

WILL PTAB DECISIONS IN INTERFERENCES DECLARED AFTER SEPTEMBER 15, 2012 BE REVIEWABLE IN COURT? ¹

By

Charles L. Gholz² and

Lisa M. Mandrusiak³

INTRODUCTION

Section 6(f)(3)(C) of the America Invents Act (hereinafter referred to as “the AIA”) preserves court review under both 35 USC 141 (straight appeals to the Federal Circuit) and 35 USC 146 (civil actions in district courts having personal jurisdiction over winning interferents) of decisions by the Board of Patent Appeals and Interferences (hereinafter referred to as “the BPAI”) and the Patent Trial and Appeal Board (hereinafter referred to as “the PTAB”) in interferences decided before September 15, 2012 and in interferences pending on September 15, 2012.⁴ However, the AIA contains no language expressly preserving court review under either 35 USC 141 or 35 USC 146 for interferences declared after September 15, 2012--despite the obvious fact that interferences will continue to be declared for on the order of another decade.⁵

The absence of a “savings clause” preserving court review of decisions in interferences declared after September 16, 2012 no doubt creates a negative inference that Congress, in its wisdom, deliberately decided to do away with court review of the PTAB’s decisions in such interferences. However, as explained in this article, we think that there are enough contrary arguments to at least leave an open question as to whether there will be court review of such decisions. Moreover, if Congress could be persuaded that doing away with court review of the PTAB’s decisions in interferences that were not yet pending on September 16, 2012 was not a wise thing to do, it would be an easy error to correct. At the end of this article, we propose

technical amendments to 35 USC 141 and 35 USC 146 which would remove all doubt by clearly providing appellate jurisdiction in the Federal Circuit to entertain appeals from the PTAB's decisions in such interferences and original jurisdiction in the district courts over civil actions to review the PTAB's decisions in such interferences.

WILL THE AIA'S AMENDMENTS TO 35 USC 141 AND 146 BE APPLIED RETROACTIVELY?

On and before September 15, 2012, potential interferences had what might be referred to as "inchoate rights" to judicial review of the decisions in prospective interferences.⁶ However, if the absence of language in the AIA expressly preserving those rights is interpreted as taking away those inchoate rights, then the statute will have arguably done so retroactively. While Congress clearly has the authority to pass laws with retroactive effect,⁷ the courts disfavor the retroactive application of laws without a very clear Congressional signal that they are to do so.⁸

In deciding retroactivity issues, the courts rely on legislative language, legislative history, and precedent.⁹ We discuss below how each of those factors might influence decisions on the question under consideration in this article. Initially, however, we note that there are two leading canons of statutory construction at play in determining retroactive applicability. The first canon is "a court is to apply the law in effect at the time it renders its decision."¹⁰ The second canon is "retroactivity is not favored in the law," and "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."¹¹ Importantly, the Supreme Court has established that the presumption against statutory retroactivity is the appropriate default rule.¹²

Retroactive application of two provisions of the AIA has already been considered by the Federal Circuit. In Rogers v. Tristar Prod., Inc., 102 USPQ2d 1722 (Fed. Cir. 2012)(non-

precedential)(per curiam opinion for a panel that consisted of Circuit Judge Bryson, Senior Circuit Judge Schall, and Circuit Judge Prost), the issue was whether the Fifth Amendment of the U.S. Constitution prohibits applying the AIA’s new “competitive injury” requirement to false marking cases brought by a qui tam relator prior to the law’s enactment.¹³ The Federal Circuit determined that Congress intended the competitive injury requirement to apply retroactively to “cases pending at any level of appeal or review.”¹⁴ On the other hand, the Federal Circuit determined that retroactive application was inappropriate in In re EMC Corp., 677 F.3d 1351, 102 USPQ2d 1539 (Fed. Cir. 2012)(opinion by Circuit Judge Dyk for a panel that also consisted of Chief Circuit Judge Rader and Circuit Judge Moore), which decided an issue related to the AIA’s changes to the joinder rules.¹⁵ The court refused to apply the new AIA joinder provision retroactively, stating that, as a general rule, “we do not give statutes retroactive effect ‘unless Congress clearly indicates its intention to do so.’”¹⁶ These opinions will be discussed in greater detail below to assist in analyzing the fate of 35 USC 141 appeals and 35 USC 146 civil actions.

