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Rocket docket tactics may have jets cooled

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The Supreme Court has granted certiorari in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, and depending on how the court interprets sections of the Patent Venue Statute and the general venue statute, the number of available venues in patent litigation cases could dramatically decrease.

The case is significant because the Supreme Court must define where a defendant resides under the Patent Venue Statute.

Depending on the Supreme Court's interpretation of the Patent Venue Statute, plaintiffs could be prevented from bringing patent infringement cases to district courts commonly known as "rocket dockets," such as the U.S. District Courts for the Eastern District of Virginia and Eastern District of Texas.

The Patent Venue Statute is found in 28 U.S.C. Section 1400(b) and states that patent infringement actions can occur either "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."

Further, in 1957, the Supreme Court held "[Section] 1400(b) is not to be supplemented by [Section] 1391(c), and that as applied to corporate entities, the phrase 'where the defendant resides in [Section] 1400(b) 'mean[s] the state of incorporation only.' " *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957).

The *Fourco* decision is significant, because in 1988, Congress amended 28 U.S.C. Section 1391(c) and expanded the definition of a corporation's residence to include all districts where the company has minimum contacts.

Specifically, Section 1391(c) prescribes "an entity with the capacity to sue and be sued ... whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction."

In 1990, the Federal Circuit rejected *Fourco*'s analysis of Section 1400(b) by holding "as we here apply [Section 1391(c)], venue in a patent infringement case includes any district where there would be personal jurisdiction over the corporate defendant at the time the action is commenced ... it is somewhat broader than that encompassed by the previous standard of 'place of incorporation.' " *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1583 (Fed. Cir. 1990).

After the Federal Circuit decided *VE Holding*, patent litigation filings surged in venues such as the Eastern Districts of Virginia and Texas. These districts were known for the speed of a final decision (12½ months for the Eastern District of Virginia) and for the frequency juries ruled in favor of the plaintiff (78 percent in the Eastern District of Texas, compared to the national average of 59 percent).

Plaintiff's attorneys also find some of these rocket docket districts, such as the Eastern District of Texas, valuable because few companies are incorporated in these districts.

Further, in 2011, Congress expanded the statutory definition of 28 U.S.C. Section 1391 by amending Section 1391(a). Section 1391(a) now says that Section 1391 applies to all civil actions "except as otherwise provided by law."

Congress also expanded the language of Section 1391(c), because the section now applies for "all venue purposes." In sum, Congress seemed to tacitly endorse the Federal Circuit's analysis in *VE Holding Corp.* by further amending Section 1391(c) to include the "all venue purposes" language, even though such a reading would conflict with the holding in *Fourco*.

If the Supreme Court decides to more strictly interpret Sections 1400(b) and 1391(c) by overruling *VE Holding*, defendants' minimum contacts with a venue will become insufficient for personal jurisdiction.

Instead, a court will have personal jurisdiction over defendants only where substantial infringement occurs, or where the defendants are incorporated or reside.

As a result, patent litigation would be greatly expanded to many judicial districts, and the rocket dockets could fail to launch for plaintiff's patent litigators.

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