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New case law potentially turns the tide of patent lawsuits fleeing favoured venues

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The decision in *TC Heartland LLC v Kraft Foods Group Brands LLC*, handed down by the Supreme Court in late May 2017, caused a minor scramble among patent owners to find suitable and accessible alternative forums in which to litigate infringement claims. However, a recent decision by the district judge who sees more patent cases than any other judge in the United States could help lessen the impact of *TC Heartland* and preserve some of the ability of patent owners to file infringement claims in a venue of their choosing.

The Eastern District of Texas has historically been the most popular venue for patent litigation filings in the United States, collecting more than 38% of new case filings in 2016. The Eastern District of Texas is favoured 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. District Judge Rodney Gilstrap was assigned more than 20% of patent cases filed in US federal district courts in 2016, and has handled more than 4,000 patent infringement lawsuits since taking the bench in the US District Court for the Eastern District of Texas in 2011.

However, in *TC Heartland* the Supreme Court threatened to complicate 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 USC Section 1400(b): the 'sole and exclusive' venue provision for patent infringement actions. Section 1400(b) reads that a patent owner can bring an infringement claim only "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 Section 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% in the immediate aftermath of *TC Heartland*, while the number of new patent suits filed in Delaware where the bulk of US entities are incorporated approximately doubled.

However, the *Raytheon Co v Cray Inc* decision authored by Gilstrap out of the Eastern District of Texas has now interpreted the other clause of Section 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 Section 1400(b) that received little attention until the Supreme Court's relatively restrictive decision in *TC Heartland*. However, Gilstrap's ruling appears to put some flexibility back into the venue statute.

The case was 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, Gilstrap outlined four flexible factors to be used in ascertaining whether a defendant has a regular and established place of business under the statute:

- Physical presence – any physical presence by the defendant in the district in question, including the presence of retail stores, warehouses and employees, weighs in favour of finding that the defendant has a regular and established place of business.
- Defendant's representations – 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.
- Benefits received – 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 favour of a finding that the defendant has a regular and established place of business there sufficient to be sued in that jurisdiction.
- Targeted interactions with the district – the extent to which a defendant interacts in a "targeted way" with existing or potential consumers, users or entities within the district, including offering localised customer support, the existence of ongoing contractual relationships and "targeted marketing efforts" in the district.

Although no single factor outlined by Gilstrap is always determinative, it is clear that a company's act of placing a billboard on a Texas highway or having a distribution warehouse in the district involve a much more tenuous attachment to that district than incorporating a business there. Gilstrap's decision is not binding on other districts, but patent owners and other entities should pay close attention to 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.

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