1   IN THE SUPREME COURT OF THE UNITED STATES

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3 MEDTRONIC, INC.,   :

4   Petitioner   : No. 12-1128

5   v.   :

6 BOSTON SCIENTIFIC   :

7 CORPORATION, ET AL.   :

8 - - - - - - - - - - - - - - - - - x

9   Washington, D.C.

10   Tuesday, November 5, 2013

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12   The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 1:00 p.m.

15 APPEARANCES:

16 SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of

17   Petitioner.

18 CURTIS E. GANNON, ESQ., Assistant to the Solicitor

19   General, Department of Justice, Washington, D.C.; for

20   United States, as amicus curiae, supporting

21   Petitioner.

22 ARTHUR I. NEUSTADT, ESQ., Alexandria, Virginia; on

23   behalf of Respondents.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (1:00 p.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   this afternoon in Case 12-1128, Medtronic v. Boston

5   Scientific Corporation.

6   Mr. Waxman.

7   ORAL ARGUMENT OF SETH P. WAXMAN

8   ON BEHALF OF THE PETITIONER

9   MR. WAXMAN: Thank you, Mr. Chief Justice,

10   and may it please the Court:

11   Patent law places the burden of proving

12   infringement on the patentee. And until this case, it

13   was settled that the burden does not shift if the issue

14   arises in a declaratory action seeking a judgment of

15   non-infringement. The Federal circuit imposed a

16   different rule in suits brought under MedImmune where

17   the party seeking a declaration of non-infringement is a

18   licensee. That was error.

19   Allocation of the burden of proof inheres in

20   the governing substantive law, while the Declaratory

21   Judgment Act is procedural only and does not change

22   substantive rights. The burden of proof in MedImmune

23   actions, like all other declaratory actions, remains

24   where it would have rested in the equivalent coercive

25   suit brought by that patentee.

1   JUSTICE ALITO: Now, this concerns just the

2   risk of nonpersuasion. It doesn't concern the burden of

3   production; is that right?

4   MR. WAXMAN: That's correct. That's --

5   that's the issue in this case. Although as we point

6   out, that the word "burden of proof" -- I think the word

7   "burden of proof" used in the opinion below could be

8   thought to be addressed to both points, but the parties

9   agree that the relevant consideration here is the burden

10   of proof and that trial judges do retain discretion to

11   make rules about ordering -- the ordering of proof in

12   patent cases.

13   JUSTICE ALITO: Well, if that's all that's

14   involved, then the case doesn't seem to amount to quite

15   as much as one might have thought otherwise, does it?

16   If -- suppose the -- the patentee has the burden of

17   production, so they would have to explain why there was

18   infringement; they would have to introduce proof of

19   infringement.

20   And the only difference is who wins when

21   the -- the factfinder thinks that it is exactly in

22   equipoise.

23   MR. WAXMAN: Right. Well, that, of course,

24   was not what happened in -- not what the Respondent

25   maintained should happen in this case. But taking your

1   question as it is, this Court has pointed out repeatedly

2   that the burden of -- where the burden of persuasion

3   rests is very often outcome -- outcome determinative.

4   And that is certainly true in patent cases. What the

5   jury is told about who has the burden of persuasion is

6   surpassingly important in many cases, including many

7   patent cases.

8   And that's the issue in this case.   I mean,

9   the substantive -- the -- the reason why the Federal

10   circuit erred is clearly doctrinal, which is this Court

11   has said, over and over again, that burdens of proof,

12   like standards of proof, are substantive. They inhere

13   in the substantive right, and the Court has also said,

14   repeatedly, that the declaratory judgment action is

15   procedural only and doesn't change substantive rights.

16   But I think if you go to a -- to the policy

17   question, Justice Alito, reversing the burden in a

18   declaratory action would impair the purpose and utility

19   of the Declaratory Judgment Act, which was enacted to

20   provide a mechanism for determining how the equivalent

21   coercive action would be resolved without the -- without

22   requiring the declaratory judgment plaintiff to subject

23   itself to retrospective liability.

24   And, indeed, shifting the burden would

25   threaten the issue preclusive effect of the declaratory

1 judgment, frustrated --

2   CHIEF JUSTICE ROBERTS: It seems to me we

3 could -- all that may be true, but we need to cut down

4 to the basic issue, which is MedImmune changes all that.

5 The idea is you're moving along with the license,

6 everybody's happy. All of a sudden, you jump into

7 court. Why shouldn't you have the burden as the party

8 who seeks to disturb the status quo?

9   MR. WAXMAN: Well, the -- the reason,

10 Mr. Chief Justice, is the reason that the burden of

11 proof is substantive, and a declaratory judgment action

12 under the Act is not -- is aimed not to change any

13 substantive rights. And that's why all of the decided

14 cases in this area, except for the one below, left the

15 burden exactly where substantive patent law left it.

16   JUSTICE KENNEDY: Does it help your answer

17 or -- or does it limit the theory of your case too much

18 to say that, in this case, there is a controversy

19 satisfying the declaratory judgment rules because the

20 patentholder gave notice of potential -- or of

21 infringement? Am I right about that?

22   MR. WAXMAN: You're right about that, and

23 that would be true, Justice Kennedy, on all MedImmune

24 cases.

25   JUSTICE KENNEDY: Now, could we -- or should

1 we make the case turn on that, or can we say, with

2 declaratory judgment, there has to be a dispute, we --

3 we know that a dispute is likely, a controversy, so the

4 formality of a notice is not important.

5   MR. WAXMAN: Well, I don't know that it's a

6 formality of a notice. I mean, the issue that this

7 Court addressed in MedImmune -- the question that you're

8 raising, I think, is one that goes to Article III

9 jurisdiction. You can't use the declaratory judgment

10 procedure to get the Court to answer a hypothetical

11 question.

12   JUSTICE KENNEDY: Well, it goes to me to --

13 a basic question of fairness. When I picked up this

14 case, I thought, how is the patentholder supposed to

15 know what all these new inventions are? What does it

16 know about it? But then I answered my own question by

17 saying, well, it gave notice of infringement.

18   But -- that's why I've asked if the notice

19 is essential to your position?

20   MR. WAXMAN: I think the notice is the --

21 well, it's essential to the Article III MedImmune

22 question, whether or not there actually is a case or

23 controversy.

24   So, in this case, it's perfectly obvious

25 because the -- the license requires Medtronic to

1   affirmatively go to Mirowski within 30 days of

2   introducing any product and not only tell -- providing

3   notice of the product, but providing the manual -- the

4   diagrams and the manuals that are given to physicians so

5   that Mirowski can determine, within 60 days, whether or

6   not to assert infringement.

7   In MedImmune, you didn't have that

8   procedure, but the Court still held in the context of

9   that case that, because Genentech had made clear that it

10   thought that the Cabilly patent covered the accused

11   devices, there was sufficient -- sufficiently concrete

12   controversy that MedImmune did not have to stop paying

13   royalties and breach the license.

14   And -- and so, therefore -- I think I may be

15   talking around your question, but I am trying to get to

16   the point that the -- the requirement of some notice,

17   the -- the patentee -- there's no declaratory judgment

18   jurisdiction if the patentee doesn't know about the

19   product, has -- has never done anything to suggest that

20   the product -- that his or her patent reads on the

21   product.

22   But that is an Article III question that

23   would be -- you wouldn't get to the burden of proof if

24   you couldn't satisfy MedImmune.

25   JUSTICE GINSBURG: Mr. Waxman, what do you

1   make of the -- the patent listing non-infringement as an

2   affirmative defense in an infringement suit?

3   MR. WAXMAN: We agree with the articulation

4   of the point by the Solicitor General in the United

5   States brief, which is that the cases have recognized

6   that non-infringement can either be a general defense --

7   that is, when -- when non-infringement is simply a

8   general denial of a cause of -- of a claim of

9   infringement, it is not an affirmative defense.

10   But there are particular types of

11   non-infringement claims. And the ones that I'm familiar

12   with are prosecution history estoppel and the

13   experimental use exception that are affirmative

14   defenses.

15   In other words, those are situations in

16   which the alleged infringer says, hey, I'm not saying

17   that your patent doesn't read -- all the claims of your

18   patent don't read on my invention; I'm claiming

19   non-infringement because I was making experimental use,

20   and that has affirmatively been determined by Congress

21   not to infringe.

22   Or, yes, your -- the elements of your claim

23   read upon my invention, but during the prosecution of

24   the patent in the Patent Office, you disclaimed some

25   claim scope, and under prosecution history estoppel,

1   this Court elucidated in Festow, there is no

2   infringement.

3   This is a case involving a general denial of

4   infringement, and therefore, it is not an affirmative

5   defense.

6   JUSTICE GINSBURG: What you -- what you just

7   responded, that would go as well for an alleged

8   infringer who is not a licensee, right?

9   MR. WAXMAN: Yes. I mean -- absolutely. I

10   mean, the point here --

11   JUSTICE GINSBURG: This here -- this case is

12   about the difference between the licensee and the

13   non-licensee.

14   MR. WAXMAN: Right. So a defense of

15   non-infringement -- a general defense of

16   non-infringement is not an affirmative defense. And in

17   the -- the potential or correlative coercive action

18   which would have been a suit for patent infringement by

19   Mirowski, had we ceased making the royalty payments,

20   they would have borne the burden of proving

21   infringement, unless we raised an affirmative defense,

22   like prosecution history estoppel or experimental use, in which case we

23   would have the burden.

24   The point of the Declaratory Judgment Act is

25   that the burden is left exactly where it would have

1   been, had there been no -- had this identical issue

2   arisen in the absence of the declaratory judgment

3   procedure.

4   And in this respect, it is identical to the

5   jury trial right, which this Court held in Beacon

6   Theatres v. Westover, is also an element of the

7   substantive claim and also cannot be deprived by the

8   peculiarity of a declaratory judgment being a claim for

9   an equitable remedy.

