

David McCombs, Eugene Goryunov and Joseph Matal on PTAB's Post-Arthrex Future

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Despite the latest challenge to its legitimacy, the U.S. Patent Trial and Appeal Board has survived — and survive it must, say David McCombs, Joe Matal, and Eugene Goryunov of Haynes Boone.

With the June 21 decision in *United States v. Arthrex* (June 21, 2021) the U.S. Patent and Trademark Office (USPTO) Patent Trial and Appeal Board (PTAB) has made its sixth trip to the U.S. Supreme Court and has survived its second constitutional challenge there — an impressive record for an agency adjudicatory body that is not even a decade old.

The remaining legal challenges to the board's authority have been rejected by the U.S. Court of Appeals for the Federal Circuit and appear to hold little promise. These challenges range from the implausible (arguments that Congress cannot update procedures for enforcing pre-existing patentability requirements [*Celgene v. Peter* (2019); *Genentech v. Hospira* (2020)]) to the ridiculous (that a company can evade validity review by transferring its patents to an Indian tribe [*Saint Regis Mohawk Tribe v. Mylan Pharms* (2018)]).

The PTAB's judges, and those who rely on the board to test patents asserted against them, may thus feel entitled to finally breathe a sigh of relief. At least those attacks on the board that have been mounted in the courts appear to have all run aground.

Concerns About Commandeering and Manipulation

Aspects of the court's opinion, however, give cause for worry — particularly in light of recent events at the board. The most noteworthy passages of the majority opinion are those which characterise and comment on the mechanisms that are used to “supervise” the board.

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