BUSINESS INSURANCE.

# "Troll" patent lawsuits seen declining in wake of Supreme Court ruling

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The U.S. Supreme Court's ruling last week in *TC Heartland L.L.C. vs. Kraft Foods Group Brands L.L.C.* is expected to lead to a reduction in the number of nuisance patent litigation lawsuits filed against many firms.

The high court held in its May 22, 8-0 ruling that patent cases can be filed only in courts located where the target company is domiciled or has a regular place of business. The ruling represents the first patent venue law change in almost 30 years, say experts.

Chicago-based Kraft, a competitor in flavored drink mixes with Carmel, Indiana-based Heartland, had filed suit in 2014 in the U.S. District Court in Delaware, charging that Heartland's products infringed on one of its patents.

Although Heartland is not registered to conduct business in Delaware, and has no meaningful local presence there, it does ship its products into the state, according to the Supreme Court's ruling.

Heartland had moved to dismiss the case or transfer the venue to the Southern District Court of Indiana, arguing a Delaware venue was improper, according to the ruling.

The United States Court of Appeals for the Federal Circuit in Washington, D.C., denied Heartland's motion in April 2016 and Heartland appealed.

In ruling in Heartland's favor, the U.S. Supreme Court focused on two statutes: a patent venue statute dating back to 1948 that states that patent infringement litigation must be brought in the district where the defendant resides or where it has committed acts of infringement and has a regular and established place of business. The Supreme Court said in its 1957 ruling in *Fourco Glass Co. v. Transmirra Products Corp.* that a corporation "resides" only in its state of incorporation.

However, a 1990 ruling by the Federal Circuit Court of Appeals held in *VE Holding Corp. v. Johnson Gas Appliance Co.* that under a general venue statute that was most recently adopted by Congress in 2011, a corporation is considered to reside in any judicial district in which it is subject to the court's "personal jurisdiction," which meant patent infringement lawsuits could be filed against companies that have nationwide distribution virtually anywhere in the United States.

In reversing the lower court ruling, the Supreme Court held the 1948 law applies to patent cases. "In *Fourco*, this Court definitely and unambiguously held that the word "reside(nce')" in the patent venue law "has a particular meaning as applied to domestic corporations."

The "current version of (the general venue law) does not contain any indication that Congress intended to alter the meaning" of the patent venue law, according to the ruling delivered by Justice Clarence Thomas.

Until this ruling, it was "fairly wide open" as to where patent infringement lawsuits could be filed, said Paul M. Rivard, an attorney with Banner & Witcoff Ltd. in Washington, D.C.

But now a plaintiff will be limited to where the defendant is located or where it has a regular and established place of business and committed acts of infringement, he said.

Experts say an expected impact of the ruling is that the volume of cases filed in the U.S. District Court for Eastern Texas in Marshall will significantly diminish. Many of the lawsuits filed there are so-called "patent troll" lawsuits, which is litigation filed by "nonpracticing entities." These are companies that make a business out of accumulating large numbers of patents with the purpose of filing patent infringement lawsuits, but do not provide any product or service.

Lawsuits by nonpublic entities accounted for 40% of that court's patent rulings, the highest percentage of any jurisdiction, according to a study issued in May 2016 by PricewaterhouseCoopers L.L.P. They had a 48% success rate, which was almost double the average for these suits, according to the study.

Texas has been an attractive jurisdiction for plaintiffs in part because under its local rules its judges do not quickly grant summary judgment, thus increasing costs and the subsequent pressure on defendants to settle quickly, experts say.

Other jurisdictions are more likely to quickly issue summary judgments dismissing litigation, they say.

There will likely be "a more even field of play, if you will," said Hector G. Gallegos, a partner with Morrison & Foerster L.L.P. in Los Angeles.

Observers say many of these lawsuits are now expected to be filed in federal district court in Delaware, where many companies are incorporated, although some question whether the federal judiciary will have enough judges to consider a glut of cases.

Northern California, where many technology companies are based, is also expected to be a popular authority. It is less attractive for nonpracticing entities because they are likely to get a jury "that would not look favorably on that kind of suit," said Leslie M. Spencer, a partner with Ropes & Gray L.L.P. in East Palo Alto, California.

She said plaintiffs may also turn to multidistrict panels, which would involve consolidating a large set of lawsuits against multiple defendants.

"The initial impact is, you're going to have a lot of motions to transfer ventures (from) the Eastern District of Texas," said Joel W. Mohrman, a member of law firm McGlinchey Stafford P.L.L.C. in Houston.

The ruling has already had an effect, said David Patariu, a senior associate with Pillsbury Winthrop Shaw Pittman L.L.P. in Washington, D.C. As of Friday, since the ruling was issued, no new patent litigation lawsuits had been filed in the Eastern District of Texas, while typically 10 or more would have been filed during this period, he said.

However, C. Graham Gerst, a Chicago-based partner with the Global IP Law Group L.L.C., said while the ruling may discourage some of the "sue and settle" nuisance lawsuits, "I would be surprised if (the Supreme Court ruling) makes a material difference" in the overall number of suits being filed.