

TC Heartland Opens The Door To New Antitrust Claims In Del.

By Adam Hudes and Stephen Medlock

Law360, New York (June 2, 2017, 12:17 PM EDT) -- In *TC Heartland LLC v. Kraft Foods Group Brands*, the U.S. Supreme Court rejected venue rules that the Federal Circuit had been applying for over 25 years. Relying on its prior decision in *Fourco Glass v. Transmirra Products*, the Supreme Court held that the proper venue in a patent case is the judicial district where a corporate defendant is incorporated, or where the defendant has committed acts of infringement and has a regular and established place of business. While a great deal has been written about how TC Heartland may give patent defendants a powerful basis to resist venue in magnet jurisdictions, such as the Eastern District of Texas, little has been written about the potential antitrust implications of the ruling. In particular, one of the jurisdictions where an increased number of patent cases are likely to be litigated following TC Heartland, the District of Delaware, has recently decided case law that may make it easier for defendants in patent infringement cases to bring antitrust counterclaims, including against nonpracticing entities.



Adam Hudes



Stephen Medlock

The TC Heartland Decision

28 U.S.C. § 1400(b) provides that venue is proper in patent infringement cases “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.” In *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 226 (1957), the Supreme Court concluded that a domestic corporation “resides” only in its state of incorporation.

In 1988 — more than three decades after *Fourco Glass* — Congress amended the general venue statute 28 U.S.C. § 1391: “Except as otherwise provided by law” and “[f]or all venue purposes,” a corporation “shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court’s personal jurisdiction with respect to the civil action in question.”[1] In *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (1990), the Federal Circuit held that this amendment applied to the patent venue statute, Section 1400(b), overriding the Supreme Court’s decision in *Fourco*.

In the wake of *VE Holding*’s significant relaxation of patent venue rules — which effectively permitted suit in any district in which the defendant is subject to specific personal jurisdiction — certain judicial districts emerged as “magnets” for patent litigation. In 2015, for example, 74.6 percent of patent

infringement cases were filed in just eight of the nation's 94 judicial districts. And 44.2 percent of the nationwide patent cases that same year were filed in the Eastern District of Texas alone.[2]

In *TC Heartland*, the Supreme Court reversed the expansion of permissible venue allowed under *VE Holding*. The court concluded that "Congress has not amended § 1400(b) since *Fourco*." The court reasoned that the amended Section 1391(c) is substantially similar to the venue statute that was in place at the time *Fourco* was decided. Additionally, Congress gave no clear indication that it was altering the settled construction of Section 1400(b), and the current version of Section 1391(c) contains a savings clause indicating that "it does not apply when 'otherwise provided by law.'" *TC Heartland* thus concluded that, "[a]s applied to domestic corporations, 'reside[nce]' in § 1400(b) refers only to the State of incorporation."

Recent Delaware Antitrust Law May Benefit Patent Infringement Defendants

The most likely impact of *TC Heartland* will be to divert patent cases from magnet jurisdictions that have seen an influx of filings in recent years, such as the Eastern District of Texas, where many patent defendants are not incorporated and do not have a regular and established place of business. Instead, new patent filings will likely be brought in states where defendants are commonly incorporated, such as the District of Delaware. Many patent infringement defendants may not be aware that recent Delaware law, *Microsoft Mobile Inc. v. InterDigital Inc.*, 2016 WL 1464545 (D. Del. 2016), opens the door to a potentially powerful response to infringement claims from NPEs and other patent plaintiffs — antitrust counterclaims for monopolizing a patent licensing market.

