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In *Wyeth v. Kappos*, the Court of Appeals for the Federal Circuit confirmed that the U.S. Patent and Trademark Office (USPTO) misconstrued the patent term statute 35 U.S.C. § 154(b)(2)(A) since at least 2004, and, as a result, denied countless patentees a portion of the patent term entitled to them. This important decision will result in extensions in patent term to both pending patent applications and recently issued patents where the USPTO has taken more than three years to issue a patent. To correct the USPTO's patent term adjustment calculation for an issued patent, the patentee must file a civil action against the Director in the United States District Court for the District of Columbia **within 180 days after the grant of the patent**. But, what if that 180-day statutory period has expired? As explained below, *General Hospital Corp. v. Dudas* may provide the answer to that very important question.

Patent Term Adjustment (PTA) attempts to retain a patent term of approximately 17-years from issuance of a patent by providing the patentee with a term adjustment in the event the USPTO takes more than three years to issue a patent. The term may be increased for certain other PTO-related delays and decreased for Applicant-related delays.

More specifically, under 35 U.S.C. § 154, the USPTO grants PTA to remedy certain delays that occur during the prosecution of a patent. Section 154(b)(1)(A) of Title 35 provides an applicant with one day of PTA for every day of certain USPTO delays (referred to as A-delays). Section 154(b)(1)(B) provides an applicant with one day of PTA for every day an application is pending before the USPTO for more than three years, subject to certain delays that are attributable to the applicant (referred to as B-delays). In the event that the periods of A delay and B delay overlap, Section 154(b)(2)(A) limits the PTA to the actual number of days the issuance of the patent was delayed.

The USPTO interpreted the language of Section 154(b)(2)(A) to mean that the period of B-delay includes the entire period during which the application was pending before the USPTO and therefore concluded that periods of A-delay *always* overlap with periods of B-delay. As such, the USPTO granted PTA for either A-delay *or* B-delay, whichever is larger, but never for both A-delay *and* B-delay.

In *Wyeth v. Kappos*, Wyeth challenged the USPTO's position that periods of A-delay always overlap with periods of B-delay. The Federal Circuit agreed with Wyeth's argument and ruled that periods of A-delay and B-delay overlap *only if* they occur on the same calendar days. The USPTO posted a notice on its website on January 25, 2010 indicating that it will not seek further review of the *Wyeth* decision. On January 28, 2010, the USPTO posted a notice on its website that it "is providing patentees with the ability to request a recalculation of their patent term adjustment without a fee or petition as is normally required pending completion of necessary modifications to the USPTO's computer program for calculating patent term adjustments. The [USPTO] expects to complete by March 2, 2010, the software modification necessary to comply with the U.S. Court of Appeals for the Federal Circuit's recent decision in Wyeth v. Kappos regarding the overlapping delay provision of 35 USC 154(b)(2)(A). In the meantime, the USPTO will be processing recalculation requests under an interim procedure that is available to a patentee whose patent issues prior to March 2, 2010, and who requests it no later than 180 days after the issue date. This procedure is available only for alleged errors in calculation that are specifically identified in Wyeth."

Anyone with a patent that issued within the last 180-days would be wise to quickly determine whether additional patent term is due because the PTO will not recalculate PTA for those patents without a request from the patentee. Presumably the PTA for patents issuing after March 2, 2010 should be properly calculated, but patentees are still advised to check the calculation. The rules for calculating the patent term adjustment are fairly complex, and, Applicants may want to consult patent counsel for guidance.

A patentee beyond the 180-day statutory period may still have recourse. Finding itself in that situation, The General Hospital Corporation filed a complaint on January 16, 2009 in the U.S. District Court for the District of Columbia asserting that the correct PTA for U.S. Patent No. 7,367,341 should be 515 days rather than the 214-day period determined by the USPTO. Its complaint contends that the lower court's decision, which the Federal Circuit affirmed in *Wyeth v. Kappos*, constituted a change in law sufficient to invoke the doctrine of equitable tolling to permit the filing of its complaint after the expiry of the 180-day statutory period.

The doctrine of equitable tolling preserves a plaintiff's claims when strict application of a statute of limitations would be inequitable. Under the doctrine of equitable tolling, a statute of limitations will not bar a claim if, despite use of due diligence, the plaintiff did not or could not discover the injury until after the expiration of the limitations period. The statute of limitations in this case is the 180-day period provided under 35 U.S.C. § 154(b)(4). To succeed on a claim under the doctrine of equitable tolling, the petitioner must demonstrate "rare and exceptional circumstances" warranting application of the doctrine. The doctrine is not applied where the petitioner failed to diligently pursue relief. Courts typically consider the individual facts and circumstances of each case in determining whether equitable tolling is appropriate.

While a denial of the relief sought by The General Hospital Corporation may make relief for those beyond the 180-day period unlikely, in view of the duty under equitable tolling to diligently pursue relief and the Federal Circuit's decision finalizing the "injury", it is recommend that patentees seeking relief under this theory act diligently and begin seeking recourse.