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The Loper Loophole: Will Loper Bright Chip Away at Federal Circuit Rule 36 Summary Affirmances?

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Criticism of the U.S. Court of Appeals for the Federal Circuit's practice of issuing summary affirmances without written opinions in federal appeals and, in particular, Patent Trial and Appeal Board (PTAB) decisions, under Federal Circuit Rule 36 has reached a fever pitch. Recent briefs to the U.S. Supreme Court and rehearing petitions to the Federal Circuit advocate for change. Does the U.S. Supreme Court's momentous 2024 decision casting aside the *Chevron* doctrine in *Loper Bright Enterprises v. Raimondo* now offer a path for PTAB appellants to circumvent Rule 36 altogether?

Rule 36 of the Federal Circuit's Rules of Appellate Procedure permits the court to affirm on appeal without an opinion when the court determines that one of five criteria are met. The Federal Circuit has explained that a summary affirmance neither rejects nor endorses the underlying reasoning from the tribunal below, and therefore does not carry precedential weight. Nevertheless, a Rule 36 affirmance constitutes a final judgment for the litigants before the court and may be relied on for purposes of claim preclusion, issue preclusion, judicial estoppel, and law of the case.

The scrutiny of Rule 36 affirmances has been especially acute in connection with recent PTAB decisions. For example, amicus briefs were filed over the past few months in support of a petition submitted by patent holder ParkerVision, Inc., which contrasted the comments of former Federal Circuit judges conveying that the court should provide an opinion in every case, with the reality that the Federal Circuit issued Rule 36 summary affirmances in 43 percent of PTAB appeals between 2011 and 2024. This practice, ParkerVision urged, runs afoul of the requirement of 35 U.S.C. § 144 that a court provide the reason for its decision.

But the *Loper Bright* decision, which overturned the Chevron doctrine requiring courts to defer to agency interpretation of statutes, may sometimes require the Federal Circuit to exercise "independent judgment in determining the meaning of a statutory provision."

In *Loper Bright*, the Supreme Court held that when confronted with a statutory ambiguity, a court must not defer to an agency's interpretation but instead should do its "ordinary job of interpreting statutes, with due respect for the views of the Executive Branch." While prior PTAB appeals to the Federal Circuit would have been affirmed when the court agreed that the agency's interpretation of an ambiguous statute was reasonable, such deference is no longer permitted. Framing a PTAB appeal through the lens of a "statutory ambiguity" may increase the likelihood that the Federal Circuit

will be unable to rubber-stamp the statutory interpretation and associated findings of the PTAB using Rule 36.

In October 2024, appellant-patent owner Converter Manufacturing made this very argument when it petitioned the Federal Circuit to rehear its appeal en banc after receiving a Rule 36 affirmance of an adverse PTAB decision in *Converter Manufacturing, LLC v. Tekni-Plex, Inc.* Converter Manufacturing claimed the Supreme Court's decision in Loper Bright barred the Federal Circuit from deferring to the U.S. Patent and Trademark Office's (USPTO) interpretation of patent law under 35 U.S.C. §§ 102 and 103, and argued that the Federal Circuit panel had substituted the USPTO's interpretation for its own by issuing the summary affirmance.

Although the petition was ultimately denied, it raises new questions about the limits of Federal Circuit affirmances under Rule 36 in light of *Loper Bright*. Perhaps the Supreme Court's shift away from deference offers a new opportunity for appellants to position their appeal to avoid the dreaded two-word decision: "summarily affirmed."

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