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PTAB Bar Association Annual Conference

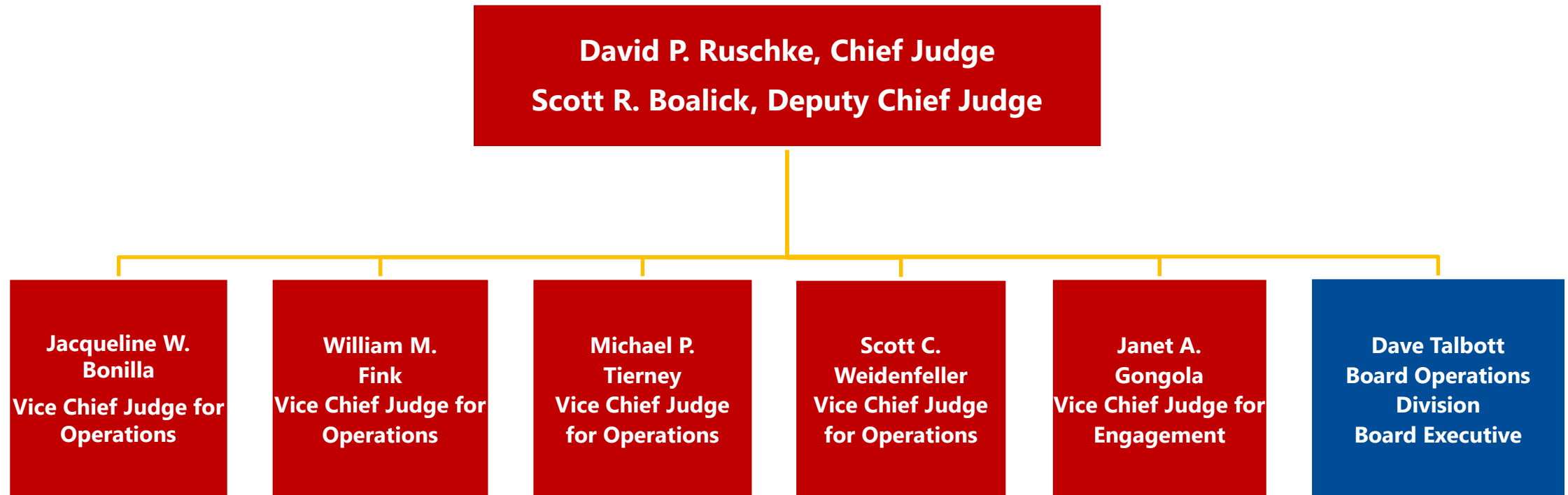
Year 2: The Continuing Evolution of PTAB

David P. Ruschke
Chief Administrative Patent Judge
March 22, 2018

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Patent Trial and Appeal Board Organizational Structure



Overview

1. *Ex Parte* Appeal Statistics

2. AIA Trial Statistics

3. Data Studies

4. New Jurisprudence

5. New PTAB Website



A detailed technical drawing of a mechanical assembly, likely a piston and crank mechanism, rendered in a light gray line-art style. The drawing includes various numbered callouts (e.g., 22, 24, 26, 30, 32, 34, 36, 40, 50, 52, 68, 80, 82, 84, 86) pointing to different components. The background is a dark blue gradient.

