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Fed. Circ. Can Handle Crush Of PTAB Appeals

By **Vin Gurrieri**

Law360, New York (March 8, 2016, 10:21 PM ET) -- The number of Federal Circuit opinions issued in patent cases has increased over the past year, thanks primarily to an increase in appeals emanating out of the Patent Trial and Appeal Board, and the U.S. Supreme Court will soon weigh in on a case that could exacerbate the complexity of such proceedings. But the Federal Circuit can handle a deluge by tapping into ways to streamline the process, attorneys say.

In 2015, the Federal Circuit issued decisions in 354 patent cases, a jump from the 314 patent decisions it issued the previous year, according to data compiled by Law360. But within those numbers lies an even more pronounced trend — the increase is due entirely to an explosion in appeals of increasingly popular America Invents Act reviews, cases that originate before the PTAB.

Over the past year, the appellate court issued rulings in 121 appeals that stemmed from PTAB disputes, nearly double the 67 it issued just one year earlier. In fact, while the number of PTAB appeals increased, the Federal Circuit actually saw a slight drop in the number of appeals it heard of federal district court rulings, shining a light onto the ever-growing popularity of the PTAB reviews.

The already busy Federal Circuit will also soon have to deal with the Supreme Court ruling in a case involving Cuozzo Speed Technologies LLC, the first company to have a patent invalidated under the AIA's inter partes review system.

One portion of Cuozzo's multipronged high court appeal takes aim at the Federal Circuit's holding that only final written decisions in AIA reviews can be reviewed, while the PTAB's decision to institute the review cannot be appealed because the law states that such decisions are "final and nonappealable." The company asked the high court to consider allowing a party to appeal the board's decision to institute an IPR proceeding.

A Slowdown Risk

Some have worried that if the high court rules that institution decisions are appealable it could add to the deluge of appeals that reach the Federal Circuit. But attorneys told Law360 the real issue won't be an increase in the overall caseload, it will be a slowing down of the process due to more complex appeals.

Jon E. Wright, a director at Sterne Kessler Goldstein & Fox PLLC who leads the firm's appellate practice, said a ruling that institution decisions can be appealed "won't have a big impact on the number of

appeals [being filed], but it would open up an additional issue that can be appealed."

Wright also noted that the litigants in Cuozzo "are not arguing for immediate appeal" of institution decisions.

Scott A. McKeown, chair of Oblon McClelland Maier & Neustadt LLP's post-grant patent practice, predicted similar effects, saying that "if Cuozzo opens the gate to issues of institution decisions, the appeals will be all the more complex."

"The time to Federal Circuit decision will increase," McKeown said. "It has to. There are only so many judges to handle this tidal wave of work."

John Dragseth, a principal at Fish & Richardson PC and a former Federal Circuit law clerk, believes that the number of appeals of institution decisions, if allowed, could actually be "somewhat small" with the patent office potentially placing procedural limits on AIA reviews that lower the instances of those appeals.

"The legal system," Dragseth said, "is an amazing system that balances itself."

'Three Basic Levers'

Wright, whose firm closely tracks the Federal Circuit's patent litigation statistics, said that the Federal Circuit's caseload was "bound to increase" upon passage of the AIA while noting that the appellate court has "three basic levers" to deal with the increased volume.

Two of those three tools, according to Wright, are the Federal Circuit's increased use of so-called Rule 36 summary affirmances that efficiently dispose of cases and the aggressive consolidation of cases.

If the Federal Circuit does face a flood of future appeals, because of Cuozzo or just the general increase out of the PTAB, Dragseth believes that could be stemmed by the USPTO coming up with solutions to many of the issues involving AIA reviews, such as institution decisions on redundant claims.

Of the Federal Circuit's practice of combining cases involving either the same patent or cases involving different patents but the same litigants, Dragseth said the court has also been flexible enough in such situations to allow the parties extra time during oral arguments, but he added that the practice may not be tenable.

"I don't know if they've reached the perfect solution yet," Dragseth said. "Having a clerk unilaterally merge appeals may not be the best approach."

The third tool the Federal Circuit could employ, though it has not yet done so, is an additional panel during open slots in its schedule to hear more cases, Wright said.

For his part, Dragseth believes the Federal Circuit's current caseload is adequate, saying the best test to determine whether the Federal Circuit docket is too full is by looking at the quality of the opinions the appellate court issues.

"I think their current caseload is fair," Dragseth said. "I don't think their opinions are sloppy, and there have been no complete miscarriages of justice."

Methodology: Law360's analysis looked at opinions and judgments issued between Jan. 1 and Dec. 31 by the Federal Circuit in patent cases. Law360 uses data from PACER and the Federal Circuit's website to compile the data set of opinions and judgments issued by the appeals court, which includes rulings on patent disputes from federal district court, the U.S. Patent and Trademark Office and the International Trade Commission.

--Editing by Jeremy Barker.