THE LEGISLATIVE HISTORY OF THE AMENDMENTS TO 35 USC 141 and 35 USC 146 IN RELATION TO INTERFERENCES DECLARED AFTER SEPTEMBER 16, 2012

We have been unable to find any legislative history explicitly discussing the amendments to 35 USC 141 and 146 in relation to judicial review of interferences declared after September 16, 2012. We conducted searches in the Congressional Record and the Congressional Hearings using Lexis® and found nothing on this issue. We conducted similar searches using www.thomas.loc.gov, the online database established and maintained by the Library of Congress. Again, we found nothing concerning judicial review of interferences declared after September 16, 2012.

One piece of the legislative history of the AIA arguably bears on this subject. However, the legislative history in question is ambiguous at best, so we think that it should be accorded little or no weight in deciding the important issue under discussion here.

During a Senate debate, Senator Kyl noted “the continuing need to allow appeals of pending interferences” without specifying only 35 USC 141 appeals to the Federal Circuit.¹⁷ Senator Kyl also asserted that later-declared interferences would be handled as under the pre-AIA law.¹⁸ By extrapolating from his explicit referral to pending interferences, it could be argued that he envisioned no appeals of not-yet-pending interferences. However, the next paragraph of Senator Kyl’s statement mentions impliedly-ongoing 35 USC 146 actions without noting that they would be limited to review of decisions in derivation proceedings or interferences declared prior to September 16, 2012, suggesting that he may have expected judicial review to continue as it had previously existed.¹⁹

THE LIKELY IMPACT OF THE AMENDMENTS TO 35 USC 141 AND 35 USC 146 ON THE AVAILABILITY OF JUDICIAL REVIEW OF DECISIONS IN INTERFERENCES THAT ARE DECLARED AFTER SEPTEMBER 16, 2012

If the amendments to 35 USC 141 and 146 are applied retroactively, judicial review of interferences declared after September 16, 2012 (since September 16, 2012 was a Sunday, no interferences were declared on that date) may simply disappear, similar to what happened to 35 USC 292 qui tam actions pending on the effective date of the AIA amendments to that statute.²⁰

Legislative Language

It has often been held that there must be clear congressional intent to give a statute retroactive effect.²¹ The legislative intent of the AIA in regard to interferences declared after September 16, 2012 can be arguably interpreted both ways. Sec. 3(j) of the AIA,²² which

eliminates references to interferences, does not indicate whether it is supposed to have a retroactive effect. Sec. 3(n) of the AIA, which sets forth the effective date of Sec. 3(j), also does not indicate whether the amendment to interferences has retroactive effect. On the other hand, Sec. 6(f)(3)(c), discussing judicial review of pending interferences under 35 USC 141 and 146, specifically states that appeals “shall be deemed to extend to any final decision in an interference that is commenced before the effective date set forth in paragraph (2)(A) of this subsection [i.e., before September 16, 2012].” This clear eligibility cut-off suggests that PTAB decisions in interferences declared after September 16, 2012 are not reviewable.²³

Legislative History

Statutory text, in isolation, does not always reveal congressional intent.²⁴ Accordingly, the courts often rely upon legislative history in determining congressional intent.²⁵ However, they can only do that if such legislative history exists. As discussed above, there is no clear legislative history to suggest retroactive applicability of the judicial review provisions to interferences declared after September 16, 2012.

Precedent

An analysis of under what circumstances the Federal Circuit has given other statutory amendments retroactive effect is essential in forecasting the fate of judicial review of interferences declared after September 16, 2012.