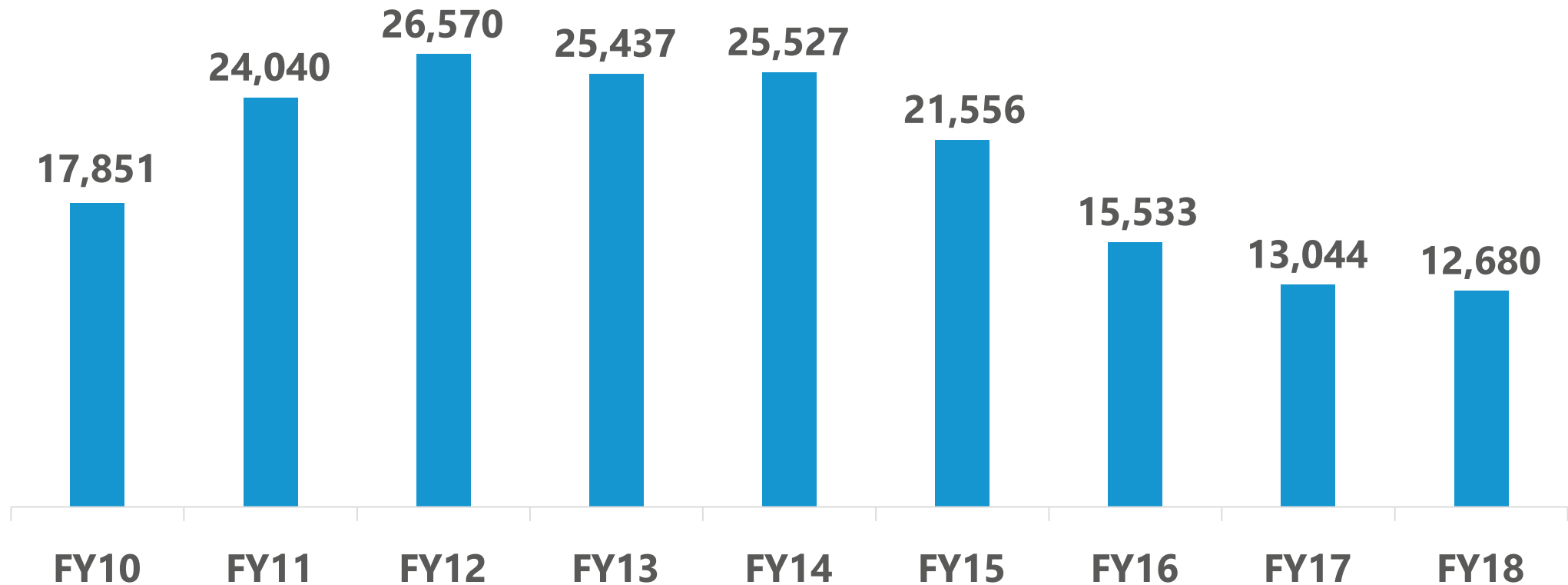
***Ex Parte* Appeal Statistics**

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Pending Appeals

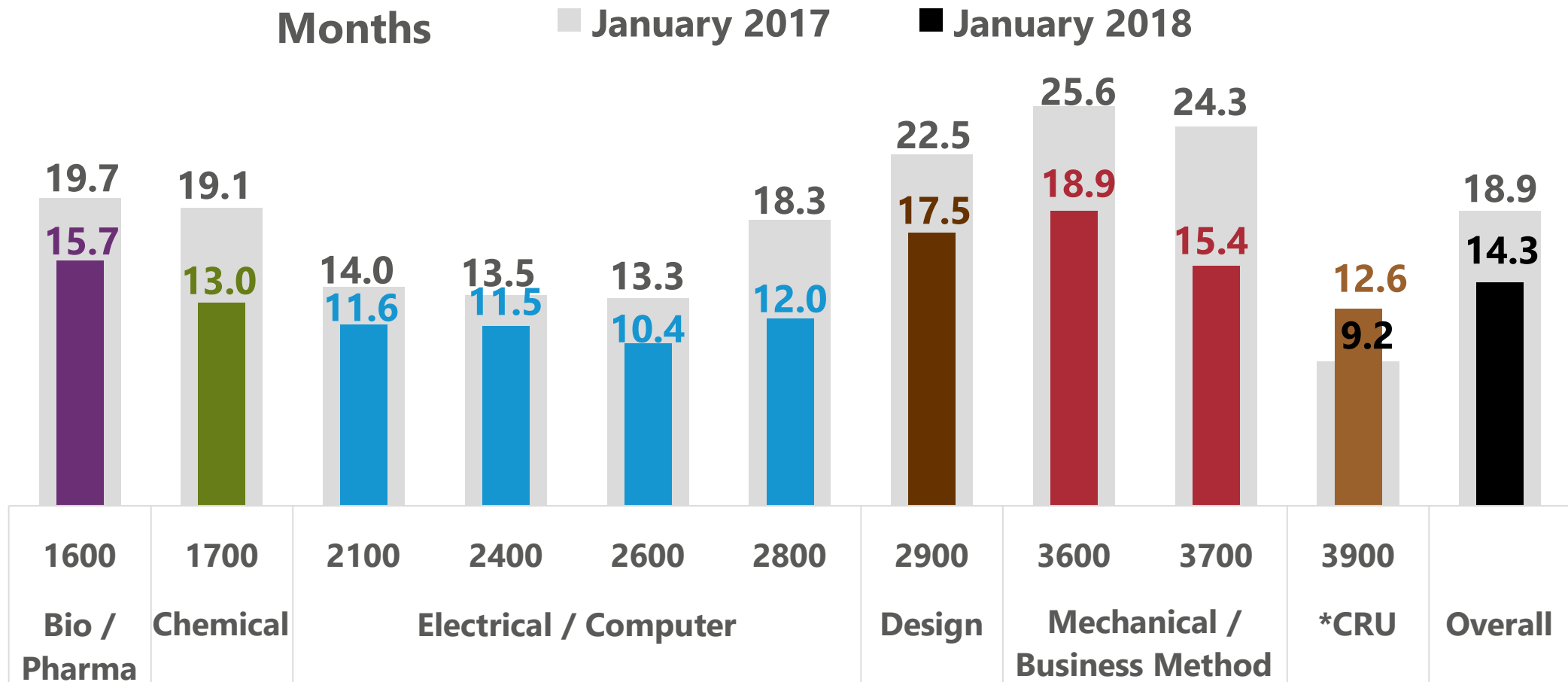
(FY10 to FY18: 9/30/10 to 1/31/18)



Note: FY17 pending changed from 13,034 to 13,044 due to an internal end of FY18 Q1 audit.

Pendency of Decided Appeals in FY17 and FY18

(Pendency of appeals decided in January 2017 compared to appeals decided in January 2018)



Pendency is calculated as average months from Board receipt date to final decision.

*CRU (Central Reexamination Unit) includes ex parte reexams, inter partes reexams, supplemental examination reviews and reissues from all technologies.

***Ex Parte* Appeal Highlights**

- Reduced *ex parte* appeal inventory by 50% from a high of 26,570 in FY12 to 12,680 in FY18
- Overall pendency has been reduced to approximately 14 months with electrical/computer case pendency at approximately 12 months

A detailed technical drawing of a mechanical assembly, likely a multi-layer printed circuit board (PCB) or a complex electronic component. The drawing features numerous hatched areas representing different materials or cross-sections. Various parts are labeled with reference numerals such as 80, 86, 84, 82, 40, 36, 22, 26, 68, 24, 30, 34, 32, 52, and 50. The drawing is oriented horizontally and occupies the upper two-thirds of the slide.

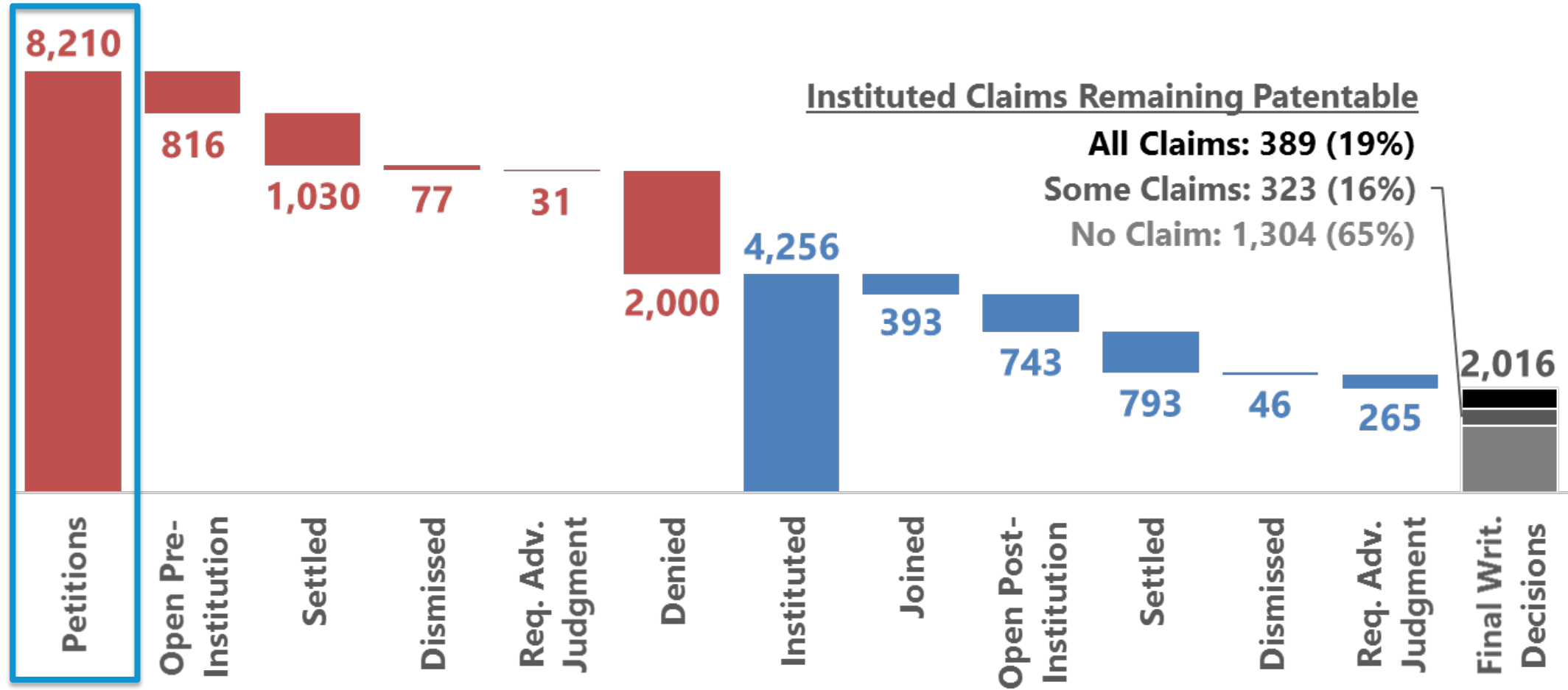
AIA Trial Statistics

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Status of Petitions

(All Time: 9/16/12 to 2/28/18)

