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PATENTS

The authors review the issues underlying and the Supreme Court oral argument in the *TC Heartland* case on patent venue selection.

Is Patent Litigation in the Market for a New Home?

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Of the thousands of patent cases filed in the United States each year, more than 40 percent of them are filed in the U.S. District Court for the Eastern District of Texas. Most of those cases are filed in one town—Marshall, Texas—and are presided over by a single judge, Judge Rodney Gilstrap. Indeed, one quarter of *all* patent cases filed in 2015 were filed with Gilstrap. This concentration of patent cases is not a mistake, since patent owners often perceive a tactical advantage to filing in this largely rural district east of Dallas.

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The unique role of the Eastern District of Texas in U.S. patent litigation may soon end. The Supreme Court recently heard arguments in a case that could significantly reshape where patent infringement cases are litigated, *TC Heartland LLC v. Kraft Foods Group Brands LLC*, No. 16-341 (U.S. argued March 27, 2017). The location of where a patent case can be filed is limited by federal venue statutes, but the U.S. Court of Appeals for the Federal Circuit's interpretation of those statutes generally permits suit in almost any federal district court.

In *TC Heartland*, the Supreme Court is considering whether such an expansive interpretation of the venue requirement is correct. Oral arguments did not reveal a clear winner, though the tenor of the justices' questions suggests that the Federal Circuit's current interpretation may be at risk.

Regardless of the outcome, this case has focused a microscope on the statutes controlling where patent cases can be filed and on the impact different interpretations of those statutes can create. Strong business interests support both sides of this case, so regardless of whether the Supreme Court overturns the current interpretation or maintains the status quo, the calls for Congress to address patent venue will likely only increase.

The Current Rule

Federal venue requirements limit where accused infringers can be forced to defend themselves, but for many accused infringers that limit is illusory. For decades the Federal Circuit has interpreted the general federal venue section (28 U.S.C. § 1391) and the patent-specific venue section (28 U.S.C. § 1400(b)) together to permit suit anywhere the defendant is subject to personal jurisdiction. Since personal jurisdiction can exist anywhere an allegedly infringing product is sold or

used, companies with widely distributed products are often subject to suit anywhere in the country.

The patent-specific venue section provides that ''any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.'' The general venue section, in turn, defines ''residency—for all venue purposes'' as ''any judicial district in which [a] defendant is subject to the court's personal jurisdiction with respect to the civil action in question.''

The compatibility (or lack thereof) between the two sections was addressed 60 years ago in *Fourco Glass v. Transmirra Products*, 353 U.S. 222, 113 U.S.P.Q. 234 (1957). In *Fourco*, the Court held that the definition of ''residency'' in the general venue section did not apply to the patent-specific venue section and that ''resides'' within the context of the latter section was limited to the state of incorporation of a corporate defendant. The Court reasoned that a specific statute prevails over a general statute, which otherwise might be controlling. Thus, following *Fourco*, a defendant in a patent litigation could be sued only where it was incorporated or where it committed an act of infringement and had a regular and established place of business.

While *Fourco* appeared to resolve the issue of venue in patent cases, Congress reanimated the issue when it amended the general venue section in 1988. Specifically, Congress added that its definition of residency applies ''for purposes of venue under *this chapter*,'' which encompasses the patent-specific venue section. In light of these amendments, the Federal Circuit in *VE Holding v. Johnson Gas Appliance*, 917 F.2d 1574, 16 U.S.P.Q.2d 1614 (Fed. Cir. 1990), held that the definition of ''resides'' in the general venue section governed the meaning of that term in the patent-specific venue section.

As a consequence of *VE Holding*, accused infringers could be sued in any venue in which they were subject to personal jurisdiction. This interpretation has stood ever since, which is why today accused infringers find themselves facing lawsuits in venues far from their state of incorporation or established places of business.

The final wrinkle occurred in 2011 when Congress again amended the general venue section. The amendment replaced the language relied on in *VE Holding*: ''for purposes of venue under this chapter,'' with new language: ''for all venue purposes.'' Congress also amended the general venue section to state that it applied to all civil actions ''except as otherwise provided by law.''