Following proceedings initiated by InterDigital at the U.S. International Trade Commission, in August 2015, Microsoft filed a complaint against InterDigital, a nonpracticing entity, alleging that InterDigital engaged in "abusive licensing practices and unlawful monopolization in the relevant markets for third-generation (3G) and fourth-generation (4G) cellular technologies." [3] Microsoft claimed that InterDigital's "patents ... have [monopoly] power because they cover technology mandated" by the 3G and 4G technological standards. [4] According to the complaint, InterDigital falsely promised to license its patents on fair, reasonable and nondiscriminatory terms "so that members of the [standard setting organizations] would include InterDigital technologies in the standards." This led the standard-setting organizations to include InterDigital's patents in the 3G and 4G standards, and exclude alternative technologies. [5]

Microsoft alleged that InterDigital exploited this power in violation of Section 2 of the Sherman Act in several ways, including: (1) demanding excessive and discriminatory royalties from companies that sell 3G and 4G devices, (2) tying access to its U.S. patents to its foreign patents, (3) tying access to its standard-essential patents to its nonstandard-essential patents, (4) transferring control of hundreds of standard essential patents in order to "double dip" in its royalty demands, and (5) pursuing baseless infringement actions. Microsoft claimed that these actions harmed competition because they excluded alternative technologies from the 3G and 4G technological standards and increased the costs of manufacturing 3G and 4G products. [6]

InterDigital moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), arguing that Microsoft (1) failed to plausibly allege monopoly power in a relevant market, (2) that Microsoft had not alleged facts showing that InterDigital excluded competition from the relevant market, and (3) that its patent enforcement actions against Microsoft had a factual basis and were, therefore, immune from antitrust scrutiny under the *Noerr-Pennington* doctrine. [7]

The district court denied InterDigital’s motion.[8] The court found that it was “difficult to discern any material differences between Microsoft’s complaint” and the allegations that the Third Circuit found sufficient to state a monopolization claim in *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007) — the Third Circuit’s most recent articulation of the pleading standard for monopolization and attempted monopolization claims. The district court observed that Microsoft’s complaint properly alleged a relevant market for “technologies covered by InterDigital patents ... that are essential ... to the 3G and 4G cellular standards ... together with all alternative technologies to the InterDigital patents that could have been in use in the cellular standards.” Because this technology “was not interchangeable with or substitutable for other technologies and adherents to the [3G and 4G] standard[s] have become locked in,” InterDigital had monopoly power in this relevant market.[9]

The district court also found that InterDigital engaged in anti-competitive conduct designed to perpetuate its monopoly power in the relevant market. Because InterDigital allegedly “made an ‘intentional false promise that it would license its ... technology on FRAND terms,” these promises induced the standard-setting organization to adopt a 3G and 4G technology standard “that they would not have considered absent a FRAND commitment.” Following the adoption of its patents in the 3G and 4G technology standard, InterDigital allegedly excluded competing technologies and raised the prices of patent licenses. This conduct harmed competition by denying manufacturers of 3G and 4G devices access to necessary technology on anything but supracompetitive prices.[10]

A Post-TC Heartland Road Map For Antitrust Counterclaims?

The district court’s opinion in *Microsoft Mobile Inc. v. InterDigital Inc.* is notable because it is one of only two courts to recognize that a patent holder can monopolize a patent licensing market.[11] While this theory of monopolization remains untested in other judicial districts, and is subject to disagreement,[12] the District of Delaware has embraced it as viable at the pleading stage.

Therefore, *Microsoft Mobile Inc. v. InterDigital Inc.* may offer some patent defendants that now find themselves in the District of Delaware an option not recognized in other districts — bringing an antitrust counterclaim based on the plaintiffs’ patent portfolio. The *InterDigital* case found that a patent licensing can be a valid antitrust market. A patent holder, including NPEs, can have market power in that relevant market if it holds standard-essential patents, or a sufficient number of patents to require a practitioner to do business with the patent holder. As with any company that sells or licenses a product, a patent holder can engage in anti-competitive conduct if it excludes competing technologies from the market, or charges supracompetitive prices to patent licensees. As a result, patent infringement defendants may draw on the logic of *InterDigital* to respond to patent infringement suits brought in the District of Delaware, even where those suits are brought by NPEs that have not previously been subject to antitrust scrutiny. Patent plaintiffs and defendants should take note.