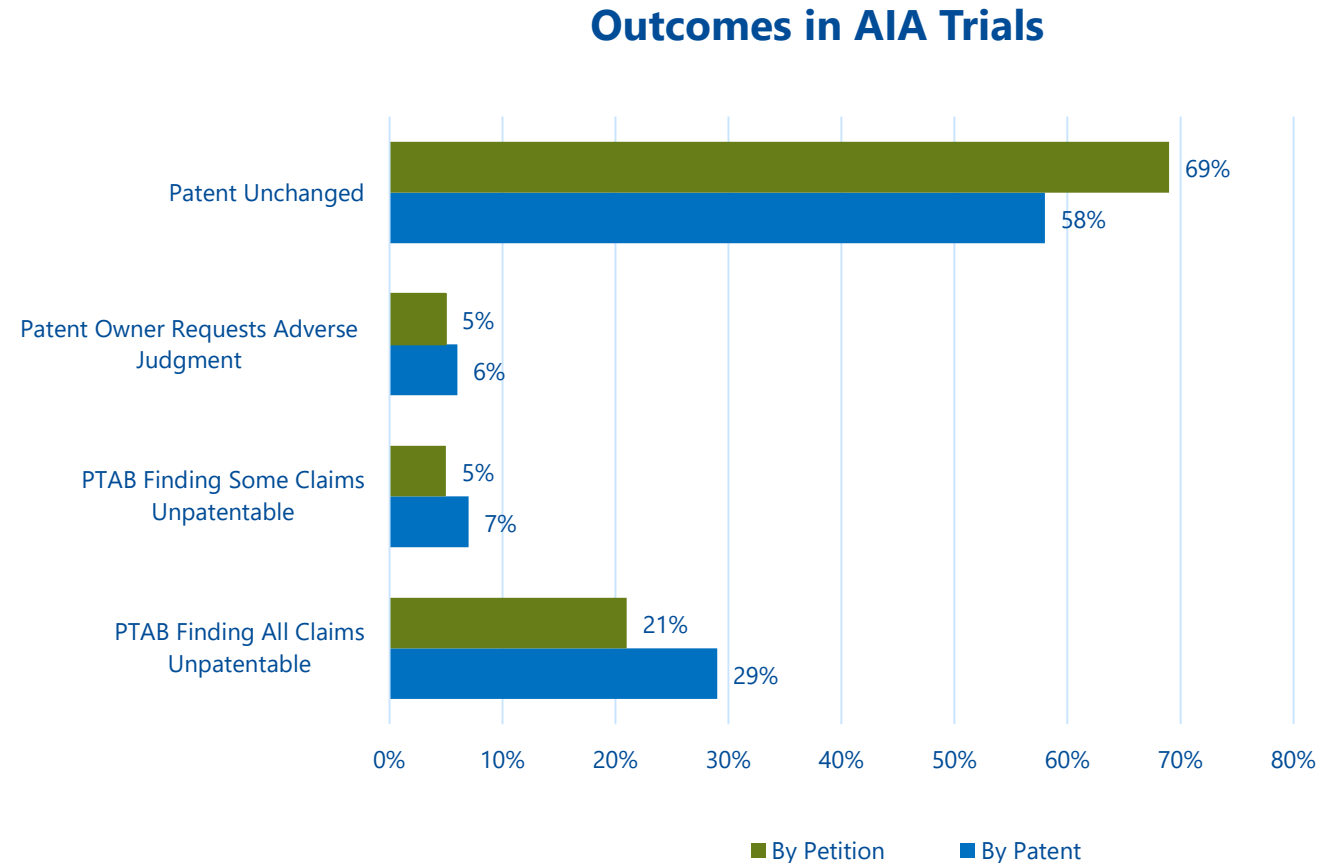


These figures reflect the latest status of each petition. The outcomes of decisions on institution responsive to requests for rehearing are incorporated. Once joined to a base case, a petition remains in the Joined category regardless of subsequent outcomes.

Multiple Petition Study

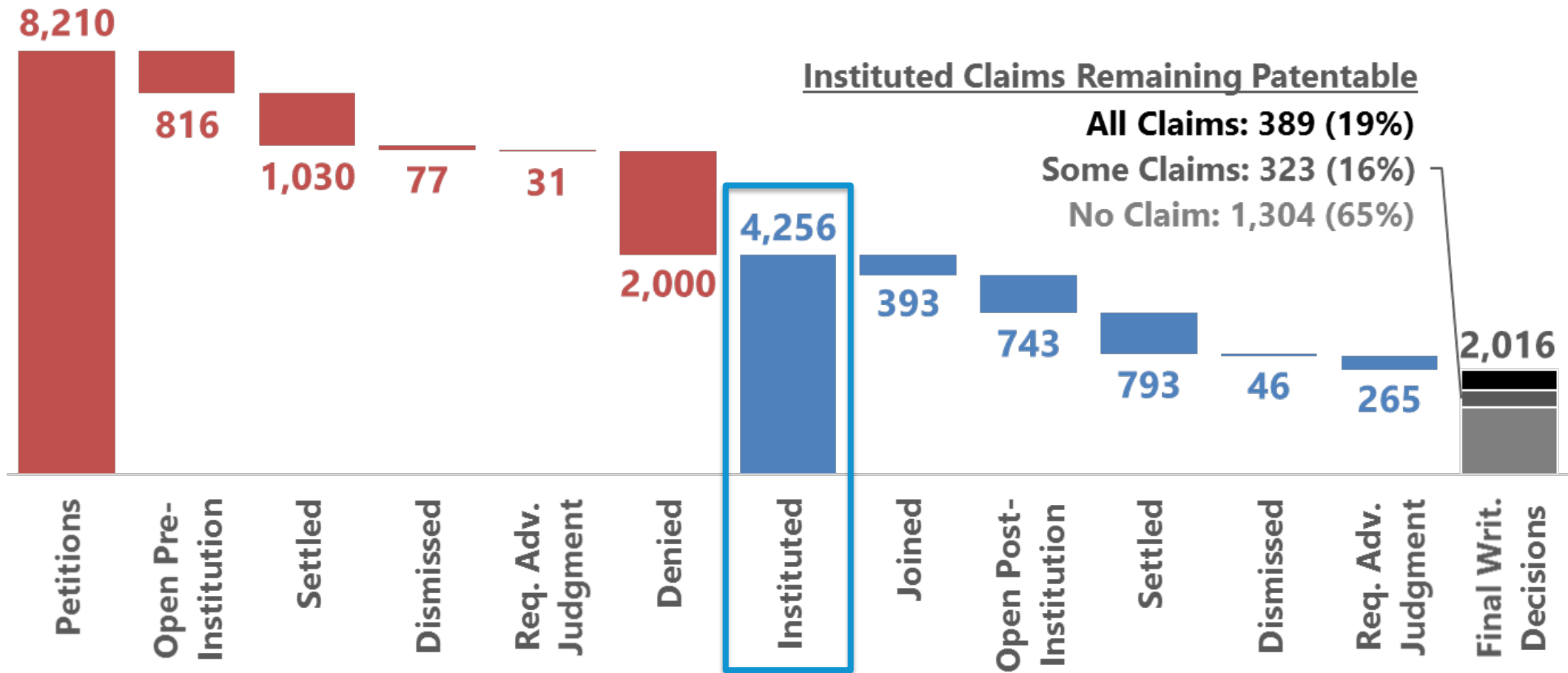
Ultimate Outcome

- *69% of all petitions result in a patent being unchanged; 58% of patents are unchanged at the end of one or more AIA proceedings*
- *“**By patent**” accounts for whether any one petition against particular patent results in any unpatentable claims*
- *“**By petition**” accounts for whether a particular petition results in any unpatentable claims*



Status of Petitions

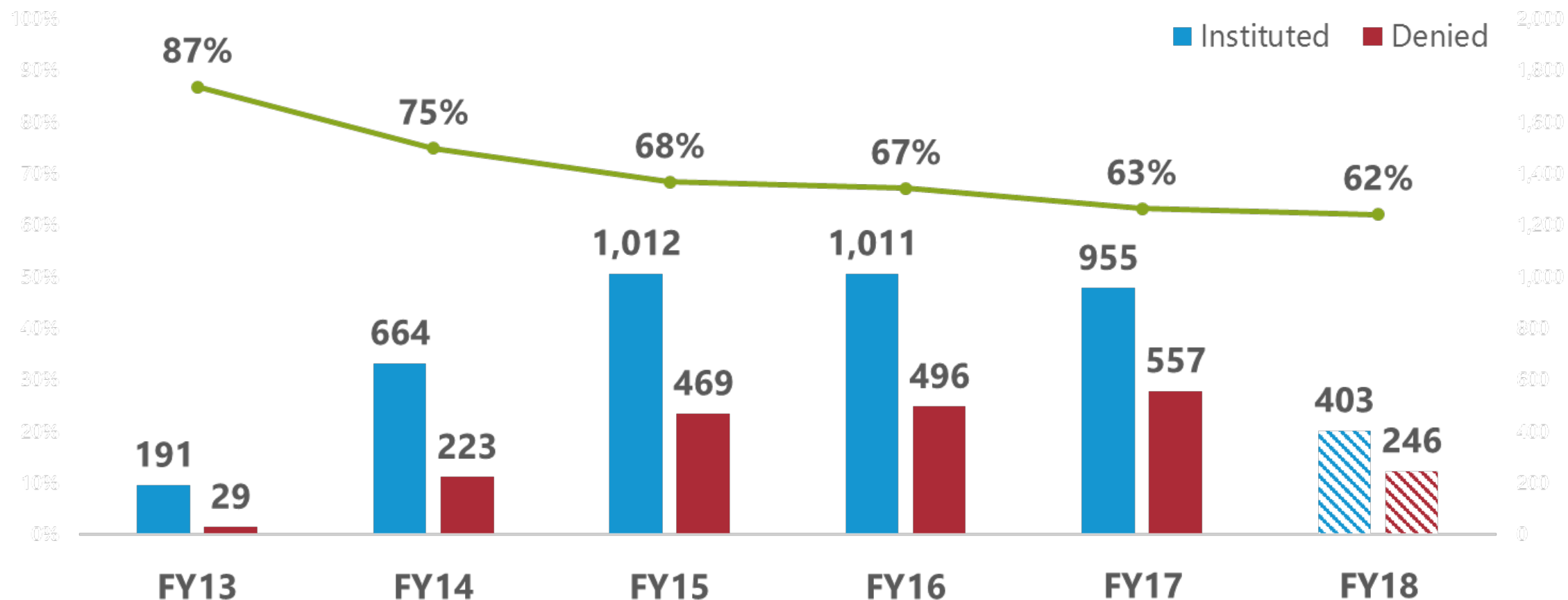
(All Time: 9/16/12 to 2/28/18)



