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Fifth Circuit Issues Ruling on Standards for Transferring Venue

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On October 10, 2008, the Fifth Circuit, sitting en banc, issued its decision in *In re Volkswagen of America Inc.*^[1]

The case concerns the appropriate standard to apply to a motion to transfer venue. Though *Volkswagen* is not a patent infringement case - as the name suggests, it concerns automobile product liability - the patent bar in the Eastern District of Texas has closely watched this case because of the perceived difficulty of winning a motion to transfer in the Eastern District.^[2]

The Fifth Circuit sided with Volkswagen, holding that denying the motion to transfer was “an abuse of discretion that clearly exceeds the bounds of judicial discretion.” In arriving at that conclusion, the Fifth Circuit expressed concern that “the district courts have developed their own [venue transfer] tests, and they have applied these tests with too little regard for consistency of outcomes.” The Fifth Circuit explicitly noted that it was exercising its “supervisory” powers in granting the writ because “the issues presented and decided above have an importance beyond this case.”^[3]

Background

In May 2005, the plaintiffs' Volkswagen Golf was hit from behind and driven into a flat-bed trailer. The accident paralyzed one passenger and killed another - his seven-year-old granddaughter. The plaintiffs claimed the injuries were the result of Volkswagen's defective design of seat adjustment mechanisms; the seat collapsed during the accident.

The car was bought at a Volkswagen dealership in Dallas County, Texas. The accident occurred on a freeway in Dallas County and was witnessed by Dallas County residents. The driver of the car that struck the plaintiffs is a Dallas County resident, as are the responding officers, paramedics, and treating doctors.

The suit was nevertheless filed in the Marshall Division of the Eastern District of Texas. No party lives in that district. No witness lives in