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Federal Circuit Orders Transfer of Case from Eastern District of Texas to Western District of Wisconsin, Based Upon *TC Heartland*

On September 21, 2017, in *In re Cray, Inc*., No. 2017-129, the Federal Circuit granted a petition for writ of mandamus, and directed that a case brought in the Eastern District of Texas be transferred to the Western District of Wisconsin. The Federal Circuit relied upon the United States Supreme Court's decision in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017).

The case involves a patent infringement action filed in the Eastern District of Texas by Raytheon Company ("Raytheon") against Cray Inc. ("Cray"). Cray does not rent or own an office or any property in that district, but allowed individuals to work remotely there from their homes. Cray moved to transfer the lawsuit under 28 U.S.C. § 1406(a), arguing that it does not "reside" in the Eastern District of Texas, based upon the Supreme Court's *TC Heartland* decision. Cray also argued that venue was improper because Cray did not commit any acts of infringement there, nor kept a regular place of business there.

The district court denied the motion. The court agreed that Cray did not "reside" in the district, but found that the activities at issue were essentially the same as those performed by representatives in *In re Cordis Corp*., 769 F.2d 733 (Fed. Cir. 1985), where the Federal Circuit actually rejected a mandamus request to reverse an order that denied a request to transfer based upon improper venue.

The Federal Circuit, on Cray's petition for a writ of mandamus directing reversal of the denial of motion requesting the case be transferred to the Western District of Wisconsin, found that the district court "misunderstood the scope and effect of our decision in *Cordis*." The Federal Circuit noted that, since *TC Heartland*, courts have been faced with an increasing number of motions to transfer based upon improper venue. The court held that, if any of the following factors were not met, venue was improper: "(1) there must be a physical place in the district; (2) it must be a regular and established place of business; and (3) it must be the place of the defendant."

As applied to this case, the Federal Circuit held that the district court erred in holding that a "fixed physical location in the district is not a prerequisite to venue" – in fact, there must be a "physical, geographical location in the district from which the business of the defendant is carried out." Further, the district court erred in holding that a "regular and established place of business of the defendant" can include a home office, because "an employee can move his or her home out of the district at his or her own instigation, without ... approval ..." – and such an office, while it may be the place of business of a defendant's employee, is not an established place of business "of the defendant." The Federal Circuit also contrasted the *Cray* facts with those in *In re Cordis*, where the place of business was established by Cordis – not by the employees themselves – and Cordis's business depended on employees being physically present at places in the district.

The Federal Circuit concluded that, "[f]or purposes of [the patent infringement venue statute], it is of no moment that an employee may permanently reside at a place or intend to conduct his or her business from that place for present and fu-

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ture employers. 'The statute clearly requires that venue be laid where "the defendant has a regular and established place of business," not where the defendant's employee owns a home in which he carries on some of the work that he does for the defendant.'" The Federal Circuit granted Cray's petition for a writ of mandamus and directed transfer of the case. ■

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New Jersey's Appellate Division Affirms Denial of Motion to Vacate Final Judgment of Foreclosure

On September 28, 2017, in *Deutsche Bank National Trust Company, as Trustee v. Ferrara*, Docket No. A-4200,15T3, the New Jersey Appellate Division affirmed the lower court's order denying borrowers' motion to vacate final judgment of foreclosure and to dismiss the trustee's foreclosure complaint.

Borrowers obtained a $806,000.00 note, secured by a mortgage on their property, to IndyMac Federal Bank, F.S.B. ("IndyMac"). Defendants defaulted on their loan on January 1, 2009. On March 19, 2009, OneWest Bank FSB ("OneWest") acquired IndyMac, including all of IndyMac's assets, from the Federal Deposit Insurance Corporation ("FDIC"). At that point, OneWest became the owner of the note and mortgage, and had authority to foreclose. On May 4, 2009, OneWest filed its foreclosure complaint. On March 18, 2010, OneWest moved for entry of final judgment, which was unopposed and granted by the Court on November 18, 2010.

On November 22, 2011, the FDIC as Receiver for IndyMac assigned the mortgage to OneWest. In turn, on December 5, 2011, OneWest assigned the mortgage to plaintiff ("Deutsche Bank"). On January 12, 2012, the court granted OneWest's motion to substitute in Deutsche Bank as the plaintiff. On February 1, 2016, plaintiff filed a motion to amend the final judgment and writ of execution, which the court also granted. Finally, on April 26, 2016, on the eve of the scheduled sheriff's sale, borrowers moved to vacate the final judgment and dismiss the complaint. On May 13, 2016, the judge denied the motion, and borrowers appealed.

On appeal, the Appellate Division affirmed. The court found that OneWest had standing to foreclose at the time the complaint was initially filed, and that the "belated written assignments" did not affect standing. The court further noted that borrowers had waited more than five years after entry of final judgment to assert the defense of lack of standing. Finally, the court noted that borrowers' motion was time-barred by Rule 4:50-2, as the motion was not filed within a reasonable time. ■

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