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Supreme Court Holds That The Constitution Requires Administrative Review of PTAB Decisions

Client Alert | June 21, 2021

Decided June 21, 2021

***United States v. Arthrex, Inc.*, No. 19-1434; *Smith & Nephew, Inc. v. Arthrex, Inc.*, No. 19-1452; *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 19-1458**

Today, the Supreme Court held 5-4 that the absence of Executive Branch review of decisions rendered by Administrative Patent Judges (APJs) of the Patent Trial and Appeal Board (PTAB) violates the Appointments Clause, and that the proper remedy is to sever a statutory provision so that the Director of the Patent and Trademark Office may review PTAB decisions.

Background:
The Constitution's Appointments Clause, art. II, § 2, cl. 2, requires principal Officers of the United States to be appointed by the President with the advice and consent of the Senate, but permits inferior Officers to be appointed by a department head such as the Secretary of Commerce. Under the Patent Act, the Secretary appoints APJs to preside over adjudicatory proceedings such as inter partes review (IPR) and may fire them for cause. The Director of the Patent and Trademark Office supervises APJs in various ways, but cannot unilaterally review their patentability decisions. Smith & Nephew petitioned for IPR of Arthrex's patent claims and a panel of APJs decided the claims were unpatentable. On appeal, Arthrex argued that APJs are unconstitutionally appointed principal Officers because they are insufficiently supervised by others. The Federal Circuit agreed that APJs' appointment violated the Appointments Clause. As a remedy, it severed APJs' for-cause removal protections to render them inferior Officers, and remanded Arthrex's IPR to a new panel of APJs.

Issue:
Does the Appointments Clause require administrative review of PTAB decisions?

Court's Holding:
Yes. The Appointments Clause does not permit APJs to exercise executive power unreviewed by any Executive Branch official. Accordingly, the Director has the authority to unilaterally review any PTAB decision, and a contrary statutory provision (35 U.S.C. § 6(c)) is unenforceable as applied to the Director.

"The structure of the PTO and the governing constitutional principles chart a clear course: decisions by APJs must be subject to review by the director."

Chief Justice Roberts, writing for the majority

Gibson Dunn represented the petitioners: *Smith & Nephew, Inc. and ArthroCare Corp.*

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What It Means:

- The Court's 5-4 decision holding that the Patent Act provided for constitutionally inadequate supervision of APJs may make it easier for future challengers to raise Appointments Clause objections to other administrative adjudicators.
- By a 7-2 vote, the Court rejected calls by critics of the PTAB to invalidate the entire system. Although the Court's decision allows the PTAB to continue operating, the Director now will be able to review final PTAB decisions and, upon review, may issue decisions on behalf of the Board.
- The Court clarified that its opinion concerns only the Director's ability to supervise APJs in adjudicating petitions for IPR. The opinion does not address the Director's supervision over other PTAB adjudications, such as the examination process.
- The Court held that because "the source of the constitutional violation is the restraint on the review authority of the Director, rather than the appointment of APJs by the Secretary," the appropriate remedy is a limited remand to the Acting Director to decide whether to rehear Smith & Nephew's IPR petition, rather than a hearing before a new panel of APJs.

The Court's opinion is available here.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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