10   JUSTICE KAGAN: Mr. Waxman, as I understand

11   it, the agreement in this case identified certain

12   patents and contemplated that there would be disputes

13   about whether particular products of Medtronic violated

14   or infringed or practiced, whatever, those patents.

15   But there might be some other kinds of

16   agreements which, instead, identify certain products --

17   MR. WAXMAN: Mm-hmm.

18   JUSTICE KAGAN: -- and essentially treat

19   those as infringing products in the absence of a

20   license. In that sort of agreement, would you make the

21   same kind of claim, that if Medtronic had that agreement

22   that identified certain products, but Medtronic woke up

23   one day and said, you know what, we don't think that

24   those products infringe, we essentially want to

25   relitigate our agreement, can Medtronic come to court

1   and do that via a declaratory judgment action?

2   And if so, who would bear the burden of

3   proof?

4   MR. WAXMAN: So if I understand your

5   question, first, to -- to go to the license in this

6   case. This case not only involves products that

7   didn't -- that aren't specifically articulated in a

8   license agreement; neither the patents nor the products

9   at issue in this case had even been conceived, much less

10   in existence, at the time the license agreement was in

11   effect.

12   But in -- if I understand your question, in

13   a situation in which I make Widget A and you claim that

14   you have the patent that reads on that widget, and I --

15   you agree to license me to do it, if the license -- if

16   payment of the license depends upon a determination that

17   it otherwise would be infringing, I can file a

18   declaratory judgment action and seek a declaration that

19   it's not infringing.

20   That is, if the cover -- if the license

21   covers only products that otherwise would infringe, I

22   can bring a DEC action, claiming non-infringement, and

23   you would bear the burden, assuming that you had

24   threatened, in some way, to enforce your patent against

25   me.

1   In -- in the -- the situation that -- sort

2   of bogeyman situation that Mirowski and the -- the

3   intellectual property owner's brief articulate, which --

4   imagine, which is you license -- I have a -- I have a

5   product, you have a patent, you license it to me, and I

6   turn around the next day and sue for -- a declaration of

7   non-infringement, there are any number of ways that you,

8   as the patentee, could protect yourself from that

9   extraordinary eventuality.

10   You could provide, for example, that -- I --

11   you would require me to issue a -- you know, to -- to --

12   to pay a paid-up royalty for all use. Or you could

13   simply say, we don't care whether the patent infringes

14   or not; you agree to pay me three dollars per unit sold.

15   Or you could put a provision in that would say, if you

16   sue for patent infringement, the royalty rate goes to

17   3X.

18   Or, for that matter, if you sue, that

19   will -- that can -- I can deem that a breach of the

20   license agreement and -- and recover the -- the remedies

21   that patent law allows, an injunction and treble damages

22   and attorneys' fees in the context of a -- a willful

23   action.

24   I want to underscore, although the Federal

25   circuit made a broad rule, exactly what we have here.

1   In this case, Mirowski -- this license is from 1991.

2   Mirowski -- it's not in the record, but there's no

3   dispute that Mirowski has received hundreds of millions

4   of dollars of royalties from Medtronic for its patents.

5   It gets, as a benefit of this license --

6   notice, as I said, within 30 days of every new product

7   and the manual, and it can require Medtronic to start

8   accruing royalties and an interest rate of 2 -- of 2

9   points over prime, as soon as it sends us a notice.

10   And moreover, in the -- in the litigation

11   tolling agreement, we agree that, even though we are not

12   a party in the referenced St. Jude action, we would be

13   bound by any determination in that adjudication,

14   whereas, otherwise, we wouldn't.

15   So this license agreement was enormously

16   beneficial and couldn't be farther from the scenario of

17   I have a widget, I agree to license it, and the next

18   day, I turn around and sue you. But, in that event,

19   there would be lots and lots of remedies.

20   I do want to underscore one other thing,

21   that the Federal circuit said that it was applying this

22   special rule only in MedImmune-type cases. But the

23   rationale of the court is that what causes the burden to

24   shift is the absence of a counterclaim for infringement.

25   That would have, for example, caused the

1   burden to shift in the Myriad case that this Court

2   decided last term, where there was one researcher at NYU

3   who had standing to bring a declaratory judgment action.

4   There was no basis for Myriad to claim

5   infringement because he had made clear that he

6   wouldn't -- he wouldn't engage in the research and

7   clinical work that he was going to, so long as he was in

8   risk of patent infringement remedies. And that -- the

9   source of the rule -- the source of the law where the

10   burden of proof lies, is in substantive patent law. And

11   this Court has said, for 125 years, that it rests with

12   the infringer.

13   What neither the Federal circuit nor my

14   friend on the other side of this case has ever

15   identified is what is the source of the rule that shifts

16   the burden in a declaratory judgment action? It can't

17   be the Declaratory Judgment Act because that Act is

18   procedural only.

19   If I can reserve the balance of my time?

20   CHIEF JUSTICE ROBERTS: Thank you, counsel.

21   Mr. Gannon.

22   ORAL ARGUMENT OF CURTIS E. GANNON,

23   FOR UNITED STATES, AS AMICUS CURIAE,

24   SUPPORTING THE PETITIONER

25   MR. GANNON: Mr. Chief Justice, and may it

1   please the Court:

2   The government agrees that using the same

3   burden of proof that would apply in the hypothetical

4   coercive action that underlies the Declaratory Judgment

5   Act is the best thing to do in this mirror image

6   declaratory judgment action.   That best serves the

7   purposes of the Declaratory Judgment Act and allows for

8   final resolution of the types of controversies that this

9   Court contemplated in MedImmune.

10   If I could turn to Justice Kagan's points

11   about an incident in which the parties had actually

12   agreed to -- whether certain products were covered by a

13   particular license.

14   That would be different from the situation

15   we have here because the products in question here

16   weren't actually in existence at the time of the

17   underlying license agreement.   The whole point of that

18   aspect of the license agreement was to, as you said,

19   channel future disputes into this particular dispute

20   resolution mechanism.

21   JUSTICE SOTOMAYOR: Are -- are you

22   suggesting that the burden-shifting rule should be

23   different in the hypothetical Justice Kagan --

24   MR. GANNON: I was not about to suggest

25   that, Justice Sotomayor.   I was going to say that I

 1   think that's the -- that -- that that would probably be

 2   the least logical way to deal with the quandary that

 3   might arise from thinking that somebody is then trying

 4   to breach the license.

 5   And we don't think there's any license

 6   breach here because there wasn't any prior agreement on

 7   the fact that these future products were going to be

 8   covered by the -- by these patents, that they'd be

 9   practicing these patents.

10   But, even if there were some concern about

11   the licensee turning around and challenging the

12   agreement that it had previously made, it seems like the

13   problem there is either that they should be estopped by

14   what they already said in the agreement or Lear needs to

15   be extended to keep them from being estopped in that

16   way. But shifting the burden of proof seems like an odd

17   way to get at solving whatever the quandary there might

18   be.

19   And I think that, at some point, this --

20   this also interweaves with a point that the Chief

21   Justice made, about whether Medtronic here is seeking to

22   change the status quo. And we don't think that

23   Medtronic is seeking to change the status quo here, for

24   a couple different reasons.

25   One of them is, as I was just saying, that

1   the agreement here didn't actually reach -- the license

2   agreement here didn't -- it didn't include a meeting of

3   the minds about whether these particular future products

4   would be covered by these patents, including one of the

5   patents was reissued after the time of the license.

6   And also, this license agreement expressly

7   preserved the parties' ability, including Medtronic's

8   ability, to challenge both the validity and the

9   enforceability of the patent. That's at page 13 of the

10   Joint Appendix. And so there's no way in which I think

11   it can be legitimately said that Medtronic is trying to

12   either get out of its contractual obligations or to

13   change the status quo.

14   The status quo, right now, is that the

15   royalties are collecting in a certified account, and so,

16   in a sense, both parties are trying to change the status

17   quo, in trying to get the stream of royalties that

18   either is applicable to these products or isn't, on the

19   basis of the resolution of a question that the parties

20   had not decided, but said would be decided in a

21   declaratory judgment action like this.

22   And we think that the best way to think of a

23   declaratory judgment action like this is that it is the

24   mirror image of the underlying coercive hypothetical

25   action that could have been brought against Medtronic.

1   CHIEF JUSTICE ROBERTS: Well -- well, but I

2   guess the argument is that it's the mirror image of an

3   action that could not have been brought because

4   Medtronic is paying royalties.

5   MR. GANNON: Well, the same thing is true in

6   MedImmune, and I think that the Court noted that the --

7   in MedImmune, that the Declaratory Judgment Act was

8   intended to help get the party out of the dilemma it

9   would be in, in deciding whether it should continue to

10   be effectively coerced into paying royalties that it

11   thinks it doesn't need to pay or exposing itself to the

12   risks associated with -- with breaching the license

13   and -- and being subject to treble damages, attorneys'

14   fees, and the other remedies that would be available

15   under the Patent Act.

16   And, yet, even though there had been no

17   infringement in that case and no breach of the contract

18   in that case, which is also true here, because, so far,

19   everybody has been behaving the way the license expected

20   them to behave, the Court recognized that the parties

21   had a concrete dispute about the applicability of the

22   patents to those particular products, that the scope of

23   the contract was not going to require payment of

24   royalties where the patent did not apply, and said that

25   the -- the issues that were going to be resolved in the

1   declaratory judgment action there were going to involve

2   questions of patent validity, patent enforceability, and

3   scope of coverage, patent infringement, which is exactly

4   what we have here.

5   Medtronic has raised in their complaint --

6   the well-pleaded complaint that you would look to here,

7   is one that arises under the Patent Act and includes

8   claims involving all three of those issues, just as was

9   the case in MedImmune.

10   JUSTICE GINSBURG: I take it you disagree

11   with the -- we have one friend of the Court brief that

12   says this is not a case arising under the patent law; it

13   arises under contract law.   It's a contract case with a

14   patent issue.

