U.S. SUPREME COURT KICKS PATENT TROLLS TO THE CURB

By Audrey D. Kline

***This article is part of a series of commentary articles written for B>Quest by Dr. Kline. See* http://www.westga.edu/~bquest/2017/insights.htm for a list of the articles in this series.**

In a 2017 case, the U.S. Supreme Court dealt a devastating blow to patent trolls and their rent-seeking activities. Rent seeking is commonly known as the unnecessary expenditure of resources to capture a transfer (profit) by manipulating circumstances in the economy. William Watkins, Jr.'s informative book, *Patent Trolls: Predatory Litigation and the Smothering of Innovation,* points out the rent-seeking activity taking place in the patent-troll friendly Eastern District of Texas. (See review of Watkins' book.)

Patent trolls are typically non-practicing entities (NPE) that obtain a patent on an old, broad-based software and/or computer technology in the hope of filing suit later against an entity using the technology (Watkins, p. 8). In other words, NPEs are shell companies – they are trolls that seek to profit simply by owning the patent and filing suit against businesses they claim are infringing on their patent. Patent trolls typically have no intention of ever entering the industry in which they hold the patent. Watkins notes that trolls are often after "protection money rather than jury verdicts," (Watkins, p. 13), and have been historically successful because it is less costly for the defendant to pay the protection money (akin to paying ransom money) than to engage in costly litigation. Much like a

playground bully or the mafia, patent trolls have had a history of employing scare tactics to capture revenue.

Watkins provides several reasons why trolls in recent years have become more prevalent and have sought to have their cases heard in the East Texas District—notably a lack of corporate presence, a largely uneducated jury pool, and an older, less technologically savvy population. The combination of these factors led to an historically plaintiff-friendly courtroom, with nearly 80% of judgments awarded to the plaintiff (Watkins, pp. 29-31). Watkins called on Congress and the Federal Circuit to revisit the rules surrounding personal jurisdiction and corporate residence in an effort to reduce the rent-seeking behavior of patent trolls. The importance of this is to restore incentives for innovation, spur economic growth, and put an end to the bullying behavior to extract profit from defendants.

On May 22, 2017 the U.S. Supreme Court in TC Heartland LLC v. Kraft Foods Group Brands LLC, No. 16-341, unanimously tightened the definition of corporate residence, with Justice Thomas noting that corporate residence lies with the state of its incorporation. This decision overturned a lower court ruling that allowed patent holders to file suit anywhere they wished, which led to shopping for plaintiff-friendly venues, such as the East Texas District. As Larry Downes noted recently in the *Harvard Business Review* (June 2, 2017), this ruling, combined with a second ruling (Impression Products v. Lexmark) related to the control patent holders have once their product is in the hands of consumers, will serve to dramatically slow the pace at which trolls will be able to operate. The latter decision limits the patent-holder's power to the primary market, eliminating control in secondary markets.

Together, these two rulings will serve to reduce abuse of patent law. Trolling behavior will be lessened, and secondary markets can thrive. Both of these developments should serve to promote continued innovation and economic development. Rent-seeking behavior should diminish, along with bullying tactics of patent trolls and their attorneys who often were seeking out of court settlements from the defendant to avoid costly litigation. Several trade groups and technology companies sided with TC Heartland, as did the attorney generals of 17 states, all urging the Court to put an end to the ability to shop for a friendly district. The various briefs are available here.

The various businesses that have grown up around the patent-troll industry in the East Texas District (Marshall, to be exact) will certainly experience some tougher times. As explained in one brief (Watkins, p. 8) filed with the Court, one local hotel that promoted itself to lawyers by offering electronic access to federal court dockets probably won't be so full anymore. A technology company that was a frequent defendant in Marshall will likely find less need to invest advertising and sponsorship dollars in the town as well. So, while many patent holders will benefit from the Court's ruling, there will be some fallout as the rent-

seeking behavior of the trolls dries up in East Texas, and the defendants will also feel less need to invest in their reputation in Marshall to mitigate financial damages in the litigation process.

The losses to the industry that has grown up to support the troll-friendly East Texas District are a small price to pay in comparison to the economic benefits of busting up the patent troll economy. Small businesses will begin to feel relief, no longer burdened by patent trolls demanding licensing or other fees under the threat of litigation, and the legal system will experience a reduction in frivolous lawsuits. Instead, innovation and economic growth can once more be the focal point of many small businesses, rather than fighting off the rent-seeking behavior of patent trolls. Bravo to the Court!