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# Patent Cases To Watch In 2018

By **Matthew Bultman**

*Law360, New York (January 1, 2018, 3:04 PM EST)* -- The U.S. Supreme Court is weighing two cases relating to America Invents Act reviews, including one that could undo the entire process, headlining what could shape out to be a memorable year in patent law. Here are the cases attorneys should be tracking.

**Oil States Energy Services LLC v. Greene's Energy Group LLC**

Everyone in the patent world will be waiting to see how the Supreme Court rules in a case that challenges America Invents Act inter partes reviews as being unconstitutional.

Oil States filed the appeal after its hydraulic fracturing patent was invalidated at the Patent Trial and Appeal Board in an IPR requested by Greene's Energy. It argues patents are private property that can only be taken away by a federal court, not by an executive branch agency like the PTAB.

The IPR process has been used to challenge the validity of thousands of issued patents since it was established in 2012. But the entire program could disappear if the Supreme Court were to rule that it violates the U.S. Constitution.

"That has just massive implications if it comes out in favor of the unconstitutionality of the IPR process," Steven Maslowski of Akin Gump Strauss Hauer & Feld LLP said.

During oral arguments in November, the justices appeared divided on the issue.

Some, including Justice Neil Gorsuch, seemed skeptical of the PTAB's authority to invalidate patents. Others were receptive to the argument that IPRs are a mechanism that allows the patent office to review its work and make corrections when patents were wrongly issued.

The court is expected to issue a decision within the first half of 2018.

Even if the court were to uphold the review process and find IPRs to be constitutional, Maslowski said the case provides the justices an opportunity to give their thoughts on how they view the fairness of the overall procedure.

"I think this is certainly one of those cases where we hope that there is guidance, or at least

commentary on the Supreme Court's view of the procedure as a whole, even if it meets the requirements of constitutionality as it has been teed up in the current case," he said.

The case is Oil States Energy Services LLC v. Greene's Energy Group LLC, case number 16-712, in the Supreme Court of the United States.

**SAS Institute Inc. v. Matal**

The second patent case in front of the Supreme Court concerns the PTAB's process for instituting review of patents.

SAS Institute, which had challenged a software patent it was accused of infringing, contends the board should have to address the patentability of every challenged claim in IPR. Currently, the board can pick and choose which claims to review.

Provided the Supreme Court doesn't undo AIA reviews with its decision in Oil States, a ruling in favor of SAS Institute could have wide-ranging implications for PTAB proceedings.

"SAS has the potential to have a huge impact on a number of different parties to the IPR process overall," Maslowski said.

Should the court determine the PTAB needs to address all the challenged claims in its final decisions, attorneys say the board would see an increase in its workload. It could also impact the appeal options of petitioners, who have generally been unable to appeal decisions not to review certain claims in a patent.

A ruling in favor of SAS Institute would also mean that all challenged claims are subject to the IPR estoppel provision, which attaches from a final decision and prevents parties who challenge a patent in review from making those arguments later in district court litigation.

The Supreme Court heard arguments in SAS Institute the same day as the Oil States case.

While a couple of justices suggested the AIA was clear that all challenged claims need to be addressed in a final decision, several others noted that Congress appears to have given the PTAB broad discretion when deciding whether to institute review of a patent.

"It's a little bit odd to say, 'Well, here's the one thing you don't have discretion over when it comes to institution: You can't say these claims but not those claims,'" Justice Elena Kagan said. "In a context in which Congress said the institution decision is really for the board, it's a discretionary decision that lies in its bailiwick, why should we carve out that one thing?"

The case is SAS Institute Inc. v. Matal, case number 16-969, in the Supreme Court of the United States.

**Wi-Fi One LLC v. Broadcom Corp.**

It's been almost eight months since the full Federal Circuit heard arguments in a case involving Wi-Fi One that raises the question of whether patent owners can appeal PTAB decisions holding that IPR petitions challenging their patents were timely.

