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INTELLECTUAL PROPERTY

TC HEARTLAND LLC VS. KRAFT FOODS GROUP BRANDS LLC: THE SUPREME COURT CONTINUES TO TAKE AIM AT PATENT TROLLS

Patent assertion entities (PAEs), frequently labeled "patent trolls," often purchase patents of questionable validity and bring costly infringement suits against companies large and small. In an effort to limit their liability, patent trolls often create a new corporate entity for each patent portfolio they acquire and operate with little or no working capital. Many troll lawsuits are directed at smaller businesses, to extract quick settlements because they lack the experience and resources necessary to defend a patent suit. Thus, patent trolls leverage broad and ambiguous patents and the high cost of patent litigation into significant settlement payments, with little out-of-pocket risk. In total, some estimate that PAEs have extracted a half-trillion dollars from the economy that could have gone to innovation and R&D. Remarkably, 36% of all patent infringement cases filed in 2016 were brought in the Eastern District of Texas, widely considered to be the most patent-friendly court. The Eastern District sits in Marshall, Texas, a small town of about 24,000 people. Marshall does not have any major corporate headquarters, but strictly enforces local rules making it very difficult for defendants to dispose of baseless cases early. This forces many companies to settle cases they are confident they could win.

The Supreme Court's ruling yesterday in *TC Heartland LLC vs. Kraft Foods Group Brands LLC* will bar many patent owners from suing in the Eastern District of Texas and bring an end to that court's unlikely influence in the patent world. In an opinion by Justice Clarence Thomas, the Supreme Court unanimously ruled in favor of TC Heartland, an Indiana manufacturer of flavored drink mixes, which argued that Kraft Foods should not be permitted to sue it in Delaware because TC Heartland is neither registered to conduct business, nor does it have any meaningful presence in that jurisdiction.

The Supreme Court clearly ruled that a corporation's "residence" is its state of incorporation, and that the patent venue statute limits patent suits to (a) a district where the defendant is incorporated, or (b) a district where the defendant has a regular and established place of business and has committed acts of infringement. The decision should effectively end "forum shopping," which is a significant advantage for patent trolls. Additionally, the decision may significantly increase new patent litigation filings in the District of Delaware (already having the second busiest patent docket in the country) where many companies are incorporated, and in the Northern District of California where many technology companies are headquartered.

TC Heartland is the latest in a series of recent Supreme Court decisions impacting patent trolls. In *Octane Fitness v. Icon Health & Fitness* (2014), the Court lowered the standard of proof for attorneys' fee awards from clear and convincing evidence to a preponderance of the evidence, resulting in a significant increase in attorneys' fee awards for prevailing defendants. One example is an unlikely $500,000 award from Judge Gilstrap in the Eastern District of Texas.

In *Alice Corp. v. CLS Bank Int'l* (2014), the Court limited the scope of patent protection for computer-implemented inventions, holding that claims directed to an "abstract idea" which are simply "performed by a generic computer" do not qualify for patent protection. The result has been a significant increase in motions to dismiss (with a success rate of about 2 in 3) hundreds of patents invalidated by the courts and the United States Patent and Trademark Office (USPTO), and a sharp reduction in software patents issued by the USPTO.

Also, in *Nautilus v. Biosig Instruments* (2014), the Court held that patent claims must provide notice of the scope of an invention with "reasonable certainty," limiting a PAE's ability to use ambiguity in patents to its advantage in order to extract settlements.

Clearly, the Supreme Court has provided defendants new tools to battle patent trolls, and Congress may provide additional tools, but it remains to be seen whether PAEs will continue to attack new technologies armed with dubious patents.

HSE's attorneys have handled patent litigation matters in the Eastern District of Texas, the District of Delaware, and numerous district courts throughout the country. Please feel free to contact a member of the Commercial and Intellectual Property Litigation group for more information about the issues discussed above, or any other patent and intellectual property matters.

Harter Secrest & Emery provides comprehensive Intellectual Property legal services to clients throughout the United States and in many foreign countries. The firm's attorneys assist clients in acquiring patents, trademarks, and copyrights; negotiating and drafting licensing agreements; and when disputes arise, counseling clients on intellectual property and patent litigation claims. Recipients of a top-tier ranking from *Chambers USA* for litigation, Harter Secrest & Emery attorneys have comprehensive experience that range from trying cases in state and federal courts to handling appeals at all levels of the appellate courts. For more information, visit www.hselaw.com.