

The (Unintended) Consequences of the AIA Joinder Provision

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Joinder Before The AIA

- Fed. R. Civ. P. 20(a):
 - common question of fact or law (i.e. validity & claim construction); and
 - arising out of the same transaction or occurrence.
- Most courts found misjoinder even if common patents asserted, products were similar, and technology was similar.
- E.D. Tex. was the exception.

E.D. Tex. Pre-AIA Joinder Rulings

- Joinder proper where unrelated defendants alleged to infringe the same patent(s).
- Results in “nucleus of operative facts or law”.
- *Eolas Tech., Inc. v. Adobe Systems, Inc.*
 - “the products, facts, and issues of law were significantly related and overlapping” and severance “would not preserve judicial economy.”
 - Fed. Cir. Denied petition for writ of mandamus.

America Invents Act – s. 299

- (a) Joinder of Accused Infringers. – With respect to any civil action arising under any Act of Congress relating to patents, . . . parties that are accused infringers may be joined in one action as defendants or counterclaim defendants, or have their actions consolidated for trial, or counterclaim defendants *only if* --
- (1) any right to relief is asserted against the parties jointly, severally, or . . . With respect to or arising out of the *same transaction, occurrence, or series* of transactions or occurrences relating to the making, using, importing. . . offering for sale, or selling of the same accused product or process; *and*
 - (2) questions of fact common to all defendants or counterclaim defendants will arise in the action.
- (b) Allegations Insufficient for Joinder – For purposes of this subsection, accused infringers *may not be joined in one action* as defendants or counterclaim defendants, or have their actions *consolidated for trial*, based *solely* on allegations that they each have infringed the patent or patents in suit.

Congress' Intent

- Enacted with NPEs, the E.D. Tex., and multi-defendant patent litigation in mind.
 - “Section 299 legislatively abrogated” 7 rulings, including 5 from Texas, that allowed joinder in multi-defendant litigation.
 - “effectively codifies current law as it has been applied everywhere outside of the Eastern District of Texas.”
 - Congressional testimony that “Congress should limit a patent plaintiff’s ability to join multiple unrelated defendants in a patent lawsuit unless the accused products are so closely related that proof of infringement as to one product will prove infringement of the other . . . This change will limit a NPE’s ability to haul dozens of unrelated defendants into an inappropriate jurisdiction.”
 - AIPLA: “the AIA’s joinder provision was intended to raise the litigation costs of non-practicing entities in an effort to reduce litigation by such entities.”

Is It All It Was Cracked Up To Be?

Rate of Patent Litigation Filings Pre- and Post-AIA

	1/1/11-9/1/11	9/2-15/11
All District Courts	2,694 (73/wk)	239 (120/wk)
E.D. Tex.	392 (11/wk)	69 (35/wk)

Is It All It Was Cracked Up To Be?

E.D. Tex. v. D. Del. -- Pre- and Post-AIA

	1/1/11-9/15/11	9/16/11-5/1/12
E.D. Tex.	461	525
D. Del.	279	469

Is It All It Was Cracked Up To Be?

Rate of Patent Litigation Filings Pre- and Post-AIA

9/16/10-5/1/11	9/16/11-5/1/12
2,612	3,098

- Portion of increase is attributable to numerous individual suits being filed, instead of single, multi-defendant suits.

Is It All It Was Cracked Up To Be?

Top 5 Patent Jurisdictions -- Pre- and Post-AIA

	9/16/10-5/1/11	9/16/11-5/1/12
E.D. Tex.	573	525
D. Del.	199	469
N.D. Cal.	243	242
C.D. Cal.	183	215
N.D. Ill.	117	171

NPEs (and others) Filing Numerous Single-Defendant Lawsuits

- NovelPoint Security: filed 34 suits on Mar. 9-10 in E.D. Tex.
- ArrivalStar: filed 69 suits between Sept. 16, 2011-Mar. 20, 2012, including 44 in the S.D. Fla. And 18 in the N.D. Ill.
- Klausner Technologies: filed 55 suits between Oct. 1, 2011-Mar. 20, 2012 in E.D. Tex.
- Data Carriers: filed 24 suits on Mar. 16, 2012 in D. Del.
- Maxim: filed 10 suits between Jan. 6-Feb. 23, 2012 in E.D. Tex.