15   MR. GANNON: Yes, Justice Ginsburg, we do

16   disagree with that.   We think that this case involves a

17   claim that arises under the patent laws, for the reasons

18   that I was just saying.

19   I think that the way to -- the way to

20   conceptualize this is to look to what the well-pleaded

21   complaint would be in the hypothetical coercive action

22   that would be being brought against Medtronic if we

23   didn't have the problem presented by the fact that they

24   haven't actually breached the contract or infringed at

25   this point.

1   And we have every reason to think that that

2   hypothetical coercive action is one that arises under

3   the patent laws because it's one involving infringement.

4   That's the dispute that the parties acknowledge that

5   they have.

6   In the litigation tolling agreement at page

7   20 of the Joint Appendix, it talks about the fact that

8   the parties have a dispute under Section 271 of the

9   Patent Act. In the red brief here, Mirowski has -- has

10   told us on page 48 that, if Medtronic were to cease

11   paying royalties, that the recourse would be that they

12   would bring an infringement suit. And the complaint

13   here in paragraph 5 alleges that the claim here arises

14   under the Patent Act.

15   And because it does arise under the Patent

16   Act and because it's clear here that all of the

17   defensive issues would also be Federal, as I mentioned

18   before, I think there is no dispute here that this --

19   this would arise under the patent laws, which would

20   provide for district court jurisdiction under Section

21   1338 and exclusive appellate jurisdiction in the Federal

22   circuit under Section 1295(a), even before the

23   amendments in the America Invents Act in 2011.

24   I think that there is one other point that

25   would be worth making in response to some of the amicus

1   briefs about the -- the potential problems here

2   associated with whether the parties have an incentive to

3   enter into these type of licensing arrangements.

4   As Mr. Waxman already explained, the

5   patentholder here got lots of benefits out of -- out of

6   entering into an agreement like this, notwithstanding

7   the fact that they would leave themselves open to

8   precisely the suits that the agreement contemplated,

9   which was a suit involving both infringement and

10   validity questions; and that, under the circumstances,

11   there's -- they had plenty of incentive to enter into a

12   license agreement, notwithstanding the fact that they

13   would continue to bear the same burden of proof that

14   they would bear in every other procedural context in

15   which patent infringement claims have arisen up until

16   now.

17   And so I think that, in that sense,

18   that's -- that's not a sea change from their

19   perspective. And -- and, yet, even if they were to

20   think it so, as Mr. Waxman explained, a licensor in that

21   context would have several mechanisms that they could

22   use in order to rejigger the balance between the parties

23   if they wanted to.

24   And -- and I think that we agree with --

25   with everything on the list that Mr. Waxman mentioned,

1   including having fully paid-up licenses or allowing a

2   suit for infringement or invalidity to constitute a

3   termination of the license that would allow the

4   patentholder to bring an infringement action.

5   If there are no further questions, we would

6   urge the Court to reverse.

7   CHIEF JUSTICE ROBERTS: Thank you, counsel.

8   Mr. Neustadt.

9   ORAL ARGUMENT OF ARTHUR I. NEUSTADT

10   ON BEHALF OF THE RESPONDENTS

11   MR. NEUSTADT: Thank you, Your Honor.

12   Mr. Chief Justice, and may it please the Court:

13   The Federal circuit got it right in this

14   case.   The Federal circuit took the well-settled law on

15   burden of proof, and it applied it to two stipulated

16   facts and reached a conclusion that it had to reach.   It

17   was controlled by it.

18   The two stipulated facts were, number one,

19   when Mirowski's counsel, me, wrote letters to Medtronic,

20   that was not a notice of infringement.   There could be

21   no infringement in this case.   Infringement is defined

22   as "using a patented invention without authority."

23   Medtronic had authority.   It was licensed.

24   The second stipulated fact -- and this is at

25   page 51 of the Joint Appendix -- is that Medtronic is a

1   licensee. It cannot be an infringer. So everything

2   that you say about infringement involves a completely

3   different situation.

4   There was no shifting of the burden of

5   proof. The well-settled law that I referred to is the

6   normal default rule. The normal default rule is perhaps

7   one of the most fundamental tenets of our jurisprudence.

8   It says that, if a party files a complaint and seeks

9   relief, it has the responsibility to prove that it is

10   entitled to that relief.

11   And the normal default rule has the word

12   "default" in there because it refers to the fact that

13   the statute doesn't decide the burden of proof. And

14   there's no dispute in this case that the statute does

15   not decide the burden of proof.

16   So --

17   JUSTICE SCALIA: But -- but you could say

18   that about any declaratory judgment action. You can say

19   the person bringing the declaratory judgment action is

20   seeking the relief. And if -- if we follow what you

21   said, that then the burden shifts in every declaratory

22   judgment action. And it clearly doesn't.

23   I mean, we -- we've said, time and again,

24   that the burden of proof normally does not shift.

25   What's different here?

1   MR. NEUSTADT: I'll tell you what's

2   different here. The difference is that there is no

3   infringement. Medtronic is a licensee. As a result,

4   there can be no coercive counterclaim. As the Chief

5   Justice noted, they're paying royalties. There is no

6   infringement.

7   JUSTICE GINSBURG: How about a permissive

8   counterclaim?

9   MR. NEUSTADT: Pardon me?

10   JUSTICE GINSBURG: How about a permissive

11   counterclaim?

12   MR. NEUSTADT: A permissive counterclaim, by

13   definition, would have nothing to do with the issue that

14   is involved.

15   JUSTICE GINSBURG: But could -- could the

16   patentholder bring in the declaratory action a

17   counterclaim for infringement?

18   MR. NEUSTADT: No, they cannot because

19   Medtronic is a licensee. They cannot be an infringer.

20   And the difference --

21   JUSTICE KAGAN: Well, they can be an

22   infringer, Mr. Neustadt, if --

23   MR. NEUSTADT: Pardon me?

24   JUSTICE KAGAN: They can be an infringer if

25   they say, we're ignoring our agreement, we're not paying

1   royalties, but we're going to go on and continue making

2   the product.

3   Then MVF would say they would be infringing.

4   And that's the world that MedImmune imagines is

5   happening.   It says --

6   MR. NEUSTADT: No. I'm sorry, I interrupted

7   you.   Go ahead.

8   JUSTICE KAGAN: No, I'm finished.

9   MR. NEUSTADT: No, I'm sorry. I didn't mean

10   to interrupt you.

11   Okay.   That's not what happened in

12   MedImmune. First, if you change -- if you change the

13   facts and Medtronic starts infringing because it stops

14   paying royalties, of course, you get different results.

15   Here's what happened in MedImmune, in our situation --

16   JUSTICE SOTOMAYOR: I'm not sure how you're

17   receiving royalties. It's in an escrow account.

18   MR. NEUSTADT: Medtronic is holding the

19   money.

20   JUSTICE SOTOMAYOR: Yes, but it's in an

21   escrow account. You can't touch it, right?

22   MR. NEUSTADT: Well, we do not have access

23   to the money that they're holding, correct.

24   JUSTICE SOTOMAYOR: Right. So how are you

25   getting paid? Why isn't there a technical infringement?

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1          MR. NEUSTADT:          Well, there can't be --

2          JUSTICE SOTOMAYOR:          Because you're not

3   receiving the money.

4          MR. NEUSTADT:          Because we agreed to that in

5   the agreement.  That's part of our agreement.

6          JUSTICE SOTOMAYOR:          Yes, but you're still

7   not receiving the money.

8          MR. NEUSTADT:          But we don't -- we agreed to

9   not receiving the money.  Everyone is operating in

10  accordance with the license.  We can't say, you're

11  withholding money and not paying it to us.

12         JUSTICE SOTOMAYOR:          And you agreed they

13  could sue you.

14         MR. NEUSTADT:          Pardon me?

15         JUSTICE SOTOMAYOR:          You agreed they could

16  sue you under a Declaratory Judgment Act to find out

17  whether or not they're infringing, correct?

18         MR. NEUSTADT:          That's right.

19         JUSTICE SOTOMAYOR:          All right.  So why

20  shouldn't you be bound by that --

21         MR. NEUSTADT:          I'm sorry?

22         JUSTICE SOTOMAYOR:          Why shouldn't you be

23  bound by that agreement?

24         MR. NEUSTADT:          Oh, we are bound by the

25  agreement that --
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1   JUSTICE SOTOMAYOR: To prove that they're

2   infringing.

3   MR. NEUSTADT: No, they're not infringing.

4   It's claim coverage. Medtronic cannot infringe because

5   they're a licensee. The dispute is over claim coverage.

6   It's not infringement. That's why we cannot have a

7   counterclaim for infringement.

8   Justice Scalia's question, the big

9   difference is that we cannot counterclaim for

10   infringement. Under the normal default rule, where the

11   party seeking relief has the burden of proof, you have

12   to look at the case, and you have to ask yourself --

13   JUSTICE KENNEDY: I don't -- I don't

14   understand. Suppose the licensee says, this isn't

15   covered by the agreement at all, we're not going to pay

16   you anything. And it starts to manufacture its

17   products. That's -- that's the whole point. That's

18   outside the agreement, they are not going to pay you

19   anything.

20   MR. NEUSTADT: Well, they just --

21   JUSTICE KENNEDY: Or am I missing something?

22   MR. NEUSTADT: Yes, I believe you are. What

23   Medtronic wants in this license is they want an

24   insurance policy for their future products. The problem

25   is that they could -- if they don't have a license, they

1   can get enjoined. So they build this insurance policy

2   so that they're protected, and then they even have a

3   provision whereby they can go and file a DJ action.

4   Now, as I was saying, there are two types of

5   DJ actions in this circumstance. One is where the

6   accused infringer says, I am not infringing, and I want

7   a DJ to that effect. In that response, where you are

8   talking about infringement and not claim coverage, the

9   patentee has to counterclaim. It's compulsory.

10   The patentee then has the burden of proof in

11   that case because he has claimed infringement.

