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IBG, Broker Ask High Court To Clarify 'Confusing' CBM Rules

By **Britain Eakin**

Law360 (July 30, 2019, 9:56 PM EDT) -- IBG LLC and Interactive Brokers LLC asked the Supreme Court to weigh in on what constitutes a "technological invention," an issue that has divided Federal Circuit panels about what patents are eligible for covered business method review at the Patent Trial and Appeal Board.

IBG, the nation's largest electronic trading platform, and Interactive Brokers LLC said in a petition for certiorari dated July 24 that the Federal Circuit's lack of a coherent framework to analyze the definition has created unpredictability about which patents the PTAB can review, leading to divergent outcomes in cases involving nearly identical patents.

"Patentees, patent challengers, and the public alike are ill-served by this confused and confusing legal regime," the petition said. "The uncertainty engendered by the Federal Circuit's conflicting decisions needs to be laid to rest."

In 2011, the America Invents Act established CBM review for patents related to financial products or services, but exempted technological inventions. IBG and Interactive Brokers petitioned the PTAB for CBM review after Trading Technologies International Inc. accused them of infringing four of its patents covering electronic trading methods in Illinois federal court.

The patents are similar and cover a system for electronically trading stocks and bonds in a way that reduces the time it takes to place a trade. IBG had argued that the patents covered patent-ineligible abstract ideas.

The PTAB upheld two of the patents and invalidated several claims in the other two under the U.S. Supreme Court's ruling in Alice v. CLS Bank. But the Federal Circuit vacated those decisions on Feb. 13, **holding** that the patents were never eligible for CBM review to begin with because they were "technological inventions."

In asking the Supreme Court to reverse the Federal Circuit, IBG points to what it calls "a basic principle of administrative law." IBG said the Federal Circuit must follow both prongs of a 2012 rule by the U.S. Patent and Trademark Office, which the company said was given the authority by Congress to define technological invention for the purposes of CBM review.

The rule says that such inventions must be novel and nonobvious, but must also solve a technological

problem with a technological solution. Some Federal Circuit panels though have ignored the first prong of that test, IBG said, and have focused only on the latter. In urging the high court to take up its cause, IBG called that "profoundly improper."

"The Federal Circuit has no more power to ignore the first prong ... than it has to ignore a duly enacted provision of the United States Code," the petition said.

IBG notes that the Federal Circuit has criticized the USPTO rule, and says that some members of the court consider it "unhelpful." Still, agency regulations carry the force of law, the petition said.

"Federal courts do not have freewheeling authority to strike down (or ignore) agency regulations simply because they deem them unhelpful," IBG said.

The CBM program is set to expire in 2020 unless Congress acts to extend it, which means that the program could shut down soon after the Supreme Court issues a decision, should it agree to hear the case.

IBG urged the court to not let that dissuade it from taking the case, arguing in its petition that Congress will likely extend the program given its success in invalidating "low-quality business method patents." But even if Congress fails to act, IBG said the court should still take the case because the outcome will impact a large number of pending cases, including any filed before the program expires.

The case also presents a separation of powers issue for the high court to resolve, IBG said, given the Federal Circuit's purported disregard for the USPTO regulation.

"This case presents an excellent opportunity for this court to clarify the proper allocation of power among Congress, administrative agencies, and courts," the petition said.

Counsel for IBG and a representative for Interactive Brokers LLC declined to comment.

Counsel for Trading Technologies could not be immediately identified. A representative for the company was unavailable to comment.

The patents-in-suit are U.S. Patent Nos. 6,766,304, 6,772,132, 7,6767,411, and 7,813,996.

IBG and Interactive Brokers are represented by Robert E. Sokohl, Byron L. Pickard, Richard M. Bemben and William H. Milliken of Sterne Kessler Goldstein & Fox PLLC.

Counsel for Trading Technologies at the Supreme Court was not immediately available. At the Federal Circuit, it was represented by BakerHostetler and in-house counsel.

The case is IBG LLC et al. v. Trading Technologies International Inc., case number 19-120, in the U.S. Supreme Court.

--Additional reporting by Matthew Bultman. Editing by Emily Kokoll.