

Do Patent Challenge Rights Lead to Placeholder Lawsuits?

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One of the more curious features of patent law is that patents can be challenged by anyone affected by them, at any time. This challenge right allows potential defendants to file a declaratory relief lawsuit in their local federal district court, seeking a judgment that a patent is invalid or noninfringed. To avoid this home-court advantage, patent owners may file a patent infringement lawsuit first and, by doing so, retain the case in the patent owner's venue of choice. But there is an unfortunate side effect to such placeholder lawsuits: they escalate the dispute when the parties may want to instead settle for a license. Thus, policies that allow challenges are favored, but they are tempered by escalation caused by placeholder lawsuits. To the extent a particular challenge rule leads to more placeholder lawsuits, it might be disfavored.

This article tests one such important challenge rule. In *MedImmune v. Genentech*, the U.S. Supreme Court made it easier for a potential defendant to sue first. Whereas the prior rule required threat of immediate injury, the Supreme Court made clear that any case or controversy would allow a challenger to file a declaratory relief action. This ruling had a real practical effect, allowing recipients of letters that boiled down to, "Please license my patent," to file a lawsuit when they could not before.

Many observers at the time predicted that this would lead to more placeholder lawsuits filed by patent holders meant to preempt the new, more easily obtained challenges. But to date, no study has empirically considered the effect of the *MedImmune* ruling.

Using a novel longitudinal dataset, this article considers whether the new standard led to more placeholder suit filings. It does so in two ways. First, it performs a differences-in-differences analysis to test whether case duration for savvy patent licensors grew shorter after *MedImmune*. Second, it considers whether, all other factors equal, the rate of short lived case filings increased after *MedImmune*. It turns out that neither are true; not only did cases not grow shorter – cases with similar characteristics grew longer after *MedImmune*. The article discusses reasons for this phenomenon, including the possibility that there may be more placeholder suits, but that escalation completely hides their use.