In Rogers v. Tristar Prod., Inc., supra, the issue was whether the Fifth Amendment of the U.S. Constitution prohibits applying the AIA’s new “competitive injury” requirement to false marking cases brought by a qui tam relator prior to the law’s enactment.²⁶ The Federal Circuit determined that Congress intended the competitive injury requirement to apply retroactively to “cases pending at any level of appeal or review.”²⁷ In making that determination, the court

emphasized a need for clear Congressional intent to give a statute retroactive effect, including the language of the statute, legislative history of the AIA, and precedent. Most notably, the court emphasized that the language “shall apply to all cases, without exception” of the AIA clearly showed Congressional intent to apply the competitive injury requirement to all pending cases in appellate courts.²⁸ According to the court, a statement by Senator Kyl confirmed Congress’s intent for the requirement to “cases pending at any level of appeal or review.”²⁹ However, the facts in Rogers are vastly different from the facts concerning the amendments to 35 USC 141 and 146, since there is no comparable statutory language or legislative history to compel a finding of retroactive applicability.

In re EMC Corp., supra, decided a writ of mandamus seeking to sever and transfer patent claims against petitioners to more appropriate venues on the ground that the claims against them did not arise out of the same transaction or occurrence, as required under Federal Rule of Civil Procedure 20.³⁰ The petition was filed just days after the enactment of the AIA, which provides in relevant part that accused infringers may be joined in one action as defendants or have their actions consolidated for trial only if the allegations of infringement “arise out of the same transaction, occurrence, or series of transactions or occurrences relating to the making, using, importing into the United States, offering for sale, or selling of the same accused product or process.”³¹ The court refused to apply the new AIA joinder provision retroactively, stating that, as a general rule, “we do not give statutes retroactive effect ‘unless Congress clearly indicates its intention to do so.’”³² Interestingly, since the provision involved in In re EMC Corp. is not made retroactive in the language of the relevant Sec. 19(e), the Federal Circuit made it clear that the timing of the petition means that its decision will only govern cases filed before the passage of the AIA.

The question of judicial review of interferences declared after September 16, 2012 is similar to the question involved in Rogers. In Rogers, the court emphasized that the language “shall apply to all cases, without exception” in the AIA clearly showed Congressional intent to apply the competitive injury requirement to all pending cases in appellate courts.³³ In the issue under discussion here, section 6(f)(3)(C) states that judicial review shall apply to interferences pending prior to the AIA’s enactment date. As in Rogers, this could be argued to show Congressional intent to allow judicial review only of interferences declared before September 16, 2012.

THE PTO’S COMMENTS MUDDY THE WATER

The PTO has taken different positions regarding the availability of 35 USC 141 and 35 USC 146 judicial review, despite the identical language for each in section 6(f)(3)(C) of the AIA. Specifically, the PTO stated in its comments published with the initial draft of the rules governing the new inter partes proceedings created by the AIA that “the AIA makes review by the Federal Circuit available under 35 U.S.C. 141 only for proceedings commenced before September 16, 2012.”³⁴ This clear statement supports the interpretation that PTAB decisions in interferences declared after September 16, 2012 are not reviewable under 35 USC 141.

The American Intellectual Property Law Association (hereinafter referred to as “the AIPLA”) noted the PTO’s comment with concern.³⁵ However, the PTO maintained this statement verbatim in the comments to the final rules without addressing the AIPLA’s critical comment. This puzzling silence could be interpreted in at least three different ways. First, it could be interpreted to mean that the PTO considers the issue to be clear (i.e., no judicial review is available, thus no response is necessary). Second, it could be interpreted to mean that the PTO

did not consider the AIPLA's comment to have merit because judicial review is clearly still available. Finally, the PTO's silence could merely indicate that the PTO did not want to tangle publically with one of its most important "customer" organizations.

