Interactions of New Proceedings With Litigation (continued)

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Stays In Re-Exam Proceedings

- LegalMetric data from June 1991-Jan. 2013 (data provided courtesy of Finnegan)
  - Approx 59% win rate for movants on contested motions
  - 1355 decisions on stays
    - 770 granted
    - 53 granted in part
    - 532 denied
Stays in Re-Exam, cont’d

- District with most decisions N.D.Ca. (133 decisions)
  - >60% grant rate
- E.D.Tx. (67 decisions)
  - <30% grant rate
Stays post-AIA

- As of March 2013, granted in 61% of IPR cases (small n)
- As of April, granted in 2 CBM cases (emphasis on Schumer floor testimony)
  - “Too many district courts have been content to allow litigation to grind on while a reexamination is being conducted, forcing the parties to fight in two fora at the same time. This is unacceptable, and would be contrary to the fundamental purpose of the Schumer-Kyl amendment to provide a cost-efficient alternative to litigation.”
Assuming stay, how should district courts treat PTO decisions?

- If PTO rules patent invalid, and CAFC affirms, then presumably out
- What if PTO finds patent valid?
  - Does claim construction used by PTO apply?
Appeals to the CAFC: deference to results of new proceedings?

- What about law?
- *Chevron v. NRDC* (1984) (defer to “reasonable” agency legal interpretations)
  - *Mead* (2001): *Chevron* applies to legal determinations where proceeding by agency is “relatively formal” (e.g. trial-type)
Deference, cont’d

- PTO claim construction and deference
  - PTO, courts have different approaches to claim construction
  - In general, CAFC in flux on deference
  - Judge Plager, additional views in Flo HealthCare Solutions v. Kappos, 697 F.3d 1367 (Fed. Cir. 2012) (appeal from re-exam)
  - PTO argues for deference to its claim construction (is PTO’s construction of disputed claim language “reasonable” in light of specification)