With the language relied on in *VE Holding* to distinguish *Fourco* no longer in the general venue section, Heartland saw an opportunity to challenge *VE Holding*. The Supreme Court agreed to review this case to determine whether *VE Holding* remains (or ever was) good law.

Alleged Problems with the Current Rule

While the current rule may permit patent cases to be filed in almost any federal court, patent owners are not choosing to sue just anywhere; they are often choosing to sue in the Eastern District of Texas. The huge number of patent cases filed in that district dwarfs the number of cases filed in the next most popular district, the District of Delaware, by five-fold.

The reasons for the Eastern District of Texas's popularity are debatable, though many defendants complain that the district utilizes discovery procedures that disproportionately advantage plaintiffs. For example, amici supporting Heartland complain about the need to produce documents and take critical positions far earlier there than in other jurisdictions. They also note that the district historically is unlikely to transfer cases to more convenient venues or grant stays pending resolution of patent office challenges to the asserted patents.

Notable among the amicus briefs supporting Heartland was one filed by attorneys general for 17 states, led by the State of Texas. In the brief, Texas argued that the district's rules and procedures ''depart from national norms'' and ''tilt in [plaintiffs'] favor.'' Because of plaintiffs' preference for the district and its rules, Texas further argued, ''the perception of a neutral justice system is undermined.''

The fact that Heartland's case caught the attention of the Supreme Court is a little ironic; Heartland was not trying to avoid the Eastern District of Texas. Rather, Heartland is an Indiana company trying to avoid defending itself from Kraft in the District of Delaware. Nevertheless, if the Supreme Court rules in Heartland's favor, the ruling would impact patent litigation across the country.

The Merits of the Dispute

Heartland's argument is relatively straightforward: The Supreme Court already held in *Fourco* that the definition of ''residency'' in the general venue section does not supplement the limits of the patent-specific venue section. Therefore, the Federal Circuit's contrary ruling in *VE Holding* is wrong. As for Congress's 1988 amendments, Heartland argues that had Congress intended the modest amendments to overrule *Fourco*, it would not have identified the amendments as ''miscellaneous provisions dealing with relatively minor discrete proposals.''

Kraft, on the other hand, argues that the 1988 and 2011 amendments clearly show Congress's intent for the general venue section to govern venue ''*for all purposes*,'' including patent litigation. As for *Fourco*, Kraft argues the decision is not binding because it addressed a version of the general venue section that no longer exists after the 1988 and 2011 amendments. In other words, *Fourco* may have correctly interpreted the sections as originally written, but that interpretation no longer applies given the subsequent amendments.

Although the case turns on statutory interpretation and *stare decisis*, concerns with the current state of patent litigation animate the debate. Both sides agree that practical consequences should inform the meaning of the venue sections. Heartland and the amici supporting its position cite the harms of non-practicing entities, which they contend have benefited from forum shopping in places like the Eastern District of Texas. Kraft and the amici supporting its position argue that returning to *Fourco* would deprive patent owners of a real chance to enforce their patents.

Oral Argument

At oral argument, the justices struggled with the lack of evidence related to Congress's intentions with its 1988 and 2011 amendments. For example, in response

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to Kraft's argument that nuances in the amended language signal Congress's intent to overturn *Fourco*, Chief Justice John G. Roberts Jr. retorted, ''but there's no real evidence . . . of such a significant change.'' Justice Stephen G. Breyer dismissed a similarly confident assertion of Congress's motives, saying ''I laugh slightly because if that is so clear what is this case doing here?''

Among the justices' frustrations was how to account for the long delay from the Federal Circuit's *VE Holding* decision in 1990 to Congress's most recent amendment. Justice Elena Kagan asked, ''given that for 30 years the Federal Circuit has been ignoring our decision and the law has effectively been otherwise . . ., what is the backdrop against which Congress is legislating?'' If Congress's silence suggests its assent to the current law, the Court must know what law Congress had in mind—the Federal Circuit's current rule or the Supreme Court's *Fourco* decision?