12   JUSTICE SCALIA: It seems to me it is often

13   the case, in declaratory judgment actions, that the

14   defendant in the action cannot counterclaim. I mean, it

15   typically occurs when somebody doesn't want to be in

16   breach of contract and -- and brings a suit to

17   see -- you know, claiming if I do this I won't be in

18   breach.

19   The other side can't counterclaim because

20   the person hasn't been in breach. The whole purpose of

21   the declaratory judgment statute is to enable you to sue

22   before the other side has a cause of action against you.

23   That's the whole purpose of it.

24   So -- so why should the fact that the other

25   side doesn't have a counterclaim change anything?

1   That's usually the situation.

2   MR. NEUSTADT: Because, under the normal

3   default rule, if only one party is seeking relief, that

4   party has the burden of proof. You get into a more

5   complicated situation --

6   JUSTICE SCALIA: But we are not dealing with

7   the normal default rule. We are dealing with a

8   declaratory judgment statute, and we've said, time and

9   time again, that it doesn't alter the burden of proof.

10   And your response is, well, it does when the other side

11   can't counterclaim. And my response to that is,

12   usually, the other side can't counterclaim.

13   MR. NEUSTADT: The -- if you take the normal

14   default rule as set forth in Schaffer, which is the case

15   we cite, and it's this Court's precedent involving an

16   individual education program, and this Court

17   specifically states if the parents bring the suit, they

18   have the burden of proof because they're seeking relief.

19   And if the school district brings a suit,

20   they have the burden of proof because they're the ones

21   who are seeking relief. Wherever you have a case where

22   only one party is seeking relief, the normal default

23   rule is applicable, and the party that seeks relief has

24   to prove it.

25   JUSTICE GINSBURG: But that was not -- Weast

1   the money.   So there's nothing to claim for.

2   MR. NEUSTADT: That's correct.

3   JUSTICE BREYER: Yes, I know. Now, all

4   that's true.

5   MR. NEUSTADT: Yes.

6   JUSTICE BREYER: But, nonetheless, the fact

7   is in many claims -- in many instances, though perhaps

8   not yours, this kind of claim, i.e., that person's

9   patent does not cover my product --

10   MR. NEUSTADT: Yes.

11   JUSTICE BREYER: -- is actually a way of

12   saying whether your product infringes the patent, one

13   way of saying that. So their point is, call it what you

14   wish, but where you have a claim which amounts to a

15   claim that my product does not infringe his patent, the

16   rule that should apply is the person who owns the patent

17   should have to prove that the claims do cover the

18   product.

19   And there are a lot of good reasons, et

20   cetera, that they put in their brief why that should be

21   so. It's easiest for the patentee to know in what

22   respect it violates the claim. Normally, a patent,

23   being a monopoly, should not have too many advantages

24   beyond the scope of the monopoly.

25   And we don't like false patents because

 1   that -- you'd have different results in the same kind of

 2   patent with different people depending upon whether, in

 3   some other instance, your client brought a suit or

 4   whether this was -- I mean, you've read the arguments.

 5   So looking at those functional arguments, is

 6   there any answer that you have to their point, other

 7   than cases in different subject matters, where burdens

 8   of proof did shift?

 9   MR. NEUSTADT: Well, the answer to your

10   question is that the normal default rule is a

11   fundamental tenet, that you can't go into court and say,

12   it's the responsibility of the defendant to disprove the

13   allegations of my complaint.

14   In cases where you have the counterclaim, of

15   course, the patentee is going to have the burden of

16   proof. In cases where there can be no counterclaim, you

17   have only one party seeking relief, and that party has

18   the burden of proof.

19   And it follows from the normal default rule,

20   which is the rule of the Court -- rule of this Court.

21   It's the established rule of the land. It's a

22   fundamental tenet that a party cannot come into court --

23   JUSTICE SCALIA: Then the Declaratory

24   Judgment Act doesn't change it; that's your position?

25   What do you do about the res judicata

1   problem? Let's assume that we put the burden of proof

2   where you want it. Okay? So this declaratory judgment

3   action is defeated. All right?

4   Nonetheless, they say, still and all, we are

5   going to go ahead and not pay any royalties. And, then,

6   you bring -- you bring an infringement action, right?

7   MR. NEUSTADT: Right.

8   JUSTICE SCALIA: Is -- is the prior decision

9   res judicata, or are you going to have to relitigate the

10   whole thing, but, this time, with the burden of proof on

11   you?

12   MR. NEUSTADT: No, you're not going to have

13   to relitigate the whole thing.

14   JUSTICE SCALIA: Why not? You never -- you

15   never established that you're entitled to any -- any

16   infringement damages.

17   MR. NEUSTADT: I agree, but you're not going

18   to have to relitigate the whole thing. This issue is

19   going to be decided on preponderance of the evidence.

20   And we don't have the burden. They have the burden on

21   that. Once that's decided --

22   JUSTICE SCALIA: No, you -- you would

23   normally have the burden as -- as the person claiming

24   infringement.

25   MR. NEUSTADT: Oh, of course.

34

1   JUSTICE SCALIA: Of course.

2   MR. NEUSTADT: Of course.

3   JUSTICE SCALIA: Right? So you'll have to

4   relitigate the whole thing because you -- you never

5   established that there was infringement. In the

6   declaratory judgment action, all you've established is

7   that they didn't prove non-infringement.

8   MR. NEUSTADT: Yeah. That's all true, and

9   I'm not arguing with it.

10   JUSTICE SCALIA: So we have to relitigate

11   the whole thing.

12   MR. NEUSTADT: No. First of all --

13   JUSTICE SCALIA: What's the alternative?

14   MR. NEUSTADT: Okay. I will give you two

15   answers. The first answer is you are never going to get

16   this situation because the last thing in the world

17   Medtronic wants to do is give up its license. So it's

18   not going to -- it's not going to stop paying royalties.

19   The same thing in --

20   JUSTICE SCALIA: It's my hypothetical, okay?

21   (Laughter.)

22   MR. NEUSTADT: Okay. Now, to follow your --

23   to follow -- to follow your hypothetical, the court who,

24   say, tries the issue with respect to whether or not

25   there's claim coverage -- and let's say we prevail

1   on that. When there's a subsequent infringement action,

2   you're correct, we cannot say that they're estopped by

3   res judicata or issue preclusion.

4   But we can say, Your Honor, you've seen this

5   entire case. Now, where it was preponderance of the

6   evidence before, it's now preponderance of the evidence

7   on the other side. It may be the difference between

8   49.9 and 50.5. And we're going to bring a motion for

9   summary judgment and --

10   JUSTICE SCALIA: So your answer is, Justice

11 Scalia, you're right, but it doesn't matter very much.

12 That's your answer, right?

13   MR. NEUSTADT: And I've got one further

14 answer to that.

15   JUSTICE SCALIA: Okay.

16   MR. NEUSTADT: And that is, there is no

17 exception to -- to 100 percent lack of finality with

18 respect to the normal default rule. The normal default

19 rule is more important than saying that, if there is a

20 little bit of chance of a lack of finality, we're going

21 to throw out the entire normal default rule in -- in

22 favor of this rule and put the burden of proof on the

23 party who is not even seeking any relief.

24   And there was no shifting in this case.

25 Shifting involves starting with a position, shifting to

1   another position. As soon as they filed the suit and

2   you're the only party seeking relief, they would have

3   the burden of proof.

4   Now, if they are infringing, we can

5   counterclaim. Then we're going to have the burden of

6   proof because that's an issue where you have two parties

7   seeking relief, and that's a little more complicated.

8   JUSTICE GINSBURG: Why -- why isn't that

9   true here? Because you are seeking release of the

10   escrowed funds.

11   MR. NEUSTADT: We're not seeking it in the

12   suit. The way the agreement was between the parties was

13   if Medtronic disagrees with our assessment, then they

14   can go ahead and file a DJ action, and if they can

15   prevail in that DJ action, they won't have to pay. We

16   seek nothing in the suit. We have no counterclaim.

17   We're asking for nothing.

18   As to Justice Kennedy's question before, as

19   notice of infringement, there was no notice of

20   infringement. What we told them was there was claim

21   coverage. And there's a big difference between claim

22   coverage and infringement.

23   If we tell them that we're asserting

24   infringement, we're going to have the burden of proof.

25   We can't assert infringement because they're the

 1   licensee.

 2   JUSTICE KENNEDY: Well, there would have

 3   been infringement if you had refused to pay the royalty,

 4   and --

 5   MR. NEUSTADT: If they had --

 6   JUSTICE KENNEDY: And if they had refused to

 7   pay the royalty and you were covered, then -- then there

 8   would have been infringement.

 9   MR. NEUSTADT: But then you're changing all

10   the facts around. That's not -- that's not what we're

11   dealing with in this case.

12   JUSTICE KENNEDY: All right. I understand.

13   MR. NEUSTADT: And in MedImmune --

14   JUSTICE KAGAN: Well, Mr. Neustadt, I think

15   I just disagree with that. You keep on saying it's a

16   question of claim coverage, but the question of claim

17   coverage, all that is, is part of an infringement

18   analysis.

19   And that's the analysis, as Justice Kennedy

20   said, that's the analysis that would have been

21   appropriate if Medtronic had stopped paying royalties

22   and MVF had sued Medtronic as a result for patent

23   infringement.

24   And that's the world that we're supposed to

25   imagine after MedImmune, is if, contra the -- the actual

1   agreement, the licensee stopped paying royalties, and we

2   think about an infringement suit.

3   MR. NEUSTADT: No. That is -- permit me to

4   disagree with you. MedImmune was not involved with

5   that. Here was the problem in MedImmune: The MedImmune

6   did not want to continue to pay the royalties, but it

7   needed the license. 80 percent of its product line was

8   dependent upon that license.

