IP Alert | Federal Circuit Denies En Banc Review in Design Case Dealing with “Plainly Dissimilar” Test and Functionality

On August 11, 2026, the Federal Circuit denied a petition for rehearing en banc in Range of Motion Products, LLC v. Armaid Co. (An overview of the Federal Circuit opinion at issue can be found here). The Federal Circuit declined to revisit two pillars of design patent infringement law: whether the “plainly dissimilar”/”sufficiently distinct” language of Egyptian Goddess improperly permits summary judgment of non-infringement without a prior art comparison, and whether the functional v. ornamental inquiry should be in the hands of the jury rather than the judge.

Judge Cunningham, joined by Judge Hughes, concurred with the denial, reasoning that assessing whether designs are “substantially the same” accounts for both similarities and differences under Gorham, that any over usage of the “plainly dissimilar”/”sufficiently distinct” shortcut by district courts can be cured by reversal on appeal rather than by discarding settled law, and that under Markman and Teva district courts should continue to decide claim construction and claim scope, including secondary factual determinations involving functionality.

Chief Judge Moore, joined by Judge Reyna, dissented, arguing that clear incorrect district court decisions are not being overturned by the Federal Circuit because the Federal Circuit is applying bad law. The dissent argued that the court has inverted the Egyptian Goddess test by changing the substantial similarity test to whether two designs are “sufficiently distinct” or “plainly dissimilar,” without an examination of the prior art. The dissent also noted the inconsistency of treating functionality as a jury question for validity but a legal question for infringement under the identical Sport Dimension/PHG factors. Judge Moore notes there is an easy fix to these problems: “return us to Gorham, where the test for design patent infringement is whether an ordinary observer would find the two designs are substantially similar in overall appearance. Allocate to the

jury questions of ornamentality and substantial similarity, inextricable parts of the infringement assessment." Judges Stoll and Stark dissented without opinion. With four judges favoring rehearing there may be a certiorari petition and future panel interpretation and treatment of the "plainly dissimilar" line.

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