



MBHB *snippets* Alert

October 13, 2020

Supreme Court Grants Certiorari on Appointment of PTAB Judges



By James L. Lovsin and Grantland G. Drutchas

Today, the Supreme Court granted petitions for a writ of certiorari to review the Federal Circuit's decision in *Arthrex, Inc. v. Smith & Nephew, Inc.* Last Halloween, a Federal Circuit panel held in *Arthrex* that the way the U.S. Patent and Trademark Office appointed administrative patent judges (APJs) to the Patent Trial and Appeal Board violated the Appointments Clause of the Constitution (Art. II, § 2, Cl. 2). To remedy the violation, the court severed a portion of the America Invents Act restricting removal of the APJs and vacated and remanded the PTAB's judgment for a new hearing. The Federal Circuit denied rehearing, with four judges dissenting.

The Supreme Court has granted certiorari on two of the questions that the government argued were common questions across the petitions filed by the petitioner (Smith & Nephew), patent owner (Arthrex), and government:

1. Whether, for purposes of the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, administrative patent judges of the U.S. Patent and Trademark Office are principal officers who must be appointed by the President with the Senate's advice and consent, or "inferior Officers" whose appointment Congress has permissibly vested in a department head.
2. Whether, if administrative patent judges are principal officers, the court of appeals properly cured any Appointments Clause defect in the current statutory scheme prospectively by severing the application of 5 U.S.C. 7513(a) to those judges.

Notably, the Supreme Court did not grant certiorari on the government's third common question, which involved waiver/forfeiture of an Appointments Clause challenge.

Merits briefing from Smith & Nephew, Arthrex, and the government will begin on the two granted questions. There will likely be many *amicus* briefs too. The Supreme Court has scheduled one

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hour of oral argument divided between Smith & Nephew, Arthrex, and the government. A decision in the case is likely expected no later than June 2021.

MBHB will monitor developments in *Arthrex*. In the meantime, litigants should carefully consider the potential impact of the Supreme Court's decision in *Arthrex* on their PTAB proceedings.

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