9   So as a matter of sheer rigidity, they could

10   not not pay the royalty. They will lose their whole

11   business. They wanted to get into Federal court. At

12   that time, the Federal circuit had a Gen-Probe ruling

13   which says, everyone's paying royalties, there's no

14   dispute. In MedImmune, this Court reversed. You said,

15   there's enough of a controversy for MedImmune to have

16   this -- to -- to go in with the DJ action.

17   In that suit, it'd be exactly like this

18   suit. The patentee could not counterclaim because there

19   is no infringement. MedImmune is still paying its

20   royalties.

21   So in the MedImmune case -- but they never

22   got to it because -- because that MedImmune case was

23   settled -- you have the exact same situation we have

24   here, which is that there is no counterclaim, and

25   therefore, MedImmune, who is seeking relief, has the

1   burden to show it's entitled to relief.

2   JUSTICE BREYER: Well, how -- what do you do

3   with the government's argument here, which I take it as

4   being on page 17, they make an argument which, as I

5   understood it -- which is a big qualification -- the --

6   the -- some of these things are awfully complicated.

7   You might have a -- a claim or, really, it's a set of

8   claims that cover 48 pages with all kinds of symbols

9   and -- and 42 different sort of division possibilities.

10   And -- and then the -- the so-called

11   infringer, or the person who falls outside the coverage,

12   is looking at his product, and it's one of the most

13   complex things you've ever seen. And he has to think to

14   himself, well, how -- how am I supposed -- how does the

15   claim cover this? And -- and it's -- there are many,

16   many, many possibilities.

17   I take it that's what they mean when they

18   say it makes sense to put the burden of demonstrating

19   how the claim limitations map onto the accused product

20   because infringement may be found only when the product

21   falls within the scope -- scope of the asserted claim or

22   claims in every respect.

23   Your client, who's the patentee, knows how.

24   Otherwise, he wouldn't be bringing this infringement

25   suit or the inside-the-coverage suit or responding to

1   someone who says it's outside the coverage.

2   But -- but the person who is the alleged

3   infringer might not know it, and therefore, it makes

4   sense to put everything in the same place; notice of

5   infringement, burden of production, burden of proof.

6   And that way, it will be easier to focus on what's at

7   stake.

8   That's what I take it their argument is.   If

9   I've not got it right, you're certainly --

10   MR. NEUSTADT: I think it's pretty close.

11   JUSTICE BREYER: All right.

12   MR. NEUSTADT: It's absolutely not true.

13   First of all -- well, the first answer --

14   and I'll get to the second answer -- is if you have that

15   and say, well, it's more convenient for us to do it,

16   you're creating a patent law exception to the normal

17   default.

18   And that's something you keep telling the

19   Federal circuit not to do. Like in eBay, don't create a

20   separate patent rule for injunctions.

21   JUSTICE KAGAN: It's -- it's not a patent

22   law exception. It's the recognition that a procedural

23   device that simply changes the nominal status of the

24   parties doesn't change the substantive rules and that

25   the burden of proof counts as a substantive issue.

1   MR. NEUSTADT: But you only have that

2   substantive rule where the patentee counterclaims. When

3   the patentee counterclaims, you have two parties seeking

4   relief. Naturally, the patentee has the burden of

5   proof. If there is no counterclaim, there can be no

6   infringement. You're just talking about claim coverage.

7   But it's the second part of your question,

8   Justice Breyer, what happens is the -- the patentee,

9   when they give notice of claim coverage, they can tell

10 them. There's no mysteries --

11   JUSTICE BREYER: But do they have to tell

12 them?

13   MR. NEUSTADT: Well, they always do.

14 There's no mystery. If --

15   JUSTICE BREYER: They always do?

16   MR. NEUSTADT: Well, sure. I mean, if you

17 go into the suit, the first question is interrogatory,

18 why do you think this -- why do you think this is

19 covered? So there's no mystery as to that. And it's

20 much easier to prove non-infringement than to prove

21 infringement because these are governed by the all

22 elements rule.

23   The all elements rule means that if the

24 patentee wants to prove infringement of a claim that has

25 ten elements, he's got to prove ten elements or in -- or

1   in your example, many more.

2   For the person who is -- is the licensee,

3   you want to prove non-infringement, he has to only pick

4   one of those elements and say, I don't have it.

5   JUSTICE BREYER: I see, that's a

6   good point. So what you're saying is that page 19 or

7   whatever I quoted is a made-up thing, which doesn't

8   ever -- never really exists in your experience.

9   MR. NEUSTADT: Oh, that's right.

10   JUSTICE BREYER: Because the first question

11   would be, well, you tell me how -- how this infringes.

12   MR. NEUSTADT: Yeah. And that argument

13   wasn't even presented to the Federal circuit before its

14   decision. And the Federal circuit would have openly

15   rejected it and say, you've got to be kidding.

16   JUSTICE BREYER: So you're saying, I don't

17   really care about what is an action where there is an

18   infringement action or there even could be one in the

19   circumstances before us, that's not my case because

20   they're going to pay me forever, if they lose this

21   declaratory judgment, so there's no shift.

22   And where there's no shift, you ought to

23   follow the rules for where there's no shift, which is

24   that the burden lies on the person bringing the suit.

25   MR. NEUSTADT: That's exactly right.

1   JUSTICE BREYER: That's your argument?

2   MR. NEUSTADT: Yes. The analysis that the

3   Federal circuit did is they've got a burden of proof

4   issue.

5   JUSTICE BREYER: I -- I see.

6   MR. NEUSTADT: Let me find the controlling

7   law. The controlling law is the normal default rule.

8   I've got only one party here seeking relief, and that's

9   the -- the licensee, so why shouldn't he prove this?

10   JUSTICE BREYER: And your argument is that

11   the horribles don't exist because the one on page 19

12   never has come up, and as far as the no -- no res

13   judicata, I don't care because I'll come to the same

14   result with a different means.

15   MR. NEUSTADT: Yeah. And then --

16

17   JUSTICE BREYER: And any other -- is there

18   any other -- is there any other practical point that

19   they brought up that you want respond to?

20   MR. NEUSTADT: Oh, sure. Hundreds of

21   claims, that's ridiculous -- you know, the courts say,

22   hey -- you know, I have other cases on my docket, get

23   down to five claims.

24   Anticipate any argument?   The person suing,

25   the DJ licensee, doesn't have to anticipate any

1   argument. He said, you told me it was these claims.

2   And we even had an agreement with him we couldn't go

3   over 30. And all I got to do is say, in claim 1, we don't

4   have element number 6. In Claim 2, we don't have

5   element number 4. It's a very simple manner. There is

6   no problem whatsoever there.

7   So what the Federal Circuit did is, I've got

8   a burden of proof issue. Let me find the controlling

9   law. I'll look to the Supreme Court. The Supreme Court says

10   there is a normal default rule, and it's the party

11   seeking relief.

12   CHIEF JUSTICE ROBERTS: Yes, but you are

13   overlooking the -- the elephant in the room, which is

14   the relief they are seeking is protection against the

15   relief that you would be seeking, but for the

16   declaratory judgment action.

17   MR. NEUSTADT: We -- we can never seek it

18   because they are not infringing. And we do not have to

19   file a counterclaim for claim coverage because there is

20   no requirement that we do so. There is no coercive

21   complaint. If they are suing -- if there was a

22   non-infringement situation, we'd would have to file the

23   coercive complaint.

24   JUSTICE SCALIA: The Declaratory Judgment

25   Act is addressed to potential coercion, not actual

1   coercion.   That's the whole point.   You should be able

2   to bring the suit before coercion is applied.

3   Now, it is true that you're not applying

4   coercion right now, but what they're worried about is,

5   if they stop paying the royalties, you will apply

6   coercion, and the Declaratory Judgment Act is a way of

7   getting this on the table before a court without their

8   having to go into default and incurring all the

9   penalties, but it is not intended to shift the burden of

10   proof.

11   MR. NEUSTADT: Well, it doesn't shift the

12   burden of proof.

13   JUSTICE SCALIA: It does shift the burden of

14   proof because if what they are worried about is your

15   claiming infringement and -- and exacting a penalty from

16   them for their not paying the royalties that the

17   agreement provides, okay, that's what they are worried

18   about.

19   The Declaratory Judgment Act enables them to

20   sue beforehand, before they incur liability.   That's its

21   whole purpose, and its purpose is not to shift the

22   burden of proof.

23   MR. NEUSTADT: The -- in answer to your --

24   your hypothetical, I agree with you on all of that.   But

25   as in the MedImmune case, MedImmune ends up with the

1   burden of proof. MedImmune says, I've got to get a

2   resolution to this question. I want you to overrule

3   Gen-Pro, I want to show why the -- why my product is not

4   covered.

5   Well, all of that's fine, there is nothing

6   the matter with that, there is no coercion. It's just

7   that, when MedImmune does this, it's going to have the

8   burden to show it.

9   JUSTICE BREYER: But you would agree with

10   this, you would agree that, if that agreement of yours

11   read a little differently, if MedImmune -- if they had

12   said -- you know, we are not going to pay royalties

13   until your client brings an infringement suit, which you

14   intend to do, at that point, if you'd made that promise,

15   you would have the burden of proof because you'd bring

16   an infringement suit.

17   MR. NEUSTADT: Well, of course.

18   JUSTICE BREYER: And if they said either an

19   infringement suit or a declaratory judgment action,

20   then, again, you would have the burden of proof, even in

21   the declaratory judgment action because then they would

22   be totally parallel.

23   I mean, then you'd have, if you brought the

24   infringement suit, it's yours. And then, in the

25   declaratory judgment action, it should be true, too, in

1   your view.

2   MR. NEUSTADT: Well, the way it is, if you

3   have one party seeking relief, the licensee --

4   JUSTICE BREYER: But I mean --

5   MR. NEUSTADT: -- the licensee's got the

6   burden.

7   JUSTICE BREYER: The answer is yes or no.

8   The answer is yes or no. That is, am I right in -- in

9   understanding your argument that if that agreement had

10   said you can bring either kind of suit, either we --

11   yes, we the patentee, will bring a suit, in which case,

12   you will defend it; or if you bring it first, you can

13   bring a declaratory judgment action, okay, for the same

14   thing.