These figures reflect the latest status of each petition. The outcomes of decisions on institution responsive to requests for rehearing are incorporated. Once joined to a base case, a petition remains in the Joined category regardless of subsequent outcomes.

Institution Rates

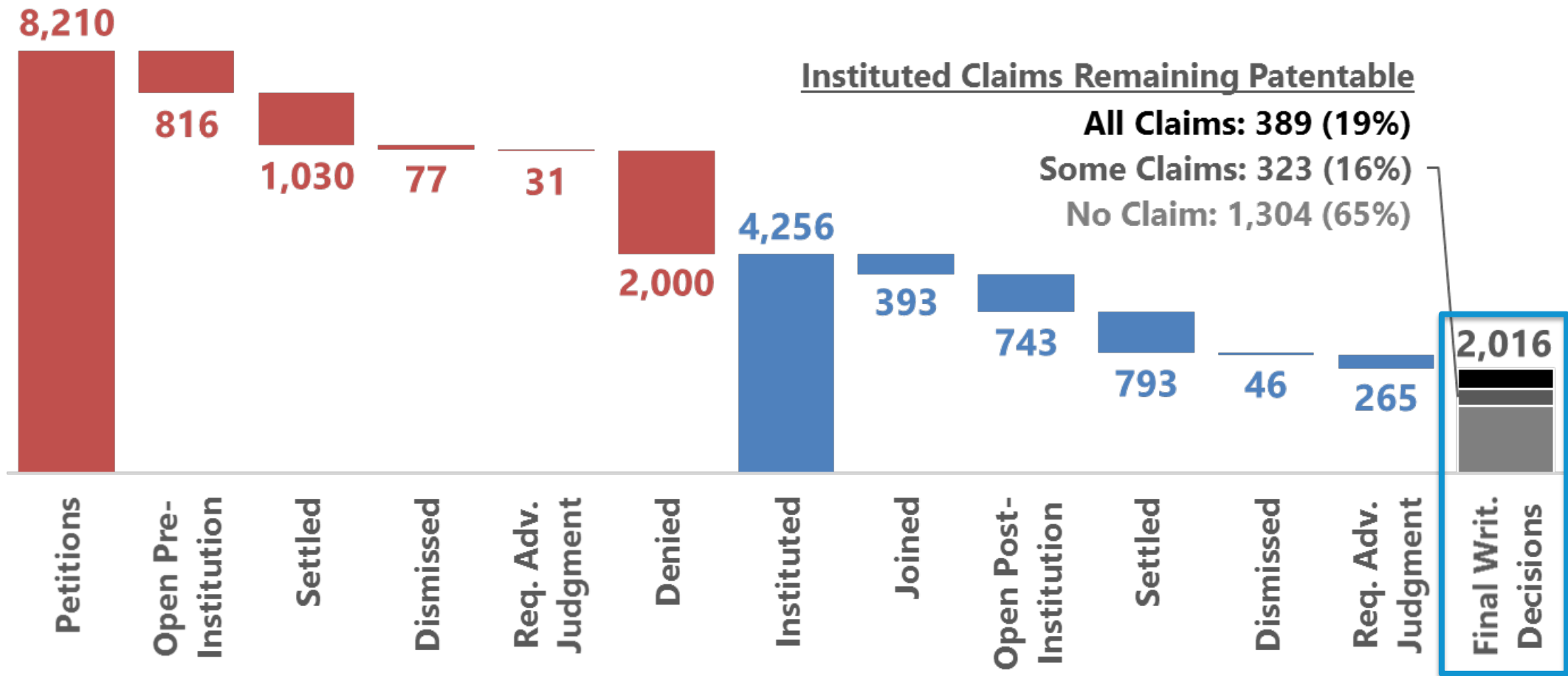
(FY13 to FY18: 10/1/12 to 2/28/18)



Institution rate for each fiscal year is calculated by dividing petitions instituted by decisions on institution (i.e., petitions instituted plus petitions denied). The outcomes of decisions on institution responsive to requests for rehearing are excluded.

Status of Petitions

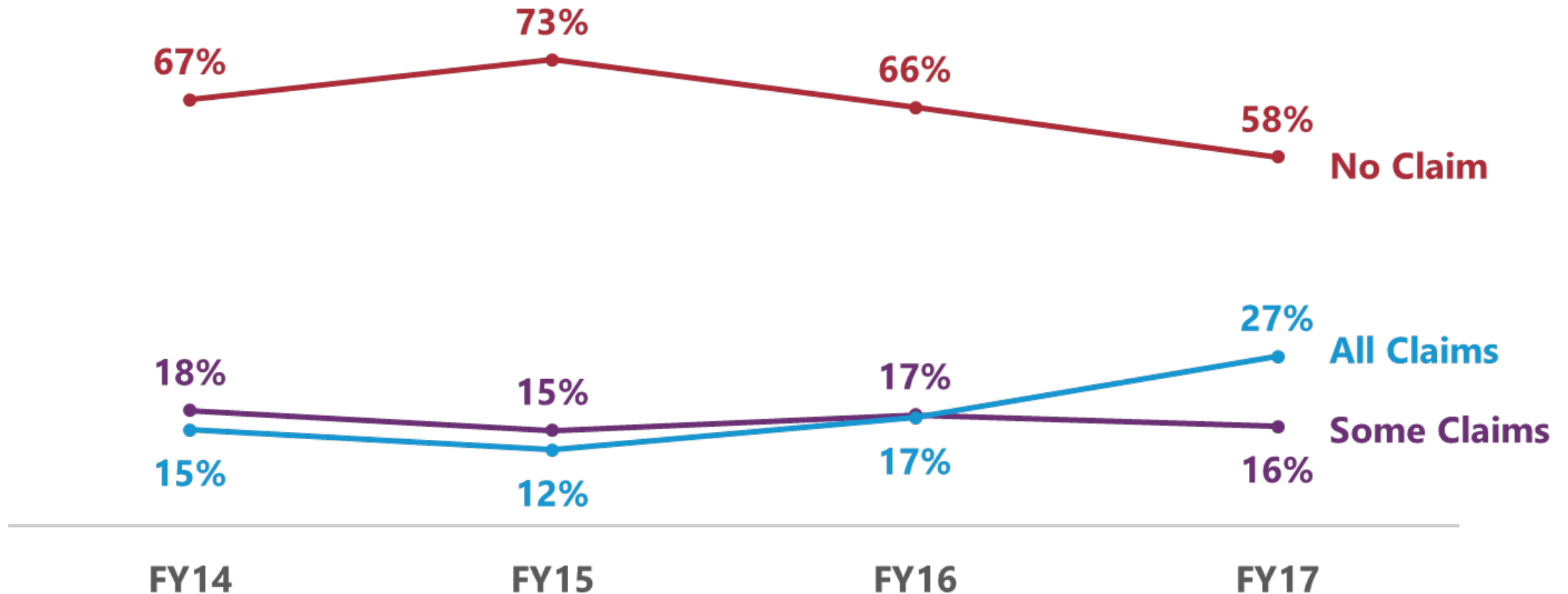
(All Time: 9/16/12 to 2/28/18)



These figures reflect the latest status of each petition. The outcomes of decisions on institution responsive to requests for rehearing are incorporated. Once joined to a base case, a petition remains in the Joined category regardless of subsequent outcomes.

