

King and Clark in Law360: Cuozzo And The Limits Of Patent Office Discretion

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PRACTICES Intellectual Property Litigation, AI and Technology, Patent Litigation, Patent Office Trials, Patents, Intellectual Property

The U.S. Supreme Court recently granted certiorari in *Cuozzo Speed Technologies v. Lee*, its first foray into patent office inter partes review practice. IPRs are a type of agency adjudication that determine whether patents are valid. The decision to grant cert was not surprising, given that *Cuozzo* involves a fundamental question of patent interpretation that deeply divided the Federal Circuit. But the Supreme Court surprised many by granting cert on a second issue: the Federal Circuit's power to review whether the Patent Trial and Appeal Board exceeded its statutory authority when it determines whether or not to institute review.

The Federal Circuit has consistently held that it lacks the jurisdiction to review a PTAB decision to institute review. But the soundness of those holdings is questionable. Under well established precedent, all agency action is presumptively subject to judicial review, absent "clear and convincing evidence" of congressional intent to the contrary.

And here, although Congress likely intended to halt review as to the substantive merits of an institution decision, whether it did so for other questions, such as whether the PTAB's procedures exceeded its authority, appears much less likely. Thus, the blanket rule precluding review of any aspect of a PTAB's decision to institute review appears improper.

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