

## A Patentee's Dismissed Lawsuit Will Preclude a Subsequent, Effectively Identical Suit in the Absence of Different Conduct, Different Alleged Violations or Litigants, or Different Subsequent Facts

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*Sowinski v. Cal. Air Res. Bd.*, No. 19-1558 (Fed. Cir. Aug. 21, 2020)

The patentee sued in 2015 for infringement of his patent for an electronic method and apparatus for validating and trading consumer pollution-control tax credits. The suit was removed to federal court, where the patentee failed to respond to motions to dismiss. The district court dismissed the complaint with prejudice, pursuant to a local rule deeming such failure to respond as consent to the grant or denial of the motion. The Federal Circuit affirmed, citing Ninth Circuit precedent that failure to oppose a motion to dismiss may lead to dismissal with prejudice.

The patentee again sued in federal court in 2018 (this time in a different district). His complaint was nearly identical but sought damages only for infringement occurring *after* the dismissal of his prior suit. The court dismissed on the ground of *res judicata*.

The Federal Circuit affirmed, explaining that *res judicata* may be based on a failure to prosecute and apply to claims arising after the prior judgment. Based on Federal Rule of Civil Procedure 41(b), which provides that a dismissal for failure to prosecute “operates as an adjudication on the merits,” the patentee’s failure to prosecute his claim in the 2015 action precluded his 2018 action. The Federal Circuit also distinguished between cases where subsequent litigation involved different conduct, different alleged violations or litigants, or different subsequent facts, and this litigation, which alleged no such differences. The dismissal of the 2015 suit effectively determined that the alleged infringer’s activity was not infringing, and the second suit involving the same allegedly infringing conduct (albeit occurring later) was therefore properly precluded by *res judicata*.

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