Final Written Decisions

Percent of Decisions by Instituted Claims Remaining Patentable
(FY14 to FY17: 10/1/13 to 9/30/17)



Joined cases are excluded.

AIA Trial Statistics Highlights

- 58% of patents challenged in AIA trials are unchanged
- Only approximately 62% of cases reaching the institution phase are instituted
- The percentage of final written decisions where no instituted claim remains patentable decreased from 73% in FY15 to 58% in FY17

A detailed technical drawing of a mechanical assembly, likely a piston and crank mechanism, rendered in a light gray line-art style. The drawing includes various numbered callouts (e.g., 18, 22, 24, 26, 32, 34, 36, 40, 52, 68, 80, 82, 84, 86) pointing to different components. The background is a dark blue gradient.

Data Studies

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A detailed technical drawing of a mechanical assembly, likely a multi-layer printed circuit board (PCB) or a similar electronic component. The drawing is rendered in a light gray line-art style against a white background. It features numerous rectangular and circular components, some of which are labeled with numbers such as 80, 86, 84, 82, 40, 36, 22, 26, 68, 24, 30, 34, 32, 52, and 50. The components are interconnected by various lines and patterns, suggesting a complex internal structure or wiring. The overall layout is dense and technical, typical of a patent drawing or a detailed engineering schematic.

Multiple Petition Study

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Methodology

- Reviewed all IPR, PGR, and CBM petitions filed on or before 6/30/2017
- Covered 7,168 petitions and their associated:
 - 4,376 patents;
 - 1,633 patent owners; and
 - 1,423 petitioners
- Studied how many petitions and petitioners challenged each patent, how each petition related to other petitions, and the net result for each challenged patent

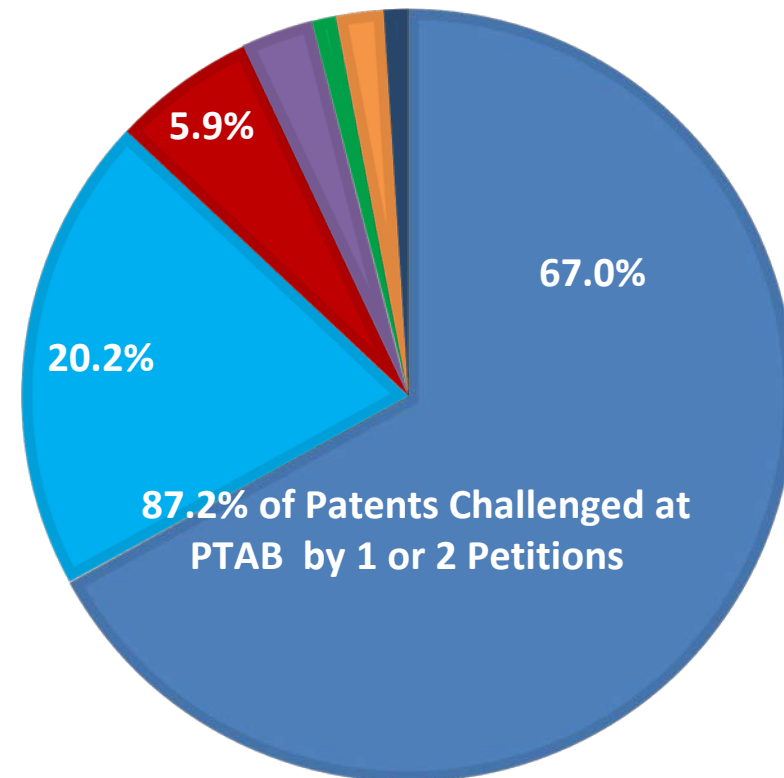
Multiple Petition Study

Petitions Per Patent

No. of Petitions per Patent	Patents	% of Total
1	2932	67.0%
2	885	20.2%
3	256	5.9%
4	142	3.2%
5	54	1.2%
6	52	1.2%
7 or more	55	1.3%
Total	4376	100%

NUMBER OF PETITIONS PER PATENT

■ 1 ■ 2 ■ 3 ■ 4 ■ 5 ■ 6 ■ 7 or more



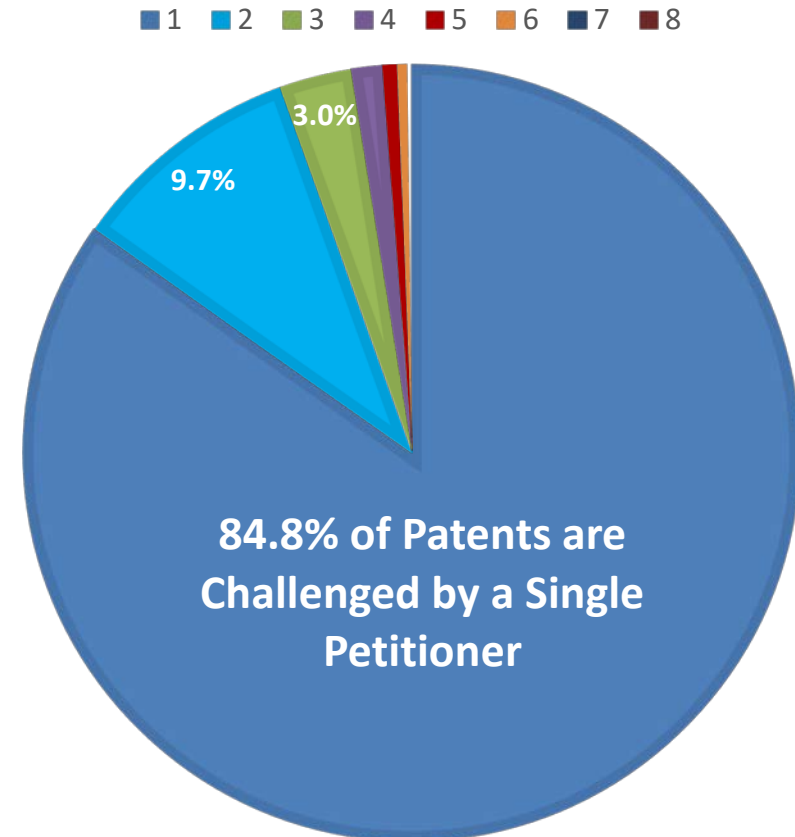
Data Through 6/30/17

Multiple Petition Study

Petitioners Per Patent

No. of Petitioners vs. Patent	No. of Patents	% Patents
1	3711	84.8%
2	424	9.7%
3	132	3.0%
4	59	1.3%
5	28	0.6%
6	17	0.4%
7	2	<0.1%
8	3	<0.1%
Total	4376	100%

