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Return of the Rocket Docket?: New Case Law Potentially Changes the Tide of Patent Lawsuits Fleeing Favored Venues

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The United States Supreme Court's May decision in *TC Heartland LLC v. Kraft Foods Group Brands LLC* was widely seen as a limitation on the jurisdictions in which a patent owner can file infringement claims. That decision set off a minor scramble among patent owners to find suitable and accessible alternative forums. More recently, a district court decision has swung the pendulum in the other direction and could potentially preserve the ability of patent owners to choose their own venue, including one so-called "rocket docket" in the Eastern District of Texas.

Despite its relatively rural environs, the Eastern District of Texas has historically been the most popular venue for patent litigation filings in the United States, collecting more than 38 percent of new case filings in 2016. The Eastern District of Texas is favored by many patent owners due in part to factors such as the "rocket" pace of the district's litigation timetable and the experience of many members of the district's bench with the complex issues arising in such cases. U.S. District Judge Rodney Gilstrap alone was assigned more than 20 percent of all patent cases filed in U.S. federal district courts in 2016, and has handled more than 4,000 patent infringement lawsuits since taking the bench in the U.S. District Court for the Eastern District of Texas in 2011.

In *TC Heartland*, however, the Supreme Court threatened to throw a wrench in the ability of districts such as the Eastern District of Texas to accept a disproportionate amount of patent lawsuits by interpreting one specific provision of 28 U.S.C. § 1400(b), the "sole and exclusive" venue provision for patent infringement actions. Section 1400(b) reads that a patent owner can only bring an infringement claim "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 *TC Heartland* decision interpreted the first clause of § 1400(b), holding that a defendant "resides" only in its state of incorporation. As a result, the number of new patent suits filed in the Eastern District of Texas dropped by an estimated 18 percent in the immediate aftermath of the *TC Heartland* decision, while the number of new patent suits filed in Delaware, where the bulk U.S. entities are incorporated, approximately doubled.

Now, however, a decision authored by Judge Gilstrap out of the Eastern District of Texas has interpreted the *other* clause of § 1400(b), allowing suits to be filed in districts where the defendant "has committed acts of infringement *and has a regular and established place of business*," a provision of § 1400(b) that didn't receive very much attention until the Supreme Court's relatively restrictive decision in *TC Heartland*. However, Judge Gilstrap's ruling appears to re-inject some flexibility back into the venue statute.

The case is *Raytheon Co. v. Cray Inc.*, filed by patent owner Raytheon Company, a Delaware corporation, against Cray, Inc., a Washington corporation headquartered in Washington but with a (now former) sales executive who kept a home office in Athens, Texas. In determining that Cray was eligible to be sued in the Eastern District of Texas, despite not being incorporated in Texas, Judge Gilstrap outlined four flexible factors to be used in ascertaining whether a defendant "has a regular and established place of business" under the statute: (1) physical presence, (2) defendant's representations, (3) benefits received and (4) targeted interactions with the district.

Under the first factor, any physical presence by the defendant in the district in question, including the presence of retail stores, warehouses and/or employees, weighs in favor of finding that the defendant "has a regular and established place of business." Under the second factor, the extent to which a defendant represents, internally or externally, that it has a presence in the district, can lead to a finding that the venue is proper for the defendant in the district in question. The third factor looks at the extent to which a defendant derives benefit from its presence in the district, including but not limited to sales revenue: "significant" revenue earned by the defendant in the district in question would tip the balance in favor of a finding that the defendant has a regular and established place of business there sufficient to be sued in that jurisdiction. Finally, the fourth factor considers the extent to which a defendant interacts in a "targeted way" with existing or potential consumers, users or entities within the district, including offering localized customer support, the existence of ongoing contractual relationships and "targeted marketing efforts" in the district.

Although no single one of the factors outlined by Judge Gilstrap is always determinative, it's clear that a company's acts of placing a billboard on a Texas highway or having a distribution warehouse in the district involve a much more tenuous attachment to a given district than incorporating a business there. Of course, Judge Gilstrap's decision is not binding on other districts, but patent owners and other entities should keep aware of how this post-*TC Heartland* jurisprudence develops in order to exercise whatever control may be available to them to sue or be sued in a venue of their choosing.