Although the PTO's comments seem to support termination of judicial review under 35 USC 141 for post-September 16, 2012 interferences, its comments in relation to 35 USC 146 can be interpreted to support continuation of judicial review under 35 USC 146 for these interferences. The PTO asserted that judicial review of interference decisions under 35 USC 146 is available "only if" provisions of Sec. 3(n)(1) of the AIA are not satisfied.³⁶ Sec. 3(n)(1) has two relevant provisions. First, it provides the effective date for Sec. 3 amendments to take effect on March 16, 2013.³⁷ Second, it provides application of Sec. 3 amendments to any patent or application containing a claim with an effective filing date on or after March 16, 2013.³⁸ Accordingly, the PTO's position seems to be that the PTAB's decision in any interference declared after September 16, 2012 is subject to judicial review if the interference involves a patent or an application with an effective filing date before March 16, 2013--even though that position would be contrary to the canon that "a court is to apply the law in effect at the time it renders its decision"³⁹ and to possible interpretation of the statutory language of section 6(f)(3)(C) as discussed above.

Although the PTO's most recent statements in the Federal Register (and as initially proposed in 77 Fed. Reg. 6891) seem clear, the comments of the AIPLA on the proposed rules considered district court review of interferences declared after September 16, 2012 to be unavailable. Specifically, the AIPLA stated that "Civil actions in the district court under the pre-AIA Section 146 over adverse interference decisions were eliminated with amendments to Section 146, which were effective September 16, 2011."⁴⁰

However, there are at least two problems with the AIPLA's interpretation of the PTO comments.

First, the AIPLA bases this interpretation of district court review on a section of the PTO supplemental information that only relates to 35 USC 141 review -- not 35 USC 146 review. The PTO passage the AIPLA refers to states that 35 USC 141 review is available for proceedings started before September 16, 2012, but makes no mention whatsoever of 35 USC 146 review.

Second, the AIPLA makes no mention of the PTO's information regarding 35 USC 146 review included in the comments accompanying the proposed rules. In fact, the next sentence of the passage the AIPLA cites contains direct information about 35 USC 146 review, but the AIPLA apparently overlooked that sentence.

THE EASTERN DISTRICT OF VIRGINIA SUGGESTS THAT SOME FORM OF JUDICIAL REVIEW SHOULD BE AVAILABLE FOR ADMINISTRATIVE DECISIONS OF THE PTO

Interpreting the AIA and PTO rules and comments in a manner to suggest that judicial review is available for interferences declared after September 16, 2012 is in keeping with a recent opinion of District Judge O'Grady of the Eastern District of Virginia. Exela Pharma Sciences, LLC v. Kappos, 12-cv-0469 (Aug. 22, 2012 E.D. Va. 2012). The opinion held that agency actions should have an opportunity for review absent a showing that Congress intended to preclude review in a manner "fairly discernible in the statutory scheme."⁴¹ By way of background, the PTO had revived an international patent application that eventually issued as a patent, and the plaintiff challenged the propriety of the revival in an action against the PTO under the Administrative Procedure Act (hereinafter referred to as "the APA"). The plaintiff was simultaneously a defendant in a patent infringement action brought by the owner of the patent that had matured from the revived application. The plaintiff alleged that the PTO improperly

used a more lenient “unintentional” standard rather than a more exacting “unavoidable” standard in reviving the application.

The PTO moved to dismiss the case on various grounds, including that the PTO’s action was simply unreviewable under the APA via a collateral attack by a third party. Judge O’Grady denied the PTO’s motion to dismiss, asserting that judicial review of a decision in an APA action against the PTO (which, of course, is much more limited than judicial review of an interference decision under either 35 USC 141 or 35 USC 146) was allowable. Judge O’Grady noted that this type of review may not be available if raised as a defense in a case against a different party. However, he asserted that the PTO’s presence as a party in the case before him prevented any inequity. Significantly, Judge O’Grady also pointed out that if there was no judicial review of this decision, there would be no forum in which to challenge the action.