NUMBER OF **PETITIONERS** PER PATENT



Data Through 6/30/17
Percentages may not add to 100% due to rounding

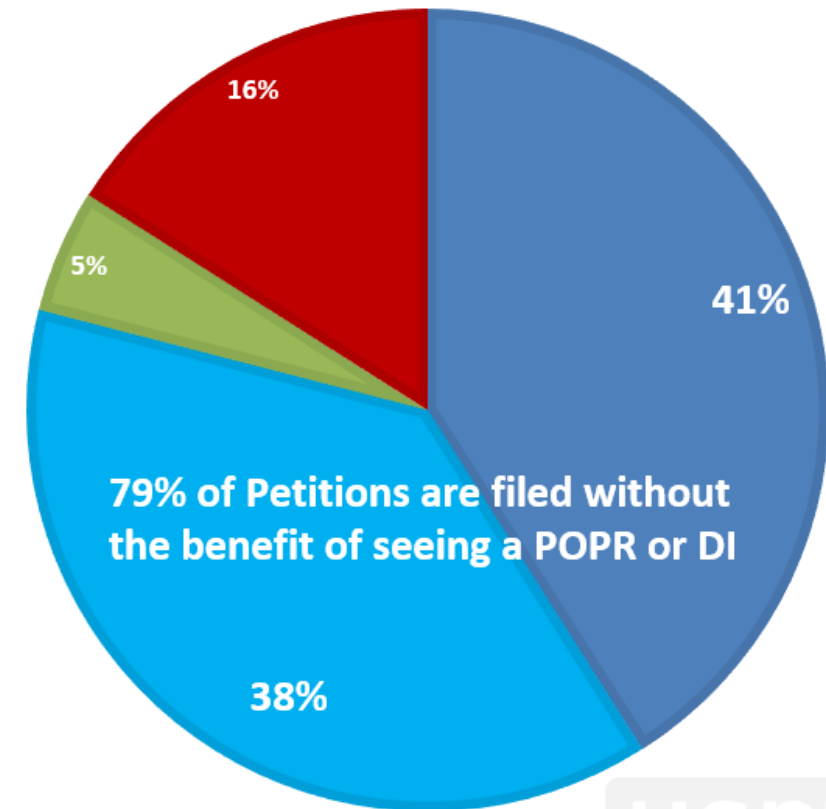
Multiple Petition Study

*When **Petitions** are Filed*

Timing of Petition	No. of Petitions	% of Petitions
Single Petition Filed	2932	41%
Multiple Petitions Filed On or Near Same Day	2685	38%
Multiple Petitions Filed After POPR, But Before DI	381	5%
Multiple Petitions Filed After DI	1170	16%
Total	7168	100%

WHEN **PETITIONS** ARE FILED

- Single Petition vs. Patent
- Multiple Petition Filed after POPR
- Multiple Petition Filed On or Near Same Day
- Multiple Petition Filed After DI



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Multiple Petition Study Highlights

- 84.8% of patents are challenged by a single petitioner
- 87% of patents are challenged by 1 or 2 petitions
- 85% of IPRs have a co-pending district court case
- 79% of petitions are filed before any Patent Owner Response or a Decision on Institution
- 95% of petitions are filed in a given petitioner's first round
- Often a petitioner could not have filed a petition earlier or may be prompted to file later because of the litigation circumstances
- Institution rate by patent (FY17: 70%) is only slightly higher than by petition (FY17: 64%)
- 58% of patents challenged at the PTAB are unchanged

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Motion to Amend Study

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Methodology

- Reviewed all IPR, PGR, and CBM petitions filed on or before 9/30/2017
- Covered 3,491 pending and completed trials and their associated 313 motions to amend
- Studied how many motions to amend have been filed, the number of motions to amend that were granted, granted-in-part, and denied, and the reasons the Board provided for denying entry of substitute claims

Motion to Amend Study

	Reason for Denying Entry	# of Motions	% of Motions
§102/103	Anticipated or Obvious Over Art of Record	67	40%
§102/103/ 112/316	Multiple Statutory Reasons *All included at least 102, 103, and/or 112 as a reason for denial	39	23%
§101	Non-Statutory Subject Matter	12	7%
§112	Written Description	10	6%
§112	Enablement	3	2%
§112	Definiteness	1	1%
§316	Claims Enlarge Scope of Patent	9	5%
§316	Unreasonable Number of Substitute Claims	3	2%
	Procedural Reasons	22	13%
	<i>Total Motions to Amend Denied (in whole or in part)</i>	166	100%

Apple Inc. v. Realtime Data LLC, IPR2016-01737

A Successful Motion to Amend

- Why was this motion to amend successful?
 - Patent Owner requested to replace 55 unpatentable claims for 55 substitute claims
 - Patent Owner proposed a narrowing limitation in each substitute claim in direct response to the grounds of unpatentability involved in the trial
 - Patent Owner identified support in the specification for the narrowing limitations
- 118. A method for providing accelerated loading of an operating system in a computer system, the method comprising:
 - preloading a portion of boot data in a compressed form into a volatile memory, the portion of boot data in the compressed form being associated with a portion of a boot data list for booting the computer system into a memory, wherein the preloading comprises transferring the portion of boot data in the compressed form into the volatile memory, and wherein the preloading occurs during the same boot sequence in which a boot device controller receives a command over a computer bus to load the portion of boot data;
 - accessing the preloaded portion of the boot data in the compressed form from the volatile memory;
 - decompressing . . . ;
 - and updating . . .



Expanded Panel Study

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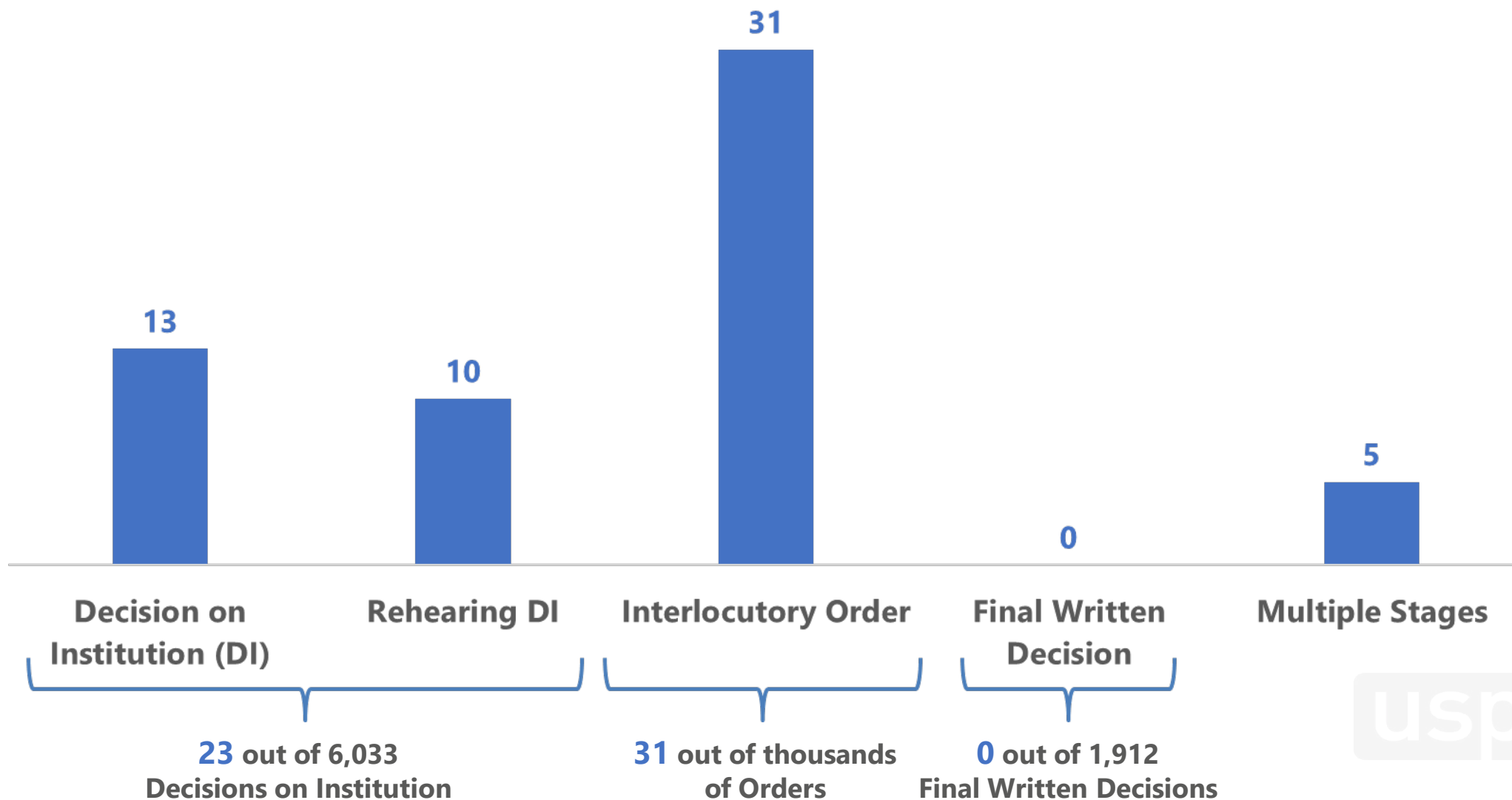