15   If it had said that and the agreement had

16   held up the royalties until one or the other was

17   decided, then your client, the patentee, would have the

18   burden of proof in either because it's exactly the same

19   thing.

20   You could have brought -- are you following

21   me?

22   MR. NEUSTADT: No, I'm afraid not.

23   JUSTICE BREYER: Okay. Skip it.

24   (Laughter.)

25   MR. NEUSTADT: So, really, what the Federal

1   circuit did -- said there was no shifting here. First,

2   you've got to look to who's got the burden of proof.

3   You get that from Schaffer, the normal default rule,

4   only one party seeking relief.

5   And then they said, and besides, the

6   patentee could not have brought suit because you can't

7   accuse him of infringement. So you have a simple case of

8   only one party seeking relief; that party has the

9   burden.

10   And you would have that anyway even -- even

11   without this agreement, because only one party can bring

12   suit. It's just like in Schaffer. This party brings

13   suit, they have the burden. Other party brings suit,

14   they have the burden.

15   CHIEF JUSTICE ROBERTS: So you are really

16   looking at it, though, from the point of view of a contract

17   action, rather than a patent action.

18   MR. NEUSTADT: Well, it can't be a patent

19   action because the whole purpose of the license is not

20   to have an infringer. And it is a contract action and

21   that gets into the jurisdictional question.

22   And, to answer Justice Ginsburg's question,

23   yes, there isn't the usual jurisdiction that you would

24   have in a patent infringement action. And this comes

25   from the unanimous opinion of this Court earlier this

1   year in Gunn vs. Minton, in which I think Your Honor --

2   Your Honor was the author, which says that that's just a

3   contract action.

4   Just having a patent question doesn't get

5   you into Federal court.

6   JUSTICE KAGAN: But Mr. Neustadt, I was under

7   the impression that, according to this contract, if

8   Medtronic stops paying royalties, you can bring not

9   only a contract suit, but, in fact, a patent suit.

10   MR. NEUSTADT: Well --

11   JUSTICE KAGAN: An infringement suit.

12   MR. NEUSTADT: -- that has nothing to do

13   with the contract because then they've breached the

14   contract.

15   JUSTICE KAGAN: But you can bring an

16   infringement suit according to the very agreement that

17   you signed.

18   MR. NEUSTADT: It's not in accordance with

19   the agreement. We can't bring an infringement suit.

20   They are not infringing.

21   JUSTICE KAGAN: They are infringing if they

22   break the contract, and they stop paying royalties.

23   MR. NEUSTADT: Oh, sure.

24   JUSTICE KAGAN: And then you can bring an

25   infringement suit.

1   MR. NEUSTADT: Well, of course. But that's

2   not the situation we face here.   That -- that's always

3   been true.   I mean, if they want to, if the burden of

4   proof is so burdensome to them, just go ahead and

5   breach.   And then we will sue them, and we will have the

6   burden of proof.

7   JUSTICE SCALIA: You can always say that in

8   declaratory judgment actions, that is not the situation

9   we face.   The Declaratory Judgment Act posits a

10   hypothetical situation.   It always does.

11   MR. NEUSTADT: You cannot say that we're going to --

12   JUSTICE SCALIA: I am worried that you are

13   going to sue me later.   You are not suing me now.

14   That's not the situation I face.   But I worry that you

15   will sue me later.

16   MR. NEUSTADT: But you have -- but how can I

17   sue later if you're continuing to pay royalties?   That

18   was -- that was the MedImmune situation.   MedImmune

19   said, I've got to pay you royalties --

20   JUSTICE SCALIA: They don't want to -- they

21   don't want to continue to pay royalties.   That's the

22   point.   That's why they bring the Declaratory Judgment

23   Act, so that the court can tell them, you don't have to

24   pay royalties because this stuff is not covered.

25   MR. NEUSTADT: Well, that's absolutely

1   right.   But in that case -- and the court didn't rule

2   upon it because it got remanded -- they would have the

3   burden of proof because they are the only party seeking

4   relief.   You can't say not only --

5   JUSTICE GINSBURG: You cite -- you cite the

6   default rule, and you rely on that totally.   But there

7   are other rules on burden of proof, for example, the

8   party who has better access to the information, so it's

9   not as though there is this firm rule with no

10   exceptions.

11   I take it, from your answers to

12   Justice Scalia, that you are saying in every declaratory

13   judgment action where only one party is seeking relief,

14   that party has the burden of proof.   So you're not

15   limiting this to patent cases; is that right?

16   MR. NEUSTADT: Oh, that's correct.   That's

17   the normal default rule.   And there should be no

18   exception to that.

19   I see my light is red.

20   CHIEF JUSTICE ROBERTS: Thank you, counsel.

21   Mr. Waxman, you have three minutes

22   remaining.

23   REBUTTAL ARGUMENT OF SETH P. WAXMAN

24   ON BEHALF OF THE PETITIONER

25   MR. WAXMAN: I'd be happy to respond to any

1   questions that the Court has.

2   Otherwise, I think we'll submit on the briefs.

3   CHIEF JUSTICE ROBERTS: Okay. Thank you

4   counsel. Counsel.

5   The case is submitted.

6   (Whereupon, at 1:54 p.m., the case in the

7   above-entitled matter was submitted.)

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21

22

23

24

25

first 12:5 26:12
35:12,15 41:13,13
42:17 43:10 48:12
49:1
five 44:23
focus 41:6
follow 24:20 35:22
35:23,23 43:23
following 48:20
follows 33:19
forever 43:20
formality 7:4,6
forth 30:14
found 40:20
friend 15:14 20:11
frustrated 6:1
fully 23:1
functional 33:5
fundamental 24:7
33:11,22
funds 37:10
further 23:5 36:13
future 16:19 17:7
18:3 28:24

G

g 3:1
gannon 1:18 2:6
15:21,22,25 16:24
19:5 20:15
genentech 8:9
general 1:19 9:4,6
9:8 10:3,15
genpro 47:3
genprobe 39:12
getting 26:25 46:7
ginsburg 8:25 10:6
10:11 20:10,15
25:7,10,15 30:25
37:8 52:5
ginsburgs 49:22
give 35:14,17 42:9
given 8:4
go 5:16 8:1 10:7
12:5 26:1,7 29:3
33:11 34:5 37:14

39:16 42:17 45:2
46:8 51:4
goes 7:8,12 13:16
going 15:7 16:25
17:7 19:23,25
20:1 26:1 28:15
28:18 33:15 34:5
34:9,12,17,19
35:15,18,18 36:8
36:20 37:5,24
43:20 47:7,12
51:11,13
good 32:19 43:6
governed 42:21
governing 3:20
government 16:2
governments 40:3
guess 19:2
gunn 50:1

H

happen 4:25
happened 4:24
26:11,15
happening 26:5
happens 42:8
happy 6:6 52:25
hasnt 29:20
havent 20:24
hear 3:3
held 8:8 11:5 48:16
hell 31:25
help 6:16 19:8
heres 26:15
hes 31:24 42:25
hey 9:16 44:22
history 9:12,25
10:22
holding 26:18,23
honor 23:11 36:4
50:1,2
horribles 44:11
hundreds 14:3
44:20
hypothetical 7:10
16:3,23 18:24

20:21 21:2 35:20
35:23 46:24 51:10

I

id 52:25
idea 6:5
identical 11:1,4
identified 11:11,22
15:15
identify 11:16
ignoring 25:25
iii 7:8,21 8:22
ill 25:1 41:14 44:13
im 9:11,16,18 26:6
26:8,9,16 27:21
31:10 35:9 48:22
image 16:5 18:24
19:2
imagine 13:4 38:25
imagines 26:4
impair 5:18
important 5:6 7:4
36:19
imposed 3:15
impression 50:7
incentive 22:2,11
incident 16:11
include 18:2
includes 20:7
including 5:6 18:4
18:7 23:1
incur 46:20
incurring 46:8
individual 30:16
information 52:8
infringe 9:21 11:24
12:21 28:4 32:15
infringed 11:14
20:24
infringement 3:12
4:18,19 6:21 7:17
8:6 9:2,9 10:2,4
10:18,21 13:16
14:24 15:5,8
19:17 20:3 21:3
21:12 22:9,15

23:2,4,20,21,21
24:2 25:3,6,17
26:25 28:6,7,10
29:8,11 31:1,22
34:6,16,24 35:5
36:1 37:19,20,22
37:24,25 38:3,8
38:17,23 39:2,19
40:20,24 41:5
42:6,21,24 43:18
46:15 47:13,16,19
47:24 49:7,24
50:11,16,19,25
infringer 9:16 10:8
15:12 24:1 25:19
25:22,24 29:6
40:11 41:3 49:20
infringes 13:13
32:12 43:11
infringing 11:19
12:17,19 26:3,13
27:17 28:2,3 29:6
37:4 45:18 50:20
50:21
inhere 5:12
inheres 3:19
injunction 13:21
injunctions 41:20
insidethecoverage
40:25
instance 33:3
instances 32:7
insurance 28:24
29:1
intellectual 13:3
intend 47:14
intended 19:8 46:9
interest 14:8
interrogatory
42:17
interrupt 26:10
interrupted 26:6
interweaves 17:20
introduce 4:18
introducing 8:2
invalidity 23:2

invention 9:18,23
23:22
inventions 7:15
invents 21:23
involve 20:1
involved 4:14 25:14
39:4
involves 12:6 20:16
24:2 36:25
involving 10:3 20:8
21:3 22:9 30:15
isnt 18:18 26:25
28:14 37:8 49:23
issue 3:13 4:5 5:8
5:25 6:4 7:6 11:1
12:9 13:11 20:14
25:13 34:18 35:24
36:3 37:6 41:25
44:4 45:8
issues 19:25 20:8
21:17
itd 39:17
ive 7:18 36:13 41:9
44:8 45:7 47:1
51:19

