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PERSPECTIVE

Justices ponder patent venue

By Matthew K. Blackburn

On Monday, the U.S. Supreme Court will hear oral argument in *TC Heartland LLC v. Kraft Foods Group Brand LLC*. The seemingly mundane topic is a statutory venue limitation on patent infringement litigation. In reality, TC Heartland represents an important front in the ongoing effort to limit efficient patent right enforcement. The court should stand with patent holders and maintain the current statutory venue system.

Congress first enacted a special patent venue statute in 1897 giving patent holders broader forum choices than were available for other federal question cases. That statute was later re-codified at 28 U.S.C. Section 1400(b), and currently restricts venue to either (1) "where the defendant resides," or (2) "where the defendant has committed acts of infringement and has a regular and established place of business."

Although Section 1400(b) does not define the meaning of "resides," Heartland (the infringer) argues it means the state of incorporation for corporate defendants, and is not supplemented by other statutory provisions. It cites to a 1957 Supreme Court decision (*Fourco Glass*) which held Section 1400(b) was the "sole and exclusive" patent venue provision.

The patent holder, Kraft, argues for a broader venue based on unambiguous language in Section 1391(c), which defines residency for individuals, corporations and unincorporated entities "[f]or all venue purposes." Together Sections 1391(c) and 1400(b) provide the most expansive venue for cases against nonresidents (any judicial district), less expansive venue for cases against corporate defendants (anywhere they are subject to personal jurisdiction with respect to the action), and least expansive venue for cases against individuals (where they are domiciled, or committed acts of infringement and have a regular and established place of business).

Kraft's argument turns principally on two congressional amendments to Section 1391(c), which render *Fourco Glass* obsolete. A 1988 amendment broadened the definition of residency for corporate defendants, and added language stating that it applies "for purposes of venue under this chapter" (which includes Section 1400). Then, in the Venue Clarification Act of 2011, Congress reemphasized the scope of Section 1391(c) by changing "for purposes of venue under this chapter" to "[f]or all venue purposes." All means *all*.

Kraft's view of the venue statute has been the controlling law for over 27 years, since the U.S. Court of Appeals for the Federal Circuit's decision in *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990). So why did the Supreme Court grant certiorari, and why are over 30 amici curiae interested?

> Patent holders may be forced to litigate closely related infringement claims in multiple venues, harming judicial economy and imposing undue burdens on patent holders.

Patent litigation is currently concentrated in relatively few judicial districts — those believed by patent holders to be most efficient. Nearly 37 percent of all new patent litigations were filed in in the Eastern District of Texas in 2016. A single judge in that judicial district was assigned nearly 25 percent of all new patent cases filed in the U.S. that year. Non-practicing entities (NPEs) frequently file patent litigation in the Eastern District.

Ironically, Kraft is not an NPE, and the underlying patent litigation was not filed in the Eastern District of Texas. *TC Heartland* is an appeal from the District of Delaware, which would likely receive an increased patent case load if the Supreme Court sides with Heartland's restrictive residency approach to patent litigation venue.

A recent academic publication by Professors Colleen Chien (Santa Clara School of Law) and Michael Risch (Villanova School of Law) analyzed the impact of restricting patent venue. Restricting venue based on the infringer's residency (Heartland's view) would merely shift patent cases among already popular judicial districts. The Eastern District of Texas, the District of Delaware and the Northern District of California would shoulder more than 62 percent of NPE cases, and more than 26 percent of operating company cases. The forum-shopping "cure" is a placebo, and would not meaningfully redistribute patent litigation.

Restricting patent venue in this manner also has undesirable consequences, and would treat patent holders and infringers differently. Declaratory judgment plaintiffs (infringers) would be governed by the broader general venue statute (Section 1391), while patent holders would be subjected to limited venue choices (Section 1400). Patent holders may be forced to litigate closely related infringement claims in multiple venues, harming judicial economy and imposing undue burdens on patent holders. Less connected judicial districts may be the only venues for certain patent litigation. Disputes between Silicon Valley heavyweights could be forced out of the Northern District of California entirely.

Existing safeguards prevent unfair venue choices by patent holders. Abusive forum-shopping can be addressed under 28 U.S.C. Section 1404, which already allows transfers of patent litigation for the convenience of the parties or witnesses, or in the interest of justice.

Rational patent holders choose efficient fora for resolving patent disputes. That explains the concentration of patent cases in selected judicial districts. Without any reliable evidence of improper forum-shopping or unfairness of popular judicial districts, Heartland and its supporting amici seek to deny patent holders venue choices provided by the unambiguous language of Sections1391 and 1400 in hopes of shifting patent litigation to districts they regard as more favorable to infringers. *TC Heartland* represents an important opportunity to cement the existing statutory balance in patent litigation venue, and to reject an invitation to rewrite statutes on unproven public policy allegations.

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