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US Law Week

# 'Rigged' Patent Board Allegations Have High Bar, Attorneys Say

By Samantha Handler

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- Inventor raised bias accusations against the PTAB
  - Federal Circuit historically reluctant to engage on issue
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A recent district court order punts concerns about an administrative patent tribunal's alleged bias to the Federal Circuit amid greater scrutiny of the patent office.

The US Court of Appeals for the Federal Circuit provides an adequate remedy in the event there's any improper bias among judges at Patent Trial and Appeal Board, a district court judge for the Western District of Tennessee found earlier this week. The order came in response to an inventor who alleged the US Patent and Trademark Office is "rigged" to favor big tech companies, and followed the release of a federal watchdog report that raised similar worries.

While the Tennessee order indicates inventors with similar concerns can raise them at the Federal Circuit, there's no real route obtain to damages from the government. A more in-depth investigation by Congress is necessary to suss out the PTAB impropriety claims, attorneys said.

A Government Accountability Office preliminary report in July found that 75% of PTAB judges said their decisions were affected by the agency's leader.

"The government's going to need to create an independent investigation and look into this with somebody that doesn't have a horse in the race," said Blair M. Jacobs, a principal at McKool Smith. "If people continue a groundswell of concern with regard to these issues, that's probably where we'll end up, and that might result in something or it might not."

**'Tainted, Underhanded, and Rigged'**

Computer engineer Martin David Hoyle had sued an Obama-era patent office director and several administrative patent judges last year, accusing them of stacking the intellectual property system against inventors. Hoyle, of BE Technology LLC, said the PTAB favored Google in the tech giant's challenges to his patents.

In his complaint, Hoyle alleged that the patent review process was "rigged," adding that the proceedings were "tainted by various improprieties and underhanded tactics." Hoyle also raised issues with the way judges earn bonuses, saying they can range as high as \$36,000 and are based, in part, on the number of cases they review.

The PTAB has faced criticism for favoring corporations over individual inventors, particularly under the leadership of Obama-era director Michelle Lee, a former Google executive. The board carried a reputation as a "patent death squad," which was largely shed under her Trump administration successor, Andrei Iancu.

Hoyle was seeking a remedy under *Bivens v. Six Unknown Agents*, the 1971 Supreme Court decision that held that a violation of constitutional rights by federal officers can result in damages.

Since the 1970s, though, the high court has issued rulings that "disfavor" any extension to the *Bivens* remedy, making Hoyle's argument an uphill fight from the start.

"Those *Bivens* actions have been limited over time from the original opinion, as many of the civil rights actions have," said Amy Landers, a law professor at Drexel University Thomas R. Kline School of Law. "The precedent has been narrowing. It's a tough claim."

### **Adequate Remedy**

The Federal Circuit, which upheld the PTAB's finding that invalidated some of the patent's claims, has refused to weigh in on similar complaints from patent owners that allege bias at the agency. One judge, Pauline Newman, has been sympathetic to the arguments, writing in a dissent that concerns about possible due process violations warrant "more attention" than her peers on the court have afforded them.

As the Federal Circuit is now clearly the main forum for raising these issues with the board, attorneys said complainants will need more concrete evidence, such as from an independent government investigation, to actually entice the circuit judges.

"Whatever your argument is, you can buttress that if you have evidence," Jacobs said. "Otherwise you risk reviewers looking with a jaded eye toward your appeal."

The trick, though, is having the right information at the right time, attorneys said. Hoyle argued that he didn't have knowledge of the alleged impropriety at the time of his Federal Circuit appeal, which had to be filed within a certain time period after PTAB's final decision was issued.

If an investigation from Congress turns up that evidence, it could bolster similar suits in the future. Congress has taken an interest in addressing transparency at the tribunal. Both chambers held hearings on potential measures during the summer, and a bipartisan trio of senators in June introduced a bill limiting some of the board's discretionary practices.

At a July House Judiciary Committee intellectual property panel hearing, Rep. Darrell Issa (R-Calif.), said the GAO report indicates "that bureaucrats in the agency leadership, led by the Director himself, have improperly influenced or altered decisions by PTAB judges in secret without transparency and, in my opinion, without due process."

Still, attorneys said, the Federal Circuit should provide an adequate check on the board as the Tennessee judge ruled. Any perceived bias, then, would be corrected at the appeals level.

"At bottom, it's really a merits determination whether the PTAB's practices or judges tend to influence the result in an improper way," said Nitika Gupta Fiorella, a principal at Fish & Richardson PC. "If the ultimate merits-based argument is upheld by the Federal Circuit, I do think that provides a check to the PTAB."

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