Comment: Observers often ask if the Court will be swayed, at all, by the reexamination of NTP's patents by the United States Patent and Trademark Office. We think not. Here is a comment that supports our view:

Transcript: “MR. WYSS: With Your Honor's permission, I
04 would like to do just the damages things and we will
05 divvy it up the way we did before. With Your Honor's
06 permission I would like Mr. Anderson to address very
07 briefly about the PTO proceedings so we have a response
08 on the record.
09 THE COURT: If you must. I think that's a
10 waste of time. I won't stop you.”

Commentary: Judge Spencer does not even care to hear rebuttal from NTP on the issue of the USPTO re-exams. In his words, argument on that issue by NTP is “a waste of time.” No stronger signal could be sent that the Court will not be swayed by administrative actions that are happening 100+ miles away in Alexandria, Va.

Conclusion: In sum, the authors believe that the Court will enter an injunction

in the next three weeks. We also believe the Court will enter a damages award by March 3, 2006. The damages award will be fully in favor of NTP. The injunction will enjoin new Blackberry service effective 30 days after the date of the injunction order. The Court will give the parties and the Federal Government 90 days to prepare a “whitelist” of non-enjoined users associated with the Federal, state and local government. The 90 day window will allow the Federal Government to seek additional time if necessary.

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