J

joint 18:10 21:7
23:25
jude 14:12
judges 4:10
judgment 3:14,21
5:14,19,22 6:1,11
6:19 7:2,9 8:17
10:24 11:2,8 12:1
12:18 15:3,16,17
16:4,6,7 18:21,23
19:7 20:1 24:18
24:19,22 27:16
29:13,21 30:8
31:3,6 33:24 34:2
35:6 36:9 43:21
45:16,24 46:6,19
47:19,21,25 48:13
51:8,9,22 52:13
judicata 33:25 34:9

3:15,17 9:1,6,7,11
9:19 10:15,16
12:22 13:7 35:7
42:20 43:3 45:22
nonlicensee 10:13
nonpersuasion 4:2
normal 24:6,6,11
28:10 30:2,7,13
30:22 31:6 33:10
33:19 36:18,18,21
41:16 44:7 45:10
49:3 52:17
normally 24:24
32:22 34:23
noted 19:6 25:5
notice 6:20 7:4,6,17
7:18,20 8:3,16
14:6,9 23:20
37:19,19 41:4
42:9
notwithstanding
22:6,12
november 1:10
number 13:7 23:18
45:4,5
nyu 15:2

_____
O
_____

o 2:1 3:1
obligations 18:12
obvious 7:24
occurs 29:15
odd 17:16
office 9:24
oh 27:24 34:25 43:9
44:20 50:23 52:16
okay 26:11 34:2
35:14,20,22 36:15
46:17 48:13,23
53:3
once 34:21
ones 9:11 30:20
open 22:7
openly 43:14
operating 27:9
opinion 4:7 49:25

oral 1:12 2:2,5,9
3:7 15:22 23:9
order 22:22
ordering 4:11,11
ought 43:22
outcome 5:3,3
outside 28:18 40:11
41:1
overlooking 45:13
overrule 47:2
owners 13:3
owns 32:16

_____
P
_____

p 1:14,16 2:3,13 3:1
3:2,7 52:23 53:6
page 2:2 18:9 21:6
21:10 23:25 40:4
43:6 44:11
pages 40:8
paid 26:25
paidup 13:12 23:1
paragraph 21:13
parallel 47:22
pardon 25:9,23
27:14
parents 30:17
part 27:5 38:17
42:7
particular 9:10
11:13 16:13,19
18:3 19:22
parties 4:8 16:11
18:7,16,19 19:20
21:4,8 22:2,22
37:6,12 41:24
42:3
party 3:17 6:7
14:12 19:8 24:8
28:11 30:3,4,22
30:23 33:17,17,22
36:23 37:2 44:8
45:10 48:3 49:4,8
49:8,11,12,13
52:3,8,13,14
patent 3:11 4:12

5:4,7 6:15 8:10,20
9:1,17,18,24,24
10:18 12:14,24
13:5,13,16,21
15:8,10 18:9
19:15,24 20:2,2,3
20:7,12,14,17
21:3,9,14,15,19
22:15 31:1,18,18
32:9,12,15,16,22
33:2 38:22 41:16
41:20,21 49:17,18
49:24 50:4,9
52:15
patented 23:22
patentee 3:12,25
4:16 8:17,18 13:8
29:9,10 32:21
33:15 39:18 40:23
42:2,3,4,8,24
48:11,17 49:6
patentholder 6:20
7:14 22:5 23:4
25:16
patents 11:12,14
12:8 14:4 17:8,9
18:4,5 19:22
32:25
pay 13:12,14 19:11
28:15,18 31:25
34:5 37:15 38:3,7
39:6,10 43:20
47:12 51:17,19,21
51:24
paying 8:12 19:4
19:10 21:11 25:5
25:25 26:14 27:11
35:18 38:21 39:1
39:13,19 46:5,16
50:8,22
payment 12:16
19:23
payments 10:19
peculiarity 11:8
penalties 46:9
penalty 46:15

people 33:2
percent 36:17 39:7
perfectly 7:24
permissive 25:7,10
25:12
permit 39:3
person 24:19 29:20
32:16 34:23 40:11
41:2 43:2,24
44:24
persons 32:8
perspective 22:19
persuasion 5:2,5
petitioner 1:4,17
1:21 2:4,8,14 3:8
15:24 52:24
physicians 8:4
pick 43:3
picked 7:13
place 41:4
places 3:11
plaintiff 5:22
please 3:10 16:1
23:12
plenty 22:11
point 4:5 8:16 9:4
10:10,24 16:17
17:19,20 20:25
21:24 28:17 32:13
33:6 43:6 44:18
46:1 47:14 49:16
51:22
pointed 5:1
points 4:8 14:9
16:10
policy 5:16 28:24
29:1
position 7:19 33:24
36:25 37:1
posits 51:9
possibilities 40:9
40:16
potential 6:20
10:17 22:1 45:25
practical 44:18
practiced 11:14

practicing 17:9
precedent 30:15
precisely 22:8
preclusion 36:3
preclusive 5:25
preponderance
34:19 36:5,6
presented 20:23
43:13
preserved 18:7
pretty 41:10
prevail 35:25 37:15
previously 17:12
prime 14:9
prior 17:6 34:8
probably 17:1
problem 17:13
20:23 28:24 34:1
39:5 45:6
problems 22:1
procedural 3:21
5:15 15:18 22:14
41:22
procedure 7:10 8:8
11:3
product 8:2,3,19,20
8:21 13:5 14:6
26:2 31:17 32:9
32:12,15,18 39:7
40:12,19,20 47:3
production 4:3,17
41:5
products 11:13,16
11:19,22,24 12:6
12:8,21 16:12,15
17:7 18:3,18
19:22 28:17,24
program 30:16
promise 47:14
proof 3:19,22 4:6,7
4:10,11,18 5:11
5:12 6:11 8:23
12:3 15:10 16:3
17:16 22:13 23:15
24:5,13,15,24
28:11 29:10 30:4

30:9,18,20 33:8
33:16,18 34:1,10
36:22 37:3,6,24
41:5,25 42:5 44:3
45:8 46:10,12,14
46:22 47:1,15,20
48:18 49:2 51:4,6
52:3,7,14
property 13:3
prosecution 9:12
9:23,25 10:22
protect 13:8
protected 29:2
protection 45:14
prove 24:9 28:1
30:24 32:17 35:7
42:20,20,24,25
43:3 44:9
provide 5:20 13:10
21:20
provides 46:17
providing 8:2,3
proving 3:11 10:20
provision 13:15
29:3
purpose 5:18 29:20
29:23 46:21,21
49:19
purposes 16:7
put 13:15 32:20
34:1 36:22 40:18
41:4

___
Q

qualification 40:5
quandary 17:2,17
question 5:1,17 7:7
7:11,13,16,22
8:15,22 12:5,12
16:15 18:19 28:8
33:10 37:18 38:16
38:16 42:7,17
43:10 47:2 49:21
49:22 50:4
questions 20:2
22:10 23:5 53:1

quite 4:14
quo 6:8 17:22,23
18:13,14,17
quoted 43:7

___
R

r 3:1
raised 10:21 20:5
raising 7:8
rate 13:16 14:8
rationale 14:23
reach 18:1 23:16
reached 23:16
read 9:17,18,23
33:4 47:11
reads 8:20 12:14
really 40:7 43:8,17
48:25 49:15
reason 5:9 6:9,10
21:1 31:18
reasons 17:24
20:17 32:19
rebuttal 2:12 52:23
received 14:3
receiving 26:17
27:3,7,9
recognition 41:22
recognized 9:5
19:20
record 14:2
recourse 21:11
recover 13:20
red 21:9 52:19
referenced 14:12
referred 24:5
refers 24:12
refused 38:3,6
reissued 18:5
rejected 43:15
rejigger 22:22
release 37:9
relevant 4:9
relief 24:9,10,20
28:11 30:3,18,21
30:22,23 33:17
36:23 37:2,7

39:25 40:1 42:4
44:8 45:11,14,15
48:3 49:4,8 52:4
52:13
relitigate 11:25
34:9,13,18 35:4
35:10
rely 52:6
remaining 52:22
remains 3:23
remanded 52:2
remedies 13:20
14:19 15:8 19:14
remedy 11:9
repeatedly 5:1,14
require 13:11 14:7
19:23
requirement 8:16
45:20
requires 7:25
requiring 5:22
res 33:25 34:9 36:3
44:12
research 15:6
researcher 15:2
reserve 15:19
resolution 16:8,20
18:19 47:2
resolved 5:21 19:25
respect 11:4 32:22
35:24 36:18 40:22
respond 44:19
52:25
responded 10:7
respondent 2:11
4:24
respondents 1:23
23:10
responding 40:25
response 21:25
29:7 30:10,11
responsibility 24:9
33:12
rested 3:24
rests 5:3 15:11
result 25:3 38:22

44:14
results 26:14 33:1
retain 4:10
retrospective 5:23
reverse 23:6
reversed 39:14
reversing 5:17
ridiculous 44:21
right 4:3,23 5:13
6:21,22 10:8,14
11:5 18:14 23:13
26:21,24 27:18,19
34:3,6,7 35:3
36:11,12 38:12
41:9,11 43:9,25
46:4 48:8 52:1,15
rights 3:22 5:15
6:13
rigidity 39:9
risk 4:2 15:8
risks 19:12
roberts 3:3 6:2
15:20 19:1 23:7
45:12 49:15 52:20
53:3
room 45:13
royalties 8:13 14:4
14:8 18:15,17
19:4,10,24 21:11
25:5 26:1,14,17
34:5 35:18 38:21
39:1,6,13,20 46:5
46:16 47:12 48:16
50:8,22 51:17,19
51:21,24
royalty 10:19 13:12
13:16 38:3,7
39:10
rule 3:16 13:25
14:22 15:9,15
16:22 24:6,6,11
28:10 30:3,7,14
30:23 31:6 32:16
33:10,19,20,20,21
36:18,19,21,22
41:20 42:2,22,23

