Section 337 Unfair Import Investigation of Medical Devices

Cornerstone Research worked with a healthcare and competition expert in a patent infringement matter before the ITC.

Retained by Sullivan & Cromwell Defense counsel for the makers of a set of medical devices retained Cornerstone Research and Professor Sean Nicholson of Cornell University in a Section 337 unfair import investigation before the U.S. International Trade Commission (ITC). The medical devices at issue were hemostatic agents that allegedly infringed certain patents held by a competing U.S. manufacturer.

Professor Nicholson evaluated the impact on the public interest if the defendants’ products were blocked from the U.S. market by an exclusion order.

Professor Nicholson evaluated the impact on the public interest if the ITC blocked the defendants’ products from the U.S. market. He determined that the plaintiff and defendants were, for all practical purposes, the only two competitors in the relevant product market so that an exclusion order would substantially increase the plaintiff’s market power. The defendants’ product family in this case was not a new entrant but had been on the market for almost a decade and had obtained a substantial market share. Professor Nicholson showed that an exclusion of the products would impose substantial switching costs on medical practitioners and hospitals, and would negatively impact public health and welfare.

Professor Nicholson also analyzed capacity data and projections to determine whether the plaintiff would be able to meet the increased demand that would result from an exclusion order. He found that the plaintiff’s internal projections did not establish that it could meet the full market demand and that any shortfall would have a further negative impact on public health and welfare.

Finally, Professor Nicholson reviewed the analyses of two of the plaintiff’s experts on issues of commercial success and on the appropriate size of the bond to be posted for the duration of the Presidential review period. The case settled after trial.