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Fintiv Fails: PTAB Uses 'Remarkably Inaccurate' Trial Dates

By **Dani Kass**

Law360 (November 2, 2021, 9:09 PM EDT) -- The Patent Trial and Appeal Board has controversially been relying on district court trial dates to figure out whether it would be duplicative to hear a patent challenge, but Perkins Coie LLP attorneys have found that the board relies on trial dates that almost always get pushed back.

Between May and October 2020, the PTAB rejected 55 petitions based on the speed of co-pending patent litigation. However, four of those were in instances where the trial already took place, and only three others had trials that took place on time, Andrew Dufresne, Nathan Kelley and Lori Gordon wrote in a blog post Friday.

"The trial date factor is pretty central to the Fintiv analysis, and we had seen anecdotal reports from others suggesting the trial dates the board was using tended to shift, so we were interested in tracking that in a more systematic way to see what the data really showed us," Dufresne told Law360 on Tuesday.

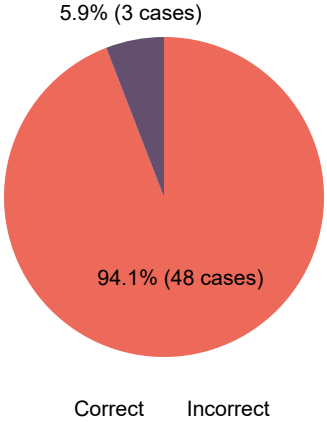
Fintiv is the precedential and **oft-challenged** PTAB ruling that lays out some of the discretionary factors administrative patent judges can weigh when deciding whether to reject an otherwise meritorious patent challenge. Under Fintiv, judges consider whether the district court trial is likely to be completed before the final written decision is legally due, and how far the parallel litigation has proceeded, among other factors.

While Fintiv denials have been **decreasing** in recent months, they've remained one of the hottest topics in patent law, and the research published Friday seems to lend support to those who think Fintiv denials should be reined in.

In their post on the firm's 1600 PTAB & Beyond blog, the attorneys said they purposely picked a six-month period that would allow them to see where trials stood a year out, which is when the board's final written decisions would have been due.

How Often Does The PTAB Get It Right?

Perkins Coie attorneys found that the vast majority of cases where Patent Trial and Appeal Board petitions were turned away based on related trial dates had the trials extended by several months.



Source: Perkins Coie

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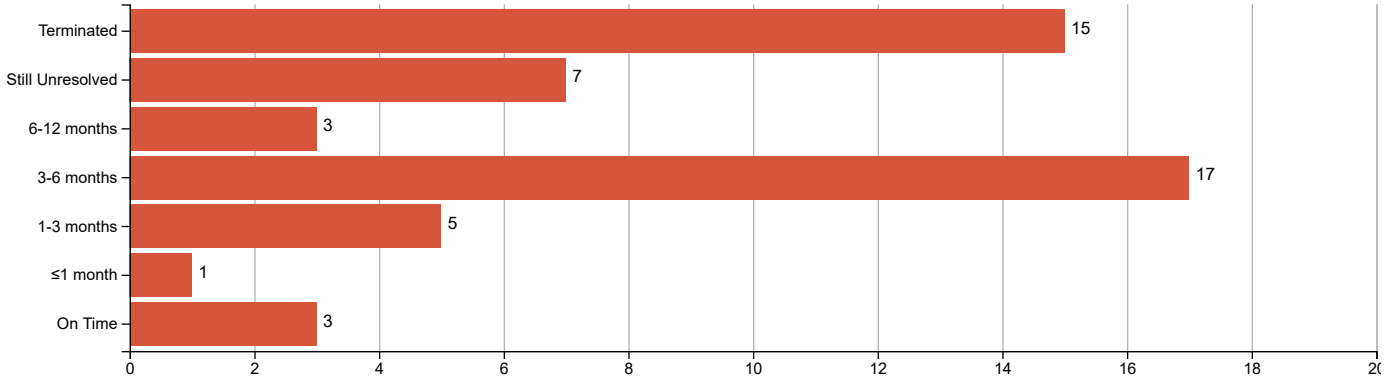
How Far Off Is The PTAB On Trial Dates?

The PTAB relies on trial dates to decide whether to hear patent challenges, but those dates are almost always pushed back.



Source: Perkins Coie

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In all, the attorneys found that three trials were conducted on the expected timeline, one was delayed by less than a month and five were delayed between one and three months. Another 17 were delayed by three to six months, while three were delayed from six months to a year, and seven more are still pending a year later. The remaining 15 were terminated with a decision from the district court about whether the patents were valid.

"The board's reliance on scheduled trial dates has proven remarkably inaccurate, and our results contradict the board's stated practice under Fintiv of simply accepting nominal trial dates at face value," the post states. "Trial dates in patent litigation are not stable and make a very poor barometer for evaluating the potential efficiency of denying institution based on a parallel proceeding."

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