

Apple, Intel Again Lose Fintiv APA Challenge in Calif. Court

Media Mentions

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On March 31, US District Judge Edward Davila ended Big Tech's coordinated challenge to Patent Trial and Appeal Board precedent that allows its judges to discretionarily deny patent reviews based on how proposed reviews overlap with related litigation in other forums.

The conjoined PTAB decisions are often referred to as Fintiv, and they lay out factors under which a seemingly meritorious petition could be denied if a trial were likely to occur by the deadline for the PTAB's decision, or similar overlap.

Fintiv falls under an exception to the Administrative Procedure Act's notice-and-comment rulemaking requirements for being a "general statement of policy," Judge Davila said. While the agency's head is telling PTAB judges what framework they should be using through a series of nonexclusive factors, it is not telling them how to conduct that analysis on the merits level, he said.

USPTO Director Kathi Vidal has provided guidance and initiated rulemaking that would ensure leadership wouldn't be manipulating that discretion behind the scenes, Bracewell's **Kit Crumbley** told *Law360*.

"It says to me that it was important to this decision that panels continue to maintain their independence," said Crumbley. "After everything that Director Vidal has done, I think that we're in a world where that's going to hold, and so I think going forward this is probably the end of the line, as long as panels are sort of free to consider the Fintiv factor however they want."

The director does have the ability to override the board, but through a different, public process.

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“We’ve had this Fintiv challenge going for so long,” Crumbley added. “I think this puts it to bed. Pending appeal.”