PATENT LAW'S VENUE PRETZEL

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The Supreme Court has twisted itself into a pretzel in applying statutory venue protections to patent litigation, resulting in a significant and important potential gap in patent venue: foreign entities with activities and/or sales in the United States may not be subject to venue in any judicial district and therefore may be effectively immune from patent suits. Though seemingly a mundane procedural matter about the technicalities of the venue statutes, the Supreme Court's venue pretzel has potentially major consequences since foreign entities are frequent patent defendants. Moreover, the proper forum for patent suits has been a hotly contested issue in modern patent litigation because of the extreme concentration of patent cases in a few districts that actively try to solicit patent cases by adopting pro-patentee practices. Venue rules have been the tool used to combat this problematic "forum selling."

In its recent *TC Heartland* decision, the Supreme Court held that patent venue for domestic corporations is determined solely by the special patent venue statute (28 U.S.C. § 1400(b)), which limits venue to the district where a corporation is incorporated or a district in which it has a regular and established place of business and committed an act of infringement. *TC Heartland* also confirmed prior Supreme Court precedent that the general venue statute, 28 U.S.C. § 1391(b), is inapplicable to patent cases. By contrast, *TC Heartland* explicitly left undisturbed prior Supreme Court precedent holding venue for foreign corporations is determined by general venue rules for foreigners, not by Section 1400(b). Under those rules as they now exist, "a defendant not resident in the United States may be sued in any judicial district." 28 U.S.C. § 1391(c)(3). Importantly, however, the general venue rules now define the residency of an entity uniquely, not based on place of formation or headquarters but instead based on whether the entity is subject to personal jurisdiction in the United States. Therefore, a foreign entity that is subject to personal jurisdiction in the United States based on its activities and/or sales is a resident of the United States for venue purposes (in the district(s) of its sales or activities) and <u>not</u> a foreign resident subject to the special venue rules for foreigners.

Thus, under existing Supreme Court patent venue precedent and relevant statutory provisions, foreign entities who have sales or activities in the United States sufficient to establish personal jurisdiction are not covered by: Section 1391(c)(3)'s venue provision for "a defendant not resident in the United States" because they are a resident of the United States under the unique definition of residency for venue; Section 1391(b)'s general venue provisions because they do not apply in patent cases; or Section 1400(b)'s special venue provisions for patent cases because they do not apply to foreign entities. As a result, no proper patent venue exists for foreign entities subject to

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personal jurisdiction in the United States, giving them an absolute defense to patent infringement claims. The Federal Circuit attempted to escape this post-*TC Heartland* venue pretzel by holding that Section 1391(c)(3) is applicable to all foreign entities and the venue statute's special definition of entity residency only applies to domestic entities, not foreign entities. This conclusion is contrary to the plain text of the statute, leading civil procedure authorities, the limited existing non-patent case law, and the underlying purpose of the statutory reforms that created the unique definition of entity residency.

By applying Section 1391(c)(3) to foreign entities subject to U.S. personal jurisdiction, the Federal Circuit has once again taken a patent exceptionalist approach to a general procedural issue, a tendency that has been heavily criticized by commentators and repeatedly repudiated by the Supreme Court. Yet, the Supreme Court is the one to blame in this instance, as it created the venue pretzel that the Federal Circuit's exceptionalist approach seeks to escape. As other experts at the intersection of civil procedure and patent law agree, the *TC Heartland* decision relied on a flawed and weak statutory interpretation analysis to reject the applicability of the general venue definition of corporate residency (based on personal jurisdiction) to Section 1400(b). The Court's purported statutory interpretation analysis masked what was essentially a results-oriented and policy-driven decision motivated by concerns about the concentration of patent cases in a few forum selling districts. The resulting patent venue pretzel provides an important reminder of the risk of results-oriented and policy-driven decision making, especially in statutory fields, because of the danger of unintended consequences and disruption of an interrelated statutory scheme.

To escape the patent venue pretzel, Congress or the Supreme Court should overrule *TC Heartland* and its flawed statutory interpretation. If the concern is that the broader venue resulting from defining corporate residence based on personal jurisdiction would exacerbate forum concentration and forum selling in patent cases, which is not necessarily the case, then that problem should be addressed directly through one of the various ways commentators have proposed. If Congress or the Supreme Court does not act, the Federal Circuit can still define foreign corporate residence for Section 1400(b) purposes using the personal jurisdiction-based definition of entity residence, since *TC Heartland*'s holding is expressly limited to domestic corporations.