To that particular question, Roberts seemed ready to rely on *stare decisis*. The 2011 amendment ''wasn't intended to overrule [the Federal Circuit's current rule],'' he said, ''but I suspect it wasn't intended to overrule *Fourco* at all either. And *Fourco* is a decision of this Court.'' His implication seemed to be that the Federal Circuit, as subordinate of the Supreme Court, could not escape the *Fourco* decision just because Congress waited so long to act.

Roberts appeared to be Kraft's sharpest critic. When Kraft argued that Congress's amendments changed the law, the chief justice countered that ''if Congress were trying to make a significant change, there'd be a lot more evidence of it.'' Kraft persisted, at which point Roberts seemed almost exasperated. ''[W]e can't get rid of this issue. I mean, we tried in *Stonite* and then in *Fourco*,'' referring to two prior Supreme Court cases holding that patent-specific section was not enlarged with the general section. ''It just sort of keeps coming up.''

Without express guidance on Congress's intent for the 2011 amendment, the justices were interested in implications from Congress's actions. In particular, the current rule leaves little for the patent-specific section to do that the general section could not do on its own. In fact, the drafter of the 2011 amendment proposed removing the patent-specific section, but Congress declined and kept it. By implication, Congress must not have thought it was pointless.

The Eastern District of Texas did not escape scrutiny. Justice Sonia Sotomayor asked about the concentration of cases there, Kagan asked about forum shopping due to the ''benefit of a certain set of rules,'' and Justice Anthony M. Kennedy asked about the district's reputation for ''generous jury verdicts.'' When Kraft attempted to dismiss those concerns as unrelated to the issues on appeal, Roberts seemed surprised: ''I didn't understand the answer. . . . So we shouldn't worry that 25 percent of the nationwide cases are there?''—referring to the share of cases over which Judge Gilstrap presides.

All told, the justices appeared more critical of Kraft than they were of Heartland. Their questions challenged the core of Kraft's arguments and yet they let Heartland's counsel speak uninterrupted for several minutes on its key points. Inferring a result from these questions would be risky, since the justices use oral argument to test the side they favor as much as they use it to attack the other side. Nevertheless, it is difficult to conclude that the current rule is safe at this point.

Consequences

Where will patent cases be litigated?

If Heartland wins, the distribution of the locations of patent litigation will be reshuffled, but only to a point. Most estimates predict that the Eastern District of Texas would lose patent cases but remain among the top districts. The District of Delaware, where many large companies are incorporated, and the Northern District of California, where many technology companies are based, would gain cases. However, both the District of Delaware and the Northern District of California are already among the top forums. Thus, the cases might be redistributed among the top districts, but the most popular districts would remain popular.

The effect of overturning the current rule on other district courts is less clear. Under *Fourco*, patent owners will not always be able to bring suit against all defendants in the same court. Multidistrict litigation has been suggested as a way to consolidate cases for pretrial issues, but each case gets sent back to the original court for trial. Districts that are home to many companies, but do not presently host many patent cases, may see more cases.

Will Congress get involved?

Regardless of who wins this case, powerful interests will be dissatisfied by the result and will amplify calls for Congress to amend the venue statutes. For example, many members of the technology and financial industries oppose the current rule as they perceive disadvantages to litigating in districts with which they have little connection. In contrast, many companies in the pharmaceutical industry favor the current rule, which allows them to protect their investment in the research and development of branded drugs against several generic companies in a single district rather than multiple districts. With the scrutiny brought by this case and the strong interests on both sides, legislative intervention may be more likely.

What is the future of the Eastern District of Texas?

This case was an opportunity for many to air their grievances with the Eastern District of Texas. Of course, this is not the first time that the district has been criticized; although supporters of the current rule point out that the district has recently fallen in line with national trends. According to the briefs, the district does not stand apart across many metrics, e.g., plaintiffs' trial win rate, damage awards and rate of affirmance on appeal. And the district's unique feature—the sheer number of cases filed there—is changing. While over 40 percent of patent cases in 2015 were filed in the district, that portion fell in 2016 and is on track to fall again in 2017—even before any change in the current rule.

A decision in this case is due by June 2017. Regardless of the outcome, the venue requirements for patent litigation will remain a topic of discussion as the courts and Congress come to grips with where and how patent litigation should proceed. While this case could have a major impact, it is likely just the first step in a process that could take years to play out.