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Supreme Court Confirms No Right to Appeal §315 Time Bar Decision

On Monday, in a highly anticipated decision, the United States Supreme Court held in *Thryv, Inc. v. Click-To-Call Techs.*, LP, No. 18-916 (U.S. Apr. 20, 2020), that Patent Trial and Appeal Board (PTAB) decisions under 35 U.S.C. §315(b) regarding timeliness of a Petition for *Inter Partes* Review (IPR) are not appealable. The Court confirmed that its prior decision in *Cuozzo Speed Technologies, LLC v. Lee* precludes review of matters "closely tied to the application and interpretation of statutes related to" PTAB institution decisions.

In response to a Petition for IPR filed by Thryv, Inc., Click-To-Call Technologies, LP argued that the Petition was untimely because it was filed beyond the one-year statutory bar under §315(b). The PTAB disagreed, instituted review, and eventually rendered a final written decision invalidating 13 of the claims of the Click-To-Call patent. On appeal, the Court of Appeals determined that the §315(b) issue was reviewable, concluded Thryv's Petition was untimely, and remanded the case with instructions to dismiss.

The Supreme Court started with 35 U.S.C. §314(d), which is entitled "No Appeal" and states that "[t]he determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable." The Court's prior decision in *Cuozzo* explained that §314(d) precludes appellate review if the issues raised on appeal "are closely tied to the application and interpretation of statutes related to the Patent Office's decision to initiate inter partes review."

Click-To-Call argued that the "no appeal" mandate of §314(d) should be limited to the substantive threshold decision pursuant to §314(a) whether petitioner has established a reasonable likelihood of prevailing on at least one claim. But the Court noted that §314(d) is not so limited and instead uses broad language.

Click-To-Call also argued that the Court's prior decision in *SAS Institute Inc.* v. *Iancu* indicates that appellate review of

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certain PTAB decisions is warranted under §314(d). But the Court noted that *SAS Institute* was reviewing a decision under 35 U.S.C. §318(a), which relates to PTAB procedure *after* institution and is not closely tied to the decision to institute.

Finally, Click-To-Call noted that the §314(a) determination was addressed in the final written decision, and thus they were appealing the final written decision and not the institution decision. The Court did not find this persuasive because it determined the issue on appeal is still whether or not the PTAB should have instituted.

Under the facts in the current case, the Court quite easily concluded that a one-year statutory bar ruling is "closely tied to the application and interpretation of statutes related to the Patent Office's decision to initiate *inter partes* review." The Court vacated and remanded with instructions to dismiss for lack of appellate jurisdiction.

Seven of the nine Justices adopted the holding of the Court. As such, the decision is a complete repudiation of the Federal Circuit's holding in *Wi-Fi One, LLC. v. Broadcom Corp.,* 878 F.3d 1364, 1374-75 (2018) *(en banc),* which concluded that § 315(b) timeliness determinations are appealable because they are not "closely related" to the merits analysis contemplated under § 314(a).

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