Proskauer

Back to District Court? PTAB Strategic Recalibration in Patent Litigation

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For years, parallel proceedings at the Patent Trial and Appeal Board (PTAB) were the near-automatic response of a defendant in district court patent litigation. Accused infringers routinely filed petitions—especially *inter partes* review (IPR) petitions—challenging validity of the asserted patents at the PTAB. Given the PTAB's technical expertise, historically favorable invalidation rates, and lower standard of review on invalidity, this has been a favored approach among defendants.

Today, that reflexive approach warrants reconsideration. Recent developments at the PTAB have prompted both patent owners and accused infringers to reassess whether parallel proceedings at the PTAB remains the default, or whether sticking to district court is the more viable option.

A More Uncertain PTAB Landscape

As we have covered in prior blog posts, one of the biggest changes at the PTAB has been the new discretionary denial process. Previously, petitioners were mainly concerned with filing their petitions within a 1-year statutory window, but now petitioners face broader timing considerations, including how long the challenged patent has been in force. PTAB 2025 statistics indicate 60% of petitions were denied for discretionary considerations. Given the high cost of filing a PTAB challenge, petitioners may be reconsidering their strategy to waste the expense and burden of putting together a PTAB challenge that may be denied on its face before the merits are even considered.

Institution rates likewise declined in 2025. Thus, the previous benefits of a PTAB challenge (enhanced technical expertise and a lower standard of review) are not necessarily being realized. Where a petition does survive the institution phase, there is less than a 50% chance that the instituted claims will be found unpatentable at final written decision. In that case, petitioner will be estopped from asserting the same arguments in district court that it raised, or could have raised, at the PTAB, which could significantly weaken a defendant's case.

Uptick in Requests for Reexamination

Along with these PTAB changes has come a sharp increase in ex parte requests for reexamination. In 2025, the Patent Office reported the highest number of reexamination requests filed since the availability of IPRs at 491. The Patent Office has also reported 236 reexamination requests filed in the first quarter of 2026 alone. The data suggests that practitioners have turned to reexamination requests as an alternative to filing petitions (e.g., *inter partes* review or post-grant review petitions) at the PTAB. Because ex parte reexaminations operate under a different standard of granting review and are not subject to the same discretionary denial process, practitioners may view this as a more attractive approach to challenging patent validity in a parallel proceeding.

District Courts Regain Strategic Weight

Patent practitioners expect to see a shift back towards patent litigation disputes being decided exclusively in district courts. With the exception of certain jurisdictions (e.g., the Eastern District of Texas), many district courts have demonstrated a willingness to stay the litigation pending resolution of any PTAB proceedings. This previously provided a strategic advantage for defendants who could have their invalidity case heard first at the PTAB before having to defend against infringement in district court.

Given the latest shifts in PTAB policy and a sharp increase in discretionary denials, however, defendants may decide to increasingly forego filing parallel PTAB proceedings. Patent owners, for their part, have already begun adapting to this new landscape by accelerating case schedules, resisting stays, and arguing against discretionary denials. Patent owners' efforts accompanied by the high cost of PTAB filings, diminished likelihood of institution, and estoppel risk, may spur defendants to choose to confine the litigation to the district court only.

Parallel PTAB and district court proceedings are no longer assumed to be a streamlined, complementary path. Both plaintiffs and defendants are forced to make early strategic decisions regarding parallel PTAB proceedings. Plaintiffs asserting older patents or patents where defendants were put on notice far in advance may feel more confident in bringing lawsuits in most district courts as the chances of a discretionary denial at the PTAB are increased. On the other hand, when asserting newer patents, plaintiffs may revert to venue shopping for districts that have fast trial schedules and are unlikely to grant a stay because the PTAB has shown a willingness to discretionarily deny petitions where the district court will reach trial before the PTAB. Defendants who see the PTAB as the best option for invalidating a patent, however, should consider filing PTAB petitions even before being sued in district court to give themselves the best chance of avoiding discretionary denial.

The Proskauer Team is continuing to monitor the evolving guidance and outcomes of PTAB proceedings relating to discretionary denials and institutions. We are happy to discuss any questions you may have regarding how these developments may affect your IPR and district court litigation strategy.

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