

Shutdown Could Disrupt A Number Of ITC Patent Cases

By **Matthew Bultman**

Law360 (January 24, 2019, 9:17 PM EST) -- While the U.S. International Trade Commission has ground to a halt during the government shutdown, those involved in patent cases are working behind the scenes to push cases forward, although there will likely be delays in a number of disputes.

With the shutdown approaching its sixth week, attorneys say companies in some patent infringement investigations have worked out their own arrangements and essentially continued to litigate, exchanging documents and preparing filings, even as the ITC's doors remain closed.

Still, with no hearings or judges available to issue decisions, the ITC has already missed its target date to finish some cases. And it is likely the agency, known for the speedy timeframe for its investigations, will be forced to push back the schedule on many others.

"It's unfortunate for a complainant that has worked hard to keep its case moving forward and came to the ITC because of the speed of the process, but it is the reality that we are looking at right now," Covington & Burling LLP partner Sturgis Sobin said.

The Senate rejected two competing proposals Thursday that would have ended the partial shutdown, one backed by the White House and another by Democrats. While lawmakers have expressed hope for breaking the logjam, it is expected to extend at least into next week.

To this point, the patent system hasn't been severely impacted. The U.S. Patent and Trademark Office remains open, and the agency said in a statement it anticipates being able to fund patent operations "at least until the second week in February."

And it has been business as usual at the Federal Circuit, which has kept all deadlines in place and proceeded with hearings as scheduled. The District of Delaware, which has a heavy patent docket, has said its doors will also remain open, even if the court runs out of funds.

Yet it's a different story at the ITC, which closed its doors when the shutdown began Dec. 22.

The commission has disabled the submission of documents through its e-filing portal, EDIS. Hearings and deadlines have come and gone, with apparently no word from the agency about what litigants should expect or how those involved in patent cases should proceed.

Needless to say, attorneys are now in uncharted territory, with the shutdown already the longest in U.S. history.

“It’s going to create a lot of confusion when things open up,” said Daniel Yonan, a director at Sterne Kessler Goldstein & Fox PLLC and leader of the firm’s ITC practice group. “There’s going to be a lot of things filed the day after the commission opens, and there’s going to be a lot of rescheduling and juggling around.”

Smith Brittingham was an investigative attorney at the ITC in 1996, when the government reopened after a then-record 21-day shutdown. While he doesn’t recall bedlam when the commission returned to work, he noted the ITC’s current patent caseload is almost four times what it was then.

“I think in the modern area, with more cases pending, there’s likely to be a fair amount of reshuffling when the government eventually reopens,” said Brittingham, who now leads the ITC litigation practice at Finnegan Henderson Garrett & Dunner LLP.

The shutdown has already affected a high-profile dispute between Apple Inc. and Qualcomm Inc. An ITC judge’s initial determination in a case where Qualcomm has accused Apple of infringing several patents was due Tuesday, a deadline that came and went with no decision.

And there could more such situations in the coming weeks.

Currently, there are 14 active patent investigations, either in front of a judge or the full ITC, that are scheduled to be completed within the next 90 days, according to agency records. This includes a second case between Apple and Qualcomm that is being considered by the full commission.

Dozens more investigations are still in earlier stages, having been started more recently.

Calls to the ITC’s press office went unanswered Thursday, and an email to a commission spokeswoman with questions about the impact of the shutdown was returned with an automatic reply that she would be unable to respond until the ITC receives funding.

With the ITC effectively shuttered, Brittingham said litigants have been coming up with their own solutions in the context of each case, working to “keep them moving as best we can.” This includes things like exchanging expert reports or witness statements with the other side.

“Everyone who does this kind of work knows that the ITC still expects to try and finish these cases as quickly as possible, even when they’re shut down,” he said. “That means you cannot assume the ITC will tolerate no activity for a month or two months during a shutdown.”

But there comes a point when the two sides have to appear before a judge. Cases that are further along in the investigation, awaiting a trial or a Markman hearing, for example, are stuck somewhat in a holding pattern waiting for the commission to reopen.

Following the last substantial shutdown in 2013, the ITC extended certain deadlines. When the government eventually reopens, attorneys expect judges will handle cases on an individual basis, rescheduling missed hearings and deciding when it is appropriate to push back deadlines.

“Overall, for cases that are not in the very early stage of the process, it is highly likely that they will have wholly new schedules set and more than likely will see the schedule pushed out,” Sobin said. “By how much may depend [judge by judge] in terms of what they can do with their schedule.”

The typical target date for a decision from the ITC in a patent case is 16 months after the investigation is started, although that is not a requirement. Under the law, the commission is only mandated to complete its investigation at the “earliest practicable time.”

The ITC doesn’t have the same flexibility in other investigations that it conducts, such as antidumping investigations. Sobin questioned if investigations with statutory deadlines will get pushed to the front of the line once the government reopens, while patent cases take a backseat.

“In that sense, it’s not just delays that are the natural result of losing this much time within the [patent] part of the docket,” Sobin said. “It’s also the potential that other trade cases will crowd out ... the available schedule time and essentially make the problem worse.”

--Editing by Philip Shea and Kelly Duncan.