Although specifically directed to review under the APA, we believe the policy underlying this decision (i.e., that a complete absence of recourse is unfair, and that an action where the PTO has the opportunity to defend itself sufficiently addresses the needs of both parties) supports the notion that judicial review of interferences declared after September 16, 2012 should be available.

CONCLUSION AND RECOMMENDATIONS

For the avoidance of doubt, for the avoidance of unnecessary and socially dysfunctional litigation, and to correct what we believe to have been a bozo oversight by Congress, we recommend that the first sentence of 35 USC 146 should be amended to read as follows⁴²:

Any party to an interference or a derivation proceeding dissatisfied with the decision of the Patent Trial and Appeal Board may have remedy by civil action commenced within two months after the decision unless it has appealed to the United States Court of Appeals for the Federal Circuit and such appeal is pending or has been decided.

For the same reasons, we recommend that similar amendments should be made to 35 USC 141(d):

(d) DERIVATION AND INTERFERENCE PROCEEDINGS.--A party to a derivation or interference proceeding who is dissatisfied with the final decision of the Patent Trial and Appeal Board in the proceeding may appeal the decision to the United States Court of Appeals for the Federal Circuit, but such appeal shall be dismissed if any adverse party to such derivation or interference proceeding, within three weeks after the appellant has filed notice of appeal in accordance with section 142, files notice with the Director that the party elects to have all further proceedings conducted as provided in section 146. If the appellant does not, within 30 days after the filing of such notice by the adverse party, file a civil action under section 146, the Board's decision shall govern the further proceedings in the case.⁴³

¹ Copyright 2012 by Charles L. Gholz, Lisa M. Mandrusiak, and Jessica K. Walter; Oblon, Spivak, McClelland, Maier & Neustadt, LLP; Alexandria, Virginia. The views expressed herein are those of the authors and are not necessarily shared by Oblon, Spivak or any of its clients.

² Partner in Oblon, Spivak, McClelland, Maier & Neustadt, LLP. My direct dial telephone number is 703/412-6485, and my email address is cgholz@oblon.com.

³ Associate in Oblon, Spivak, McClelland, Maier & Neustadt, LLP. My direct dial telephone number is 703/412-6492, and my email address is lmandrusiak@oblon.com.

⁴ Section 6(f)(3) reads as follows in relevant part:

(3) PENDING INTERFERENCES. --

* * *

(C) APPEALS. -- The authorization to appeal or have remedy from derivation proceedings in sections 141(d) and 146 of title 35, United States Code, as amended by this Act, and the jurisdiction to entertain appeals from derivation proceedings in section 1295(a)(4)(A) of title 28, United States Code, as amended by this Act, shall be deemed to extend to any final decision in an interference that is commenced before the effective date set forth in Paragraph 2(A) of this subsection [that is, Sunday, September 16, 2012] and that is not dismissed pursuant to this paragraph [based on public comments by the APJs, we believe that it is unlikely that any pending interferences will be dismissed pursuant to paragraph 6(f)(3) of the AIA].

⁵See, e.g., Judge Torczon's statement in his additional views in Pfizer Inc. v. Sanofi-Aventis, Int. No. 105,757, that "while recent legislation has patent interferences fading away, they will be with us at least a decade longer." Paper No. 157, mailed January 5, 2012.

⁶ Although this characterization may be a stretch, the Federal Circuit has previously referred to potential/developing legal concepts in the patent world as inchoate. See Robotic Vision Systems, Inc. v. View Engineering, Inc., 112 F.3d 1163, 1168, 42 USPQ2d 1619, 1624 (Fed. Cir. 1997)(the court explained that "completion of the invention prior to the crucial date, pursuant to an offer to sell that invention would validate what had been theretofore an inchoate, but not yet established bar.").

