# Federal Circuit orders en banc review of *Cybor* and standard of review for claim construction

On Friday, the Court of Appeals for the Federal Circuit ordered en banc review to address long-standing questions regarding the standard of review for claim construction in patent cases. In *Lighting Ballast Control LLC v. Philips Electronics North America Corp. et al.*, Nos. 2012-1014, -1015 (Fed. Cir. Mar. 15, 2013), the Court granted plaintiff Lighting Ballast's petition for rehearing en banc. This case may lead to fundamental, far-reaching changes in patent law and patent litigation strategies.

The core issue under review is whether the Federal Circuit should afford any deference to district court rulings on claim construction. The Federal Circuit has long held that construing the claim terms of a patent presents a pure question of law, which is therefore subject to *de novo* review on appeal with no deference to a district court's conclusions. Specifically, in *Cybor Corp. v. FAS Technologies, Inc.*, the full Court held that, "as a purely legal question, we review claim construction *de novo* on appeal including any allegedly fact-based questions relating to claim construction." 138 F.3d 1448, 1456 (Fed. Cir. 1998) (en banc). Critics of this rule have noted that district courts must often resolve highly factual issues to construe patent claims (such as weighing the credibility of experts), and that *de novo* review has contributed to a high reversal rate of claim construction rulings by the Federal Circuit.

In *Lighting Ballast*, the original Federal Circuit panel addressed claim construction of a means-plus-function term under 35 U.S.C. § 112 ¶ 6. The patent at issue includes the claim phrase "voltage source means." The trial court construed the claim, initially ruling that the phrase was a means-plus-function term, and that it was indefinite because the patent lacked corresponding structure for the term. However, on reconsideration, and after hearing expert testimony, the district court ruled that "voltage source means" was *not* a means-plus-function term, finding that the term had an ordinary meaning that corresponded to a class of structures. In a short, nonprecedential opinion, the Federal Circuit reversed, holding that the district court's initial decision was correct, and that the claims were indefinite.

In its Friday order, the Court posed the following expansive questions for briefing:

> a. Should this court overrule *Cybor Corp. v. FAS Technologies, Inc.*, 138 F.3d 1448 (Fed. Cir. 1998)?
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> b. Should this court afford deference to any aspect of a district court's claim construction?
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> c. If so, which aspects should be afforded deference?

The opening brief is due 45 days from the order. The Court also invited the U.S. Patent and Trademark Office and other amici curiae to file briefs. Oral argument has not been scheduled but will likely take place this summer.

If the Court overturns *Cybor*, the decision could greatly influence patent litigation. Although ***who*** conducts claim construction will not change (*i.e.*, the court), ***how*** that construction is conducted may become even more important because claim construction rulings may be harder to overturn on appeal. The order also raises questions about the status of pending cases, such as whether the Federal Circuit will stay appeals involving claim construction until it decides *Lighting Ballast*.

To find out how the Federal Circuit's en banc order in *Lighting Ballast* affects your interests, please contact your usual Ropes & Gray attorney or one of the following Ropes & Gray attorneys:

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