APRIL 20, 2020

The Supreme Court Holds Time-Bar Decisions are Not Appealable

by John C. Alemanni

In a 7-2 decision by Justice Ginsburg, the Supreme Court held today that §314(d)'s bar on judicial review of the agency's decision to institute inter partes review precluded appeal of the PTAB's application of §315(b)'s time bar. *Thryv Inc. v. Click-To-Call Technologies LP*, case no. 18-916.[1] The court held that application of the time bar "is closely related to its decision whether to institute *inter partes* review and is therefore rendered nonappealable by §314(d)." In so doing, the high court overturned the Federal Circuit's en banc decision in *Wi-Fi One, LLC v. Broadcom Corp*., 878 F. 3d 1364, 1367 (2018).

In addressing the *Cuozzo* decision, the Court stated that "A challenge to a petition's timeliness under §315(b) thus raises 'an ordinary dispute about the application of' an institution-related statute." The Court also dismissed Click-to-Call's attempt to overturn the Board's §315(b) ruling based on §319 as an appeal of a final written decision.

Justice Gorsuch dissented, joined in part by Justice Sotomayor, asserting that the majority's decision "carries us another step down the road of ceding core judicial powers to agency officials and leaving the disposition of private rights and liberties to bureaucratic mercy."

Unfortunately, the question of whether a complaint voluntarily dismissed without prejudice can trigger §315(b)'s time bar (*Click-to-Call Technologies, LP v. Ingenio, Inc*., 899 F. 3d 1321, 1328, n. 3 (Fed. Cir. 2018)) was not addressed. The Court stated in a footnote (3) that the question was outside the scope of this review. The obvious takeaway from today's decision is that §314(d) means what it says, "The determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable."

[1] In the interest of disclosure, my partners Adam Charnes and Mitch Stockwell represented the Petitioner in the case.