⁷ See Jan G. Laitos, Legislative Retroactivity, 52 Journal of Urban and Contemporary Law, 81, 86-91 (1997)(discussing laws passed by Congress in terms of prospective or retroactive applicability).

⁸ Landgraf v. USI Film Prods., 511 U.S. 244, 268 (1994) (stating "statutory retroactivity has long been disfavored").

⁹ The authors recognize that volumes may be written about retroactive application of statutes, and they are making an effort to be succinct. For further discussion about retroactivity in general, see, e.g., Laitos, Legislative Retroactivity, 52 Journal of Urban and Contemporary Law, 81 (1997); Michael J. Graetz, Retroactivity Revisited, 98 Harvard Law Review 1820 (1985); Charles B. Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harvard Law Review 692 (1960); and Stephen R. Munzer, A Theory of Retroactive Legislation, 61 Texas Law Review 425 (1982).

¹⁰ Landgraf, 511 U.S. at 264 (1994)(citing Bradley v. School Bd. of Richmond, 416 U.S. 696, 40 L. Ed. 2d 476, 94 S. Ct. 2006 (1974)).

¹¹ Landgraf, 511 U.S. at 264 (citing Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988)).

¹² Landgraf, 511 U.S. at 272.

¹³ Rogers, 102 USPQ2d at 1723.

¹⁴ Rogers, 102 USPQ2d at 1723.

¹⁵ See Sec. 19(d) of AIA.

¹⁶ In re EMC Corp., 677 F.3d at 1356, 102 USPQ2d at 1542 (citing Lowder v. Dep't of Homeland Sec., 504 F.3d 1378, 1384 (Fed. Cir. 2007)).

¹⁷ Many people loosely refer to 35 USC 146 civil actions as “appeals,” and thus this statement might be considered to refer to both 35 USC 141 actions and 35 USC 146 actions.

¹⁸ 157 Cong. Rec. S1377 (daily ed. Mar. 8, 2011)(statement of Sen. Kyl).

¹⁹ That paragraph reads as follows:

In section 6(c)(2) of the bill, section 1295(a)(4)(A) of title 28 is modified to authorize appeals of reexaminations and reviews. Interestingly, current 1295(a)(4)(A) only gives the Federal Circuit jurisdiction over appeals from applications and interferences. It appears that Congress never gave the Federal Circuit jurisdiction over appeals from reexaminations when it created those proceedings. The language of subparagraph (A) is also generalized and clarified, recognizing that the details of what is appealable will be in sections 134 and 141. Also, for logical consistency, language is added to subparagraph (A) making clear that section 145 and 146 proceedings are an exception to the Federal Circuit's otherwise exclusive appellate jurisdiction over applications and interferences under that subparagraph.

²⁰ Rogers v. Tristar Prod. Inc., 102 USPQ2d 1722 (Fed. Cir. 2012) (non-precedential); cf. In re EMC Corp., 677 F.3d 1351, 102 USPQ2d 1539 (Fed. Cir. 2012).

²¹ See, e.g., Landgraf, 511 U.S. at 272 (1994)(“congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”).

²² Sec. 3(j) of the AIA reads as follows, in relevant parts:

3(j)(2)(A) Section 146 of title 35, United States Code, is amended -- (i) by striking “an interference” and inserting “a derivation proceeding”; and (ii) by striking “the interference” and inserting “the derivation proceeding”.

3(j)(4) The section heading for section 146 of title 35, United States Code, is amended to read as follows: §146. Civil action in case of derivation proceedings”.

3(j)(6) The item relating to section 146 in the table of sections for chapter 13 of title 35, United States code, is amended to read as follows: “146. Civil action in case of derivation proceeding.”

²³ The PTO is not reluctant to argue that some of its decisions are simply unreviewable. See Exela Pharma Sciences, LLC v. Kappos, 12-cv-0469 (Aug. 22, 2012 E.D. Va. 2012), discussed further below, where the PTO moved to dismiss the case on various grounds, including that the PTO's action was unreviewable. What administrative agency wouldn't like at least some of its decisions to be unreviewable by those pesky (and sometimes embarrassing) judicial activists!

