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## Federal Circuit Panel Majority Calls for *En Banc* Review of Proper Standard of Review for Claim Construction Rulings Made by the U.S. Patent and Trademark Office

### Intellectual Property Client Alert

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*For more information, contact your Patton Boggs LLP attorney or the authors listed below.*

**Scott A. Chambers, Ph.D.**  
[schambers@pattonboggs.com](mailto:schambers@pattonboggs.com)

**Richard J. Oparil**  
[roprail@pattonboggs.com](mailto:roprail@pattonboggs.com)

**Lacy L. Kolo, Ph.D.**  
[lkolo@pattonboggs.com](mailto:lkolo@pattonboggs.com)

WWW.PATTONBOGGS.COM

On Tuesday, the Federal Circuit affirmed an U.S. Patent and Trademark Office (PTO) re-examination decision, upholding the rejection of certain claims of a Flo Healthcare Solutions, LLC patent. In *Flo Healthcare Solutions, LLC v. Kappos*, the Court held that the PTO erred in construing claim terms under 35 U.S.C. §112, ¶6, but the Court agreed with the ultimate decision of the Patent Trial and Appeal Board (formerly the Board of Patent Appeals and Interferences) on claim construction. In applying the claim construction to the prior art cited in the re-examination, the Court reviewed the PTO's legal conclusions without deference.

Judges Plager and Newman filed concurring opinions discussing the standard of review applied to Board claim construction decisions. Both Judges noted that various prior Federal Circuit decisions applied inconsistent standards, mostly without acknowledging that the other standard exists. For one standard, the Federal Circuit gives deference to the PTO Board's prior decision and determines whether the Board's interpretation of the disputed claim language is reasonable, *i.e.*, not arbitrary and capricious. The Federal Circuit at times uses a different standard, stating that claim construction is a question of law that is reviewed *de novo*, *i.e.*, giving no deference to the Board's prior decision. Judge Plager noted that a recent Federal Circuit decision suggested a third possible standard of review for Board claim construction, which on its face appears to be a blend of the other two standards.

Judge Plager stated that although the review standard would not have changed the outcome of the current appeal, "as a matter of basic court law there should be one standard uniformly applied by the Court to Board claim constructions, rather than what may appear to be panel-dependent articulations." Judge Newman further noted that the Federal Circuit was created so all patent appeals would be resolved under a single tribunal and under a single law, thus avoiding circuit splits. Both Judges advocate establishment of a uniform law.

An *en banc* review would determine whether the Board's claim construction is a question of pure law, in which case it should be reviewed without deference, or whether it is a blend of law, fact and judgment. In that case it would be entitled to deferential review. Given that two Judges have highlighted the inconsistent standard, the Federal Circuit may grant an *en banc* review.

A copy of the decision is available [here](#).

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