

The Texas Lawbook

Free Speech, Due Process and Trial by Jury

Federal Circuit Affirms \$439M Verdict Against Apple

By Natalie Posgate

(Jan. 15) – A federal appeals court handed Nevada-based VirnetX its latest win Tuesday in its intellectual property feud with Apple when it affirmed a \$439 million judgment that stemmed from a September 2016 jury trial in East Texas.

In one sentence, the U.S. Court of Appeals for the Federal Circuit affirmed the verdict, which was originally \$302 million but grew to \$439 million after U.S. District Judge Robert Schroeder III of the Eastern District of Texas added post judgment interest and enhanced damages.

The 2016 verdict followed a one-week trial in which VirnetX argued Apple infringed on its patents through its FaceTime and VPN on Demand technology.

The affirmation is related to the third out of four jury trials that have taken place in the Eastern District for VirnetX and Apple's nearly decade-long IP battle.

"We've become very close to our friends at VirnetX over the last 10 years, and today's result makes us very happy for them," VirnetX's lead trial attorney, **Brad Caldwell of Caldwell Cassady & Curry**, told *The Texas Lawbook*.

A representative with Apple said the company is disappointed and plans to seek reconsideration of the decision.

The first verdict came down in 2012, awarding VirnetX \$368 million, which was affirmed as to infringement by VPN on Demand and validity but was remanded as to infringement by FaceTime and damages. Additionally, following the first verdict, VirnetX filed a new suit alleging newer versions of Apple's products infringed on the same patents. In early 2016, VirnetX and Apple tried the second trial between them, combining the remand of the first verdict with the second lawsuit, which resulted in a \$625 million jury verdict.

But then Judge Schroeder vacated the verdict, determining that combining the cases may have confused the jury, and ordered two new trials to separate VirnetX's claims on the older and newer Apple products.

VirnetX and Apple faced off for a third time in September 2016 for a retrial of infringement by FaceTime and damages from the first case. This trial resulted in the \$302 million verdict that grew to \$439 million including interest and enhancement.

Then, last April, another jury awarded VirnetX \$502 million in the retrial of the second case related to Apple's newer products. Apple appealed the verdict later in 2018. That appeal is still pending.

The Federal Circuit heard oral arguments a week ago before rendering its decision today affirming the \$439 million judgment. It also heard two other arguments for two other appeals brought by VirnetX after the Patent Trial and Appeals Board found some of VirnetX's patents related to the technology at issue invalid. The Federal Circuit has not yet rendered its ruling for those two cases.