Methodology

- Reviewed IPR, PGR, and CBM proceedings filed on or before 12/31/2017, which covers 7,930 Petitions and their associated:
 - 6,033 Decisions on Institution
 - 1,912 Final Written Decisions
 - Thousands of Interlocutory Orders
- Identified and studied the 59 panels that were expanded pursuant to SOP1
- Studied how many panels were expanded, when the panel expansion occurred, the reason for expansion, and the result of the expansion

Expanded Panels Are Rare

(7930 Total Petitions through 12/31/2017)



Expanded Panel Study Highlights

- Expanded panels are very **rare**
- Most expanded panel decisions issued as **original decisions**, not decisions on rehearing
- Panels were expanded for **guidance** and **consistency**:
 - to provide forward-looking guidance on reoccurring issues; and/or
 - to treat similarly situated parties the same
- Underlying result remained the **same** after panel expansion on rehearing, except for *Target* and *Nidec*, both of which address same-party joinder

A detailed technical drawing of a mechanical assembly, likely a piston and crank mechanism, rendered in a light gray line-art style. The drawing includes various numbered callouts (e.g., 22, 24, 26, 30, 32, 34, 36, 40, 50, 52, 68, 80, 82, 84, 86) pointing to different components. The background is a dark blue gradient.

Orange Book-listed Patent Study

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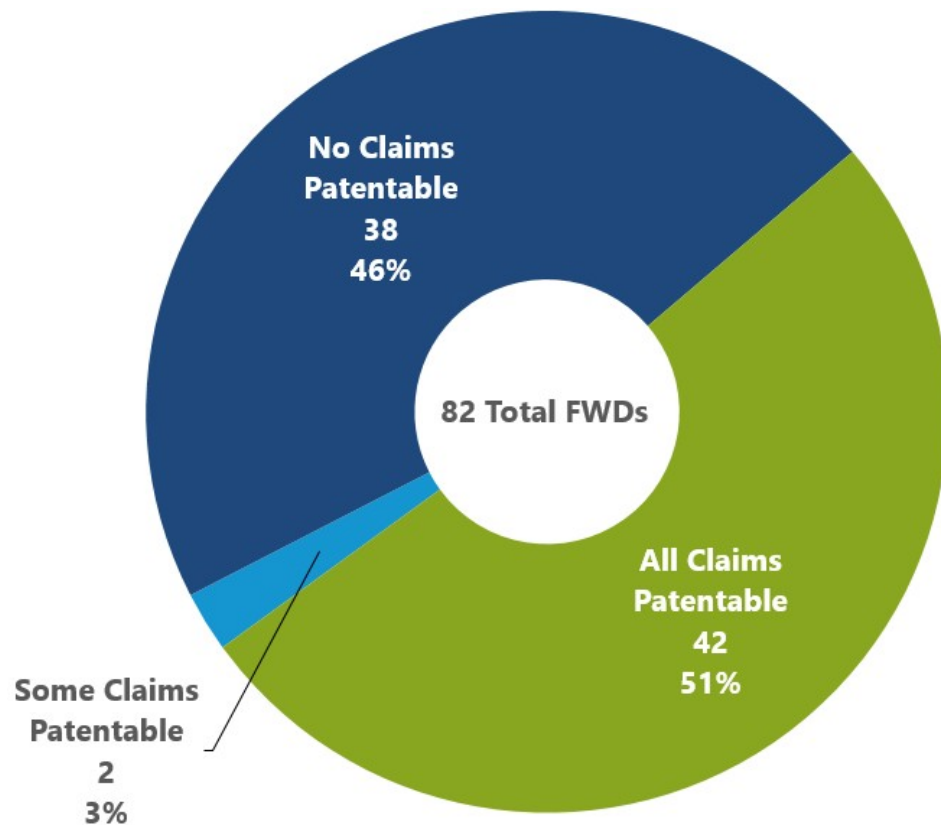
Methodology

- Reviewed AIA trial proceedings filed on or before 9/30/2017 that challenged an Orange Book-listed patent
- Identified and studied the 389 Orange Book-listed patents challenged at the PTAB

Status of Instituted Claims in Final Written Decisions

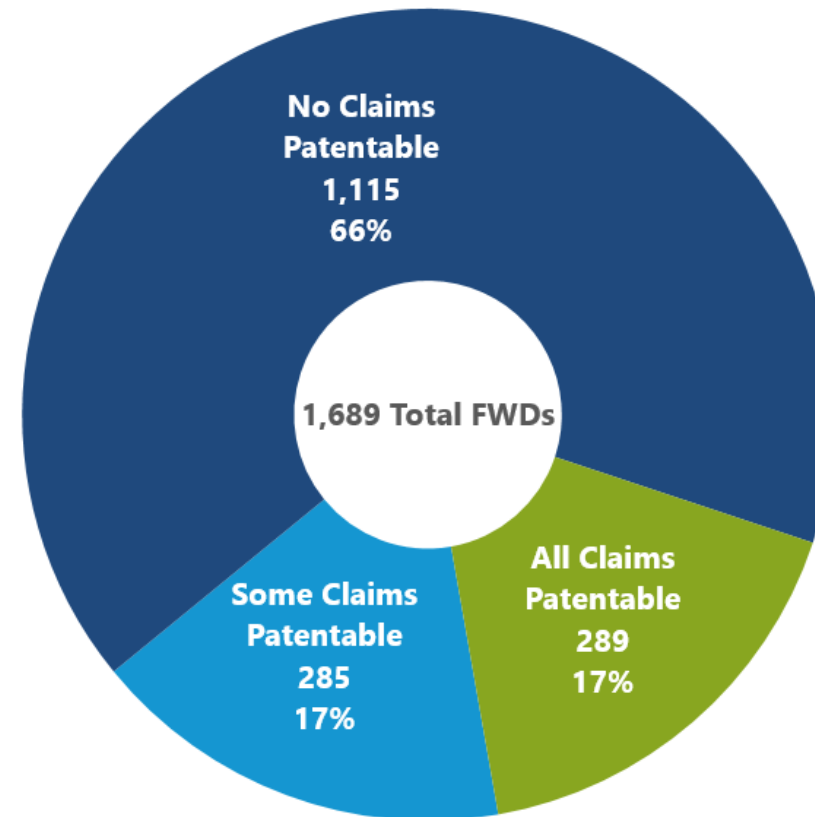
(As of End FY17: 9/16/12 to 9/30/17)

Orange Book-listed Patents



All Other Technologies

(including misc. bio-pharma)



Orange Book-listed Patent Study Highlights

- 83% of all petitions challenging Orange Book-listed patents result in patent being unchanged by PTAB
- The cumulative institution rate for Orange Book petitions (66%) is essentially the same as the cumulative overall institution rate (68%)
- Just over half of all final written decisions for petitions challenging Orange Book-listed patents find all claims patentable
- 80% of all challenged Orange Book-listed patents have 1 or 2 petitions, compared to 87% of all challenged patents
- 85% of all challenged Orange Book-listed patents have 1 or 2 petitioners, compared to 94% of all challenged patents

A detailed technical drawing of a mechanical assembly, likely a piston and crank mechanism, rendered in a light gray line-art style. The drawing includes various numbered callouts (e.g., 18, 22, 26, 32, 34, 36, 40, 52, 68, 80, 82, 84, 86) pointing to different components. The background is a solid dark blue.