What's the Benefit?

- Courts are severing multi-defendant patent cases, even if they were filed pre-AIA.
 - *GPNE Corp. v. Amazon.com, Inc., et al.* (D. Hi.): “GPNE accuses the defendants of infringing the asserted patents in the same way, but not as part of the same transaction or series of transactions.”
 - *Brandywine Comm. Tech., LLC v. Verizon Comm., Inc., et al.* (M.D. Fla.): “the mere fact that the same Patent is at issue is not enough to meet the ‘same transaction or occurrence’ requirement of Rule 20”; severance “is in full accord with the [AIA].”
 - *Body Science LLC v. Boston Scientific Corp.* (N.D. Ill.): Congress “abrogated the minority view” by passing the AIA.
- Far fewer multi-defendant patent cases have been filed post-AIA.

But Is It Effective?

- Courts that sever cases still are consolidating them for pretrial purposes
 - *GPNE Corp. v. Amazon.com, Inc., et al.* (D. Hi.): ordered that the scheduling order in the pending case govern all of the severed actions until further order from the court.
 - *Brandywine Comm. Tech., LLC v. Verizon Comm., Inc., et al.* (M.D. Fla.):
 - agreed with the need for “a unified approach to issues of claim construction and validity of the same Patent.”
 - called for “coordinated case management of the cases with respect to the resolution of truly identical issues, while allowing each Defendant to pursue their defenses as they see fit.” *But see Body Science LLC v. Boston Scientific Corp.* (N.D. Ill.): Refused consolidation.

But Is It Effective?

- Plaintiffs are filing multiple single-defendant cases and then seeking to MDL them.
 - *Bear Creek*:
 - originally filed single, multi-defendant case in E.D. Va.
 - court severed the cases
 - Bear Creek re-filed multiple, individual-defendant cases in Delaware, Georgia and Virginia, and then MDL treatment.
 - JPML rejected AIA-based arguments opposing the MDL motion.

But Is It Effective?

- *Bear Creek JPML Ruling*:
 - AIA “does not alter our authority to order pretrial centralization of this litigation.”
 - s. 299 = trial and joinder in “one action”
 - s. 1407 = pretrial and separate actions
 - “[I]f Congress intended to amend Section 1407 it would have done so in a more direct fashion[.]”
- Other patent cases with MDL motions pending:
 - *Maxim* (17 cases)
 - *Parallel Networks* (11 cases)

Rule 42(a): An End-Run Around the AIA?

- Fed. R. Civ. P. 42:
 - (a) Consolidation. If actions before the court involve a common question of law or fact, the court may:
 - (1) join for hearing or trial any or all matters at issue in the actions;
 - (2) consolidate the actions; or
 - (3) Issue any other orders to avoid unnecessary cost or delay.
 - (b) Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. . . .

MDL: An End-Run Around the AIA?

- 24 U.S.C. s. 1407:
 - (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. . . . Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred

An End-Run Around the AIA?

- Arguments against:
 - “accused infringers may not be joined in *one action* . . . or have their actions *consolidated for trial*, based solely on allegations that they each have infringed the patent or patents in suit.”
 - Rule 42(a) allows consolidation for pretrial purposes only.
 - MDL statute consolidates cases for pretrial purposes only.
 - Caselaw analyzing Rule 42(a) suggests that consolidated cases are not considered “single unit” and, thus, not “one action.”

An End-Run Around the AIA?

- Arguments in favor:
 - “spirit” of the AIA certainly should preclude it.
 - AIA was enacted to raise litigation costs for NPEs in an effort to reduce litigation by those entities.
 - Legislative history: “If a court that was barred from joining defendants in one action could instead simply consolidate their cases for trial under rule 42, Section 299’s purpose of allowing unrelated patent defendants to insist on being tried separately would be undermined.”
 - Consolidation and MDL are end-runs around the AIA.

Effect on NPEs?

- What effect?

Effect on Defendants?

- More lawsuits.
- Higher costs.
- More coordination.

Effect on Courts?

- More \$\$\$.
- More coordination.
- More headaches.