²⁴ Landgraf, 511 U.S. at 272.

²⁵ Rogers, 102 USPQ2d at 1723; and Boumediene v. Bush, 553 U.S. 723, 738-9 (2008)(Court relied on legislative history to determine whether legislation at issue deprives the federal courts of jurisdiction regarding habeas corpus actions).

²⁶ Rogers, 102 USPQ2d at 1723.

²⁷ Rogers, 102 USPQ2d at 1723.

²⁸ Rogers, 102 USPQ2d at 1723 (citing Leahy-Smith America Invents Act., Pub. L. No. 112-29, sec. 16(b), 299, 125 Stat. 284, 332-33 (2011)(to be codified at 35 USC 292)).

²⁹ Rogers, 102 USPQ2d at 1723 (citing 157 Cong. Rec. S1360-02 at 1372 (Sen. Kyl)).

³⁰ In re EMC Corp., 677 F.3d 1351, 102 USPQ2d 1539 (Fed. Cir. 2012).

³¹ See Sec. 19(d) of AIA.

³² In re EMC Corp., 677 F.3d 1351, 1356, 102 USPQ2d 1539, 1542 (Fed. Cir. 2012)(citing Lowder v. Dep't of Homeland Sec., 504 F.3d 1378, 1384 (Fed. Cir. 2007)).

³³ Rogers, 102 USPQ2d at 1723 (citing Leahy-Smith America Invents Act., Pub. L. No. 112-29, sec. 16(b), 299, 125 Stat. 284, 332-33 (2011)(to be codified at 35 USC 292)).

³⁴ 77 Fed. Reg. 48625 (Aug. 14, 2012).

³⁵ AIPLA Comments on Notice of Proposed Rulemaking “Rules of Practice for Trials Before the Patent Trial and Appeal Board and Judicial Review of Patent Trial and Appeal Board Decisions” (April 9, 2012) at 20-21.

³⁶ *Id.*

³⁷ Sec. 3(n)(1) of AIA reads as follows:

In general.--Except as otherwise provided in this section, the *amendments made by this section shall take effect upon the expiration of the 18-month period beginning on the date of the enactment of this Act, and shall apply to any application for patent, and to any patent issuing thereon, that contains or contained at any time -- (A) a claim to a claimed invention that has an effective filing date as defined in section 100(i) of title 35, United States Code, that is on or after the effective date described in this paragraph; or (B) a specific reference under section 120, 121, or 365(c) of title 35, United States Code, to any patent or application that contains or contained at any time such a claim. [Emphasis added.]*

³⁸ Sec. 3(n)(1) of AIA.

³⁹ Landgraf, 511 U.S. at 264 (citing Bradley v. School Bd. of Richmond, 416 U.S. 696, 40 L. Ed. 2d 476, 94 S. Ct. 2006 (1974)).

⁴⁰ AIPLA Comments on Notice of Proposed Rulemaking “Rules of Practice for Trials Before the Patent Trial and Appeal Board and Judicial Review of Patent Trial and Appeal Board Decisions” (April 9, 2012) at 21.

⁴¹ Exela Pharma Sciences, LLC, 12-cv-0469 (Aug. 22, 2012 E.D. Va. 2012) at 8.

⁴² As long as we were at it, we have also suggested changing “he” to --it--, since parties are generally regarded as being gender neutral; cleaning up the punctuation; and changing “sixty days” to --two months-- in order to permit simplification of 37 CFR 1.304, “**Time for appeal or civil action**,” the PTO’s rule regarding the due date for filing a 35 USC 146 action.

⁴³ As with out proposed amendment to 35 USC 146, we have suggested changing a period measured by a large number of days with a similar period measured by a small number of a shorter time period, since periods measured by a large number of days are a notorious trap for unwary docket clerks.