

## Full Fed. Circ. Rules PTAB Time-Bar Rulings Are Appealable

By Ryan Davis

*Law360, New York (January 8, 2018, 12:04 PM EST)* -- The Federal Circuit ruled en banc Monday that decisions by the Patent Trial and Appeal Board that an inter partes review petition is timely can be appealed, overruling previous decisions that barred appeals of such findings.

In a decision giving Wi-Fi One LLC a new opportunity to show that Broadcom Corp.'s challenge to its messaging patent was time-barred, the full court held by a vote of 9 to 4 that "the strong presumption in favor of judicial review of agency actions" means that decisions on the America Invents Act's time bar are subject to appeal.

"To overcome this presumption, Congress must clearly and convincingly indicate its intent to prohibit judicial review," Judge Jimmie Reyna wrote for the majority. "We find no clear and convincing indication of such congressional intent. We therefore hold that the time-bar determinations ... are appealable."

The case involves two sections of the AIA. One says that the board may not institute inter partes review if the petition requesting review is filed more than one year after the date on which the petitioner, or a company it has a legal relationship with, is served with a complaint alleging infringement. The other says that decisions on whether to institute an inter partes review "shall be final and nonappealable."

The time bar is "not some minor statutory technicality," the majority wrote, but a limit on the PTAB's authority to review a patent.

"Enforcing statutory limits on an agency's authority to act is precisely the type of issue that courts have historically reviewed," the majority said. "As a statutory limit on the director's ability to institute IPR, the ... time bar is such an issue."

As such, time-bar decisions can be appealed, the court held, though it noted that its decision does not address whether other aspects of institution decisions are appealable.

Wi-Fi One alleged that Broadcom's petition was time-barred because, although Broadcom was not itself sued, it worked with other companies that were sued over the patent more than a year before the petition was filed. The PTAB refused Wi-Fi One's request to take discovery on Broadcom's relationship with those companies and ultimately found the patent invalid.

A Federal Circuit panel upheld that decision, relying on a 2015 ruling that decisions that an AIA petition

is not time-barred cannot be appealed.

The full court agreed to review the issue in the wake of the U.S. Supreme Court decision known as *Cuozzo*, which held that some aspects of inter partes review institution decisions may be appealable, without specifying which ones.

Judge Todd Hughes penned a strong dissent, joined by three of his colleagues, writing that the majority's opinion "not only contradicts the statutory language, but is also contrary to the Supreme Court's construction of that language in *Cuozzo*."

The inquiry "should start and end with the words of the statute," he said, calling the AIA's bar on appeals "clear and unmistakable."

"The statute calls out a specific agency determination, and expressly prohibits courts from reviewing that decision," he wrote, adding that *Cuozzo* made clear that the AIA bars appeals not only of the merits of a petition, but also related issues such as whether it was timely.

Douglas Cawley of McKool Smith PC, an attorney for Wi-Fi One, said that the decision means the case will return to the Federal Circuit, which could decide itself whether the petition is or is not time-barred, or send the case back to the PTAB for further proceedings.

The decision "signals raised scrutiny of the PTAB's institution decisions" and could lead to future Federal Circuit rulings that other issues are appealable, he said.

An attorney for Broadcom could not immediately be reached for comment Monday.

The patent-in-suit is U.S. Patent Number 6,772,215.

Wi-Fi One is represented by Douglas Cawley of McKool Smith PC, Donald Puckett of Nelson Bumgardner PC and Peter Ayers of Lee & Hayes PLLC.

Broadcom is represented by Dominic Massa, Kevin Goldman, Zachary Piccolomini and Katie Saxton of WilmerHale.

The case is *Wi-Fi One LLC v. Broadcom Corp.*, case number 15-1944, in the U.S. Court of Appeals for the Federal Circuit.

--Editing by Jack Karp.