Under the AIA, the PTAB cannot institute an IPR if the petition 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 Federal Circuit previously held that PTAB decisions finding a petition is not time-barred can't be appealed because it is part of the board's decision to institute review of a patent, which the AIA states is not appealable.

Wi-Fi One, which had its online messaging patent invalidated in an IPR brought by Broadcom Corp., argues that the Supreme Court's 2016 decision in Cuozzo Speed Technologies LLC v. Lee has thrown that holding into question.

In Cuozzo, the justices indicated that some aspects of AIA institution decisions can be appealed.

"Wi-Fi One is unaware of any indication in the statutory text, structure of the statutory scheme or legislative history to suggest that Congress intended to completely shield ... timeliness determinations ... from all judicial review," Wi-Fi One wrote in a brief last year.

The Federal Circuit didn't tip its hand on how it might come down on the issue when it heard arguments in May.

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.

**Momenta Pharmaceuticals Inc. v. Bristol-Myers Squibb Co.**

The pharmaceutical industry will be watching closely to see how the Federal Circuit rules on a question that could impact drug companies' ability to appeal PTAB decisions when they challenge a drug patent before they are ready to launch a competing product.

Momenta filed a petition with the PTAB in 2015 challenging a Bristol-Myers patent covering rheumatoid arthritis treatment Orencia. The board upheld the patent in a final decision, ruling Momenta had not shown the challenged claims were invalid.

One of the issues at the Federal Circuit is whether Momenta, which is developing a copycat version of the drug but has not filed an application with the U.S. Food and Drug Administration to market its product, has standing to appeal the board's decision.

In order to have standing in a federal court, there must be an "injury in fact."

Bristol-Myers argues Momenta doesn't have the necessary standing because it is years away from filing a biosimilar application with the FDA. On the other side, Momenta says it has spent millions of dollars on its competing product and faces near-certain infringement litigation.

"[Momenta has] an interest in the case — the question is whether the interest is enough to stay in an Article III court," John Dragseth of Fish & Richardson PC said.

More drug companies appear to be incorporating PTAB reviews in their strategy to clear out potentially problematic patents as they develop their own products. A ruling against Momenta could preclude some of those companies from appealing a losing PTAB decision.

“The concern is that ... if you don’t have an underlying infringement suit or threat of suit, have you put yourself in the position of not being able to seek judicial review if you think the PTAB gets it wrong?” Pauline Pelletier of Sterne Kessler Goldstein & Fox PLLC said. “That is a major concern for many parties.”

The case is Momenta Pharmaceuticals Inc. v. Bristol-Myers Squibb Co., case number 17-1694, in the U.S. Court of Appeals for the Federal Circuit.

**Others To Watch**

**Apple Inc. v. Samsung Electronics Co. Ltd.** — Apple and Samsung are gearing up for another trial in their epic smartphone war after the Supreme Court in 2016 vacated a $400 million verdict for Apple, the high court’s first ruling on a design patent case in over 120 years.

**WesternGeco LLC v. Ion Geophysical Corp.** — The Supreme Court is currently weighing a petition from Schlumberger Ltd., which argues foreign lost profits should be taken into account while calculating damages in patent cases. The federal government has urged the court to hear the case.

**Berkheimer v. HP Inc.** — The Federal Circuit in December heard arguments in a case that could make it more difficult for defendants to quickly nix infringement suits by arguing a patent is invalid because it is directed to an abstract idea or other ineligible subject matter.

**Gilead Sciences Inc. v. Merck & Co. Inc.** — Arguments are set for early 2018 in this Federal Circuit case, after a judge overturned a $200 million jury verdict because “serious and outrageous conduct” left Merck with no right to enforce against Gilead two patents related to a hepatitis C treatment.

**ATI Technologies ULC v. Matal** — This case, involving semiconductor technology, could give the Federal Circuit a chance to address the standard the PTAB applies when evaluating what’s known as “swear behind” — when a patent owner tries to disqualify a reference by establishing an earlier date of invention.

--Editing by Philip Shea and Orlando Lorenzo.