

High Court Asked To Look At Alice Ax In Dropbox Fight

By [Andrew Karpan](#)

Law360 (December 4, 2021, 6:33 PM EST) -- A patent-holding company is going to the [U.S. Supreme Court](#) again after seeing one of its patents invalidated under Alice, arguing that the Federal Circuit ruled in favor of Dropbox without looking at evidence that its third-party data processing invention wasn't abstract.

In a petition docketed Wednesday, WhitServe LLC asked the justices to take a look at the appeals court's ruling that signed off on U.S. District Judge Colm F. Connolly's decision to throw out a patent WhitServe owns, one that dates to a series of 1999 patent applications filed by WhitServe's founder, Wesley J. Whitmyer Jr.

Whitmyer, a patent lawyer, is also behind the law firm pursuing the lawsuit, [Whitmyer IP Group LLC](#). His company sued Dropbox in 2018 and, in the Supreme Court petition, WhitServe said that Judge Connolly did not look at all available evidence, including the evidence put forward by WhitServe.

"Rather than looking at evidence regarding the claim's eligibility, the district court and Federal Circuit compared the claims with other unrelated legal opinions," WhitServe argued. "This effectively excused Dropbox from bearing their burden of proving invalidity by clear and convincing evidence."

The petition came in on the same day that two inventors [asked the high court](#) to look at a ruling that originally came from a California federal judge [axing a patent](#) on taking pictures on similar grounds. That ruling was a win for smartphone makers [Apple](#) and Samsung, though on appeal, the inventors netted a [sympathetic dissent](#) from a Federal Circuit judge.

In its own petition, WhitServe said that Delaware's Judge Connolly – who was tapped as the state's top federal judge this [July](#) – refused to hold oral arguments over Dropbox's bid to dismiss the suit "despite WhitServe's two requests."

In September 2020, a three-judge panel of Federal Circuit judges did similarly, canceling oral arguments over WhitServe's appeal. Writing for the trio this April, U.S. Circuit Judge Jimmie V. Reyna [endorsed Judge Connolly's decision](#) and said of Whitmyer's patent: "This is an abstract idea."

The patent – which was finally issued by the [U.S. Patent and Trademark Office](#) in 2014 – covers a way of backing up data on the internet. WhitServe says the method is innovative enough to pass the two-part test that the Supreme Court set up that year in its landmark Alice decision.

The patent "is not simply directed to storing any data in a general form, but instead is directed to a specific form of storing and a specific type of data," WhitServe said. The company noted that Dropbox had failed to convince the Patent Trial and Appeal Board to scratch out some of the claims in the patent, "which further confirms the merits of the ... patent."

It's not WhitServe's first time telling the justices that Delaware's top judge failed to give Whitmyer's patents the time of day in his court.

Last year, the justices [turned down the company's petition for certiorari](#) in its failed patent case against Donuts Inc., a domain name registrar. WhitServe had accused that company of infringing two different patents that Judge Connolly also found too abstract for legal protection, a ruling WhitServe said [the judge made too early](#) in the case.

Counsel for WhitServe and representatives for Dropbox did not return requests for comment on the case.

The patent-in-suit is U.S. Patent No. [8,812,437](#).

WhitServe LLC is represented by Michael J. Kosma and Stephen F.W. Ball Jr. of Whitmyer IP Group LLC.

Dropbox has yet to make an appearance in the high court case; its representation at the Federal Circuit was Gregory H. Lantier, Claire Hyungyo Chung and Elizabeth Bewley of [WilmerHale](#).

The case is WhitServe LLC v. [Dropbox Inc.](#), case number [21-812](#), before the U.S. Supreme Court.

--Additional reporting by Kevin Stawicki, Dani Kass, Ryan Davis and Tiffany Hu. Editing by Dave Trumbore.

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