44:7 45:10 49:3
52:1,6,9,17
rules 4:11 6:19
41:24 43:23 52:7
ruling 39:12

___
S

s 2:1 3:1 28:17
satisfy 8:24
satisfying 6:19
saying 7:17 9:16
17:25 20:18 29:4
31:12 32:12,13
36:19 38:15 43:6
43:16 52:12
says 9:16 20:12
24:8 26:5 28:14
29:6 39:13 41:1
45:9 47:1 50:2
scalia 24:17 29:12
30:6 33:23 34:8
34:14,22 35:1,3
35:10,13,20 36:10
36:11,15 45:24
46:13 51:7,12,20
52:12
scalias 28:8
scenario 14:16
schaffer 30:14 49:3
49:12
school 30:19
scientific 1:6 3:5
scope 9:25 19:22
20:3 31:13 32:24
40:21,21
sea 22:18
second 23:24 41:14
42:7
section 21:8,20,22
see 29:17 43:5 44:5
52:19
seek 12:18 37:16
45:17
seeking 3:14,17
17:21,23 24:20
28:11 30:3,18,21

30:22 33:17 36:23
37:2,7,9,11 39:25
42:3 44:8 45:11
45:14,15 48:3
49:4,8 52:3,13
seeks 6:8 24:8
30:23
seen 36:4 40:13
sends 14:9
sense 18:16 22:17
40:18 41:4
separate 41:20
serves 16:6
set 30:14 40:7
seth 1:16 2:3,13 3:7
52:23
settled 3:13 39:23
sheer 39:9
shift 3:13 14:24
15:1 24:24 33:8
43:21,22,23 46:9
46:11,13,21
shifting 5:24 17:16
24:4 36:24,25,25
49:1
shifts 15:15 24:21
shouldnt 6:7 27:20
27:22 31:8,11
44:9
show 40:1 47:3,8
side 15:14 29:19,22
29:25 30:10,12
36:7
signed 50:17
simple 45:5 49:7
simply 9:7 13:13
41:23
situation 12:13
13:1,2 16:14 24:3
26:15 30:1,5
35:16 39:23 45:22
51:2,8,10,14,18
situations 9:15
skip 48:23
socalled 40:10
sold 13:14

solicitor 1:18 9:4
solving 17:17
somebody 17:3
29:15
soon 14:9 37:1
sorry 26:6,9 27:21
31:10
sort 11:20 13:1
40:9
sotomayor 16:21
16:25 26:16,20,24
27:2,6,12,15,19
27:22 28:1
source 15:9,9,15
special 14:22
specifically 12:7
30:17
st 14:12
stake 41:7
standards 5:12
standing 15:3
start 14:7
starting 36:25
starts 26:13 28:16
states 1:1,13,20 2:7
9:5 15:23 30:17
status 6:8 17:22,23
18:13,14,16 41:23
statute 24:13,14
29:21 30:8
stipulated 23:15,18
23:24
stop 8:12 35:18
46:5 50:22
stopped 38:21 39:1
stops 26:13 50:8
stream 18:17
stuff 51:24
subject 5:22 19:13
33:7
submit 53:2
submitted 53:5,7
subsequent 36:1
substantive 3:20,22
5:9,12,13,15 6:11
6:13,15 11:7

15:10 41:24,25
42:2
sudden 6:6
sue 13:6,16,18
14:18 27:13,16
29:21 46:20 51:5
51:13,15,17
sued 38:22
sufficient 8:11
sufficiently 8:11
suggest 8:19 16:24
suggesting 16:22
suing 44:24 45:21
51:13
suit 3:25 9:2 10:18
21:12 22:9 23:2
29:16 30:17,19
31:25 33:3 37:1
37:12,16 39:2,17
39:18 40:25,25
42:17 43:24 46:2
47:13,16,19,24
48:10,11 49:6,12
49:13,13 50:9,9
50:11,16,19,25
suits 3:16 22:8
summary 36:9
supporting 1:20
2:8 15:24
suppose 4:16 28:14
supposed 7:14
38:24 40:14
supreme 1:1,13
45:9,9
sure 26:16 42:16
44:20 50:23
surpassingly 5:6
symbols 40:8

———————
T
———————
t 2:1,1 49:6
table 46:7
take 20:10 30:13
31:12 40:3,17
41:8 52:11
talking 8:15 29:8

42:6
talks 21:7
technical 26:25
tell 8:2 25:1 37:23
42:9,11 43:11
51:23
telling 41:18
ten 42:25,25
tenet 33:11,22
tenets 24:7
term 15:2
termination 23:3
thank 3:9 15:20
23:7,11 52:20
53:3
thats 4:4,4,5,13,13
5:8 6:13 7:18
17:1 18:9 21:4
22:18,18 26:4,11
27:5,18 28:6,17
28:17 29:23 30:1
32:2,4 33:24
34:21 35:8 36:12
37:6,7 38:10,10
38:19,20,24 40:17
41:8,18 43:5,9,19
43:25 44:1,8,21
46:1,17,20 47:5
50:2 51:1,2,14,21
51:22,25 52:16,16
theatres 11:6
theory 6:17
theres 8:17 14:2
17:5 18:10 22:11
24:14 31:5 32:1
35:25 36:1 37:21
39:13,15 42:10,14
42:19 43:21,22,23
theyre 25:5 26:23
27:17 28:1,3,5
29:2 30:18,20
36:2 37:25 43:20
46:4
theyve 44:3 50:13
thing 14:20 16:5
19:5 34:10,13,18

35:4,11,16,19
43:7 48:14,19
things 40:6,13
think 4:6 5:16 7:8
7:20 8:14 11:23
17:1,5,19,22
18:10,22,22 19:6
20:16,19 21:1,18
21:24 22:17,20,24
38:14 39:2 40:13
41:10 42:18,18
50:1 53:2
thinking 17:3
thinks 4:21 19:11
thought 4:8,15 7:14
8:10
threaten 5:25
threatened 12:24
three 13:14 20:8
52:21
throw 36:21
time 12:10 15:19
16:16 18:5 24:23
30:8,9 34:10
39:12
told 5:5 21:10
37:20 45:1
tolling 14:11 21:6
totally 47:22 52:6
touch 26:21
treat 11:18
treble 13:21 19:13
trial 4:10 11:5
tries 35:24
true 5:4 6:3,23 19:5
19:18 32:4 35:8
37:9 41:12 46:3
47:25 51:3
trying 8:15 17:3
18:11,16,17
tuesday 1:10
turn 7:1 13:6 14:18
16:10
turning 17:11
two 23:15,18 29:4
35:14 37:6 42:3

type 22:3
types 9:10 16:8 29:4
typically 29:15

___ U ___

unanimous 49:25
underlies 16:4
underlying 16:17 18:24
underscore 13:24 14:20
understand 11:10 12:4,12 28:14 38:12
understanding 48:9
understood 40:5
unit 13:14
united 1:1,13,20 2:7 9:4 15:23
urge 23:6
use 7:9 9:13,19 10:22 13:12 22:22
usual 49:23
usually 30:1,12
utility 5:18

___ V ___

v 1:5 3:4 11:6
validity 18:8 20:2 22:10
view 48:1 49:16
violate 31:17
violated 11:13
violates 32:22
virginia 1:22
vs 50:1

___ W ___

want 11:24 13:24 14:20 28:23 29:6 29:15 31:21 34:2 39:6 43:3 44:19 47:2,3 51:3,20,21
wanted 22:23 39:11
wants 28:23 35:17

42:24
washington 1:9,16 1:19
wasnt 17:6 31:2,2,4 43:13
waxman 1:16 2:3 2:13 3:6,7,9 4:4 4:23 6:9,22 7:5,20 8:25 9:3 10:9,14 11:10,17 12:4 22:4,20,25 52:21 52:23,25
way 12:24 17:2,16 17:17 18:10,22 19:19 20:19,19 32:11,13 37:12 41:6 46:6 48:2
ways 13:7
weast 30:25
wed 45:22
wellpleaded 20:6 20:20
wellsettled 23:14 24:5
westover 11:6
weve 24:23 30:8
whats 24:25 25:1 35:13 41:6
whatsoever 45:6
whos 40:23 49:2
widget 12:13,14 14:17
willful 13:22
wins 4:20
wish 31:23 32:14
withholding 27:11
woke 11:22
wont 29:17 37:15
word 4:6,6 24:11
words 9:15
work 15:7
world 26:4 35:16 38:24
worried 46:4,14,17 51:12
worry 51:14

worth 21:25
wouldnt 8:23 14:14 15:6,6 40:24
wrote 23:19

___ X ___

x 1:2,8

___ Y ___

yeah 35:8 43:12 44:15
year 50:1
years 15:11
youd 33:1 47:14,15 47:23
youll 35:3
youre 6:5,22 7:7 26:16 27:2,6,10 31:12 34:12,15,17 36:2,11 37:2 38:9 41:9,16 42:6 43:6 43:16 46:3 51:17 52:14
youve 33:4 35:6 36:4 40:13 43:15 49:2

___ Z ___

___ 0 ___

00 1:14 3:2

___ 1 ___

1 1:14 3:2 45:3 53:6
100 36:17
121128 1:4 3:4
125 15:11
1295 21:22
13 18:9
1338 21:21
15 2:8
17 40:4
19 43:6 44:11
1991 14:1

___ 2 ___

2 14:8,8 45:4

20 21:7
2011 21:23
2013 1:10
23 2:11
271 21:8

___ 3 ___

3 2:4
30 8:1 14:6 45:3
3x 13:17

___ 4 ___

4 45:5
42 40:9
48 21:10 40:8
49 36:8

___ 5 ___

5 1:10 21:13 36:8
50 36:8
51 23:25
52 2:14
54 53:6

___ 6 ___

6 45:4
60 8:5

___ 7 ___

___ 8 ___

80 39:7

___ 9 ___

9 36:8