New Jurisprudence

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Precedential Decisions: General

- AIA § 18, pre-institution statutory disclaimer
 - [Facebook, Inc. v. Skky, LLC](#)
 - Case CBM2016-00091, Paper 12 (Sept. 28, 2017)
- § 112(2), indefiniteness during prosecution
 - [Ex parte McAward](#)
 - Appeal 2015-006416 (Aug. 25, 2017)
- AIA § 311(a), assignor estoppel
 - [Athena Automation Ltd. v. Husky Injection Molding Sys. Ltd.](#)
 - Case IPR2013-00290, Paper 18 (Oct. 25, 2013)

Precedential Decision: Discretion to Institute under § 314(a)

- [General Plastic Indus. Co. v. Canon Kabushiki Kaisha](#)

- Case IPR2016-01357 et al., Paper 19 (Sept. 6, 2017)

- § 314(a) factors considered:

1. whether the same petitioner previously filed a petition directed to the same claims of the same patent;
2. whether at the time of filing of the first petition the petitioner knew or should have known of the prior art asserted in the second petition;
3. whether at the time of filing of the second petition the petitioner already received the patent owner's preliminary response to the first petition or received the Board's decision on whether to institute review in the first petition;
4. length of time that elapsed between the time the petitioner learned of the prior art asserted in the second petition and the filing of the second petition;
5. whether the petitioner provides adequate explanation for the time elapsed between the filings of multiple petitions directed to the same claims of the same patent;
6. finite resources of the Board; and
7. requirement under 35 U.S.C. § 316(a)(11) to issue a final determination not later than 1 year after the date on which the Director notices institution of review

Informative Decisions: 315(b)

- AIA § 315(b), insufficient funds at filing
 - [Luv N' Care, Ltd. v. McGinley](#),
 - Case IPR2017-01216, Paper 13 (Sept. 18, 2017)
- AIA § 315(b), district court motion to amend complaint
 - [Amneal Pharmaceuticals, LLC. v. Endo Pharmaceuticals Inc.](#)
 - Case IPR2014-00360, Paper 15 (June 27, 2014)

Informative Decisions: Discretion to Institute under § 325(d)

- [Becton, Dickinson & Company v. B. Braun Melsungen AG](#)

- Case IPR2017-01586, Paper 8 (Dec. 15, 2017)
- Panel exercised its discretion under § 325(d) and declined to institute inter partes review on *one* of the asserted obviousness grounds.
- Panel concluded that the examiner previously considered the asserted prior art references, albeit in separate obviousness rejections, and that petitioner's arguments significantly overlap with arguments considered by the examiner.
- The panel acknowledged that even though the petitioner's declarant's testimony was not considered by the examiner, the declaration testimony presented little persuasive technical evidence or explanation.

Informative Decisions: Discretion to Institute under § 325(d)

- [Becton, Dickinson & Company v. B. Braun Melsungen AG](#) (continued)
 - Case IPR2017-01586, Paper 8 (Dec. 15, 2017)
 - Panel considered the following non-exclusive factors :
 1. The similarities and material differences between the asserted art and the prior art involved during examination.
 2. The cumulative nature of the asserted art and the prior art evaluated during examination.
 3. The extent to which the asserted art was evaluated during examination, including whether the prior art was the basis of rejection.
 4. The extent of the overlap between the arguments made during examination and the manner in which Petitioner relies on the prior art or Patent Owner distinguishes the prior art;
 5. Whether Petitioner has pointed out sufficiently how the Examiner erred in its evaluation of the asserted prior art; and
 6. The extent to which additional evidence and facts presented in the Petition warranted reconsidered of the prior art or arguments.

Informative Decisions: Discretion to Institute under § 325(d)

- [Kayak Software Corp. v. International Business Machines Corp.](#)
 - Case CBM2016-00075, Paper 16 (Dec. 15, 2016)
 - Panel exercised its discretion under § 325(d) and declined to institute CBM patent review
 - Panel concluded that three of the asserted prior art references were extensively considered by the Office over eleven years of prosecution and observed that the petitioner did not identify circumstances weighing in favor of institution
 - The panel observed:
 - “To be sure, we acknowledge that similarity of prior art alone does not require the Office to exercise its discretion in denying any grounds set forth in a Petition. There could be situations where, for example, the prosecution is not as exhaustive, where there are clear errors in the original prosecution, or where the prior art at issue was only cursorily considered that can weigh against exercising the discretion.”

Informative Decisions: Discretion to Institute under § 325(d)

- [Cultec, Inc. v. Stormtech LLC](#)

- Case IPR2017-00777, Paper 7 (Aug. 22, 2017)
- Examiner considered one reference during prosecution
- Second reference was cumulative of prior art that the examiner considered

- [Hospira, Inc. v. Genentech, Inc.](#)

- Case IPR2017-00739, Paper 16 (July 27, 2017)
- Examiner previously considered 2 asserted references
- One reference cited by examiner and applied
- Other reference raised in third party submission that examiner discussed
- Two other references were cumulative of prior art that the examiner considered

- [Unified Patents Inc. v. Berman](#)

- Case IPR2016-01571, Paper 10 (Dec. 14, 2016)
- Examiner considered same argument petitioner raised regarding patent owner's claim to priority
- Examiner's previous priority determination was dispositive to each ground asserted in IPR

Motions to Amend

- *Aqua Products, Inc. v. Matal*, 872 F.3d 1290 (Fed. Cir. 2017)
- Guidance on Motions to Amend in view of Aqua Products
 - https://www.uspto.gov/sites/default/files/documents/guidance_on_motions_to_amend_11_2017.pdf
- IPR2016-01737, Paper 19 (June 14, 2017)
- *Bosch Automotive Serv. Solutions, LLC v. Matal*, 878 F.3d 1027 (Fed. Cir. 2017);
Order on Petition for Panel Rehearing, No. 2015-1928 (Fed. Cir. March 15, 2018)


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New PTAB Website

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Information about ex parte appeals conducted by the Patent Trial and Appeal Board from adverse decisions of examiners in patent applications, reissue applications, and...




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Upcoming PTAB events

PTAB/TTAB Stadium Tour at University of San Diego School of Law
Sep 20, 2018 10:00 AM PT
San Diego, CA

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PTAB tools and links

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Trial Statistics

Current FY Statistics to Date:

- [February 2018](#)
- [January 2018](#)
- [December 2017](#)
- [November 2017](#)
- [October 2017](#)

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Appeal and Interference Statistics

Current FY Statistics to Date:

- [February 2018](#)
- [January 2018](#)
- [December 2017](#)
- [November 2017](#)
- [October 2017](#)

[Complete Appeal & Interference Statistics Archive](#)

Special Reports

- [Expanded Patents Study](#) (Mar. 2018) - a report on panel expansion in AIA trials
- [Orange Book-listed Patent Study](#) (Mar. 2018) - a report on FDA-approved drug patents challenged in AIA trials
- [Multiple Petition Study](#) (Oct. 2017) - a report on multiple petitions filed in AIA Trials
- [Motion to Amend Study](#) (Sep. 2017) - a report on the outcomes of motions to amend in AIA trials

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* Recently designated decisions appear in the "Recently designated decisions" section of the expandable table and are identified in the appropriate subject matter section(s) with the label **NEW**.

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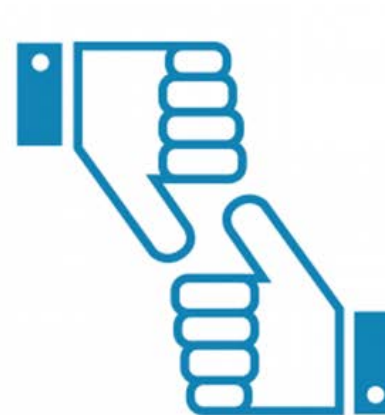
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Questions and Comments

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