Adam Hudes is a partner and Stephen Medlock is a senior associate in the Washington, D.C., office of Mayer Brown LLP.

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[1] 28 U.S.C. § 1391(c).

[2] See Amicus Curiae Brief of BSA The Software Alliance in Support of Petitioner at 6, *TC Heartland, LLC v. Kraft Foods Grp. Brands LLC*, --- S. Ct. ---, 2017 WL 2216934 (2017) (No. 16-341).

[3] See Compl. at ¶¶ 1-9, *Microsoft Mobile, Inc. v. InterDigital, Inc.*, Case No. 1:15-cv-00723-RGA (D. Del. Aug. 20, 2015) (ECF No. 1). The litigation was settled on May 16, 2017, after the Federal Circuit found one of InterDigital's patents to be obvious and, therefore, invalid. See *IPR Licensing, Inc. v. ZTE Corp.*, --- F. App'x ---, 2017 WL 1406501 (Fed. Cir. 2017); Stipulation and Order of Dismissal, *Microsoft Mobile, Inc. v. InterDigital, Inc.*, Case No. 1:15-cv-00723-RGA (D. Del. May 16, 2017) (ECF No. 73).

[4] Complaint at ¶ 37, *Microsoft Mobile, Inc. v. InterDigital, Inc.*, Case No. 1:15-cv-00723-RGA (D. Del. Aug. 20, 2015) (ECF No. 1).

[5] *Id.* at ¶ 4.

[6] *Id.* at ¶ 6.

[7] Opening Brief in Support of Defendants' Motion to Dismiss and Motion to Strike at 6-8, 10-17, *Microsoft Mobile, Inc. v. InterDigital, Inc.*, Case No. 1:15-cv-00723-RGA (D. Del. Nov. 4, 2015) (ECF No. 17).

[8] *Microsoft Mobile, Inc. v. InterDigital, Inc.*, 2016 WL 1464545, at *2-4 (D. Del. 2016).

[9] *Id.* at *2.

[10] *Id.* at *2-3.

[11] See also *Intellectual Ventures I LLC v. Capital One Fin. Corp.*, 99 F. Supp. 3d 610, 620-27 (D. Md. 2015) (finding that patent infringement defendant pled plausible claims for monopolization and attempted monopolization in a market for financial-services patents); *Intellectual Ventures I LLC v. Symantec Corp.*, 2014 U.S. Dist. LEXIS 134255, at *13-14 (D. Del. 2014) (denying motion for judgment on the pleadings for claim that patent holder "illegally monopolized relevant markets for patent portfolios that it asserts are indispensable for making, selling, and using Internet security, antivirus, storage, monitoring, and replication products . . . by aggregating and bundling a collection of patents for which . . . no substitutes exist."). But see *Intellectual Ventures I LLC v. Capital One Fin. Corp.*, 2013 WL 6682981, at *4-8 (E.D. Va. 2013) (dismissing monopolization and attempted monopolization counterclaims based on aggregation of patent rights).

[12] Compare Alan Devlin, *Antitrust Limits on Targeted Patent Aggregation*, 69 Fla. L. Rev. 775, 826-42 (Mar. 2015) (explaining how patent aggregation may be the basis of a monopolization claim) and Eric Young, *A Bridge Over the Patent Trolls: Using Antitrust Laws to Rein in Patent Aggregators*, 68 Hastings L.J. 203, 220-24 (Dec. 2016) (same), with Maureen K. Ohlhausen, *Patent Rights in a Climate of Intellectual Property Rights Skepticism*, 30 Harv. J. L. & Tech. 103, 109 (Fall 2016) ("I worry that today's calls for diluted patent rights often go beyond incremental adjustment and threaten to weaken patents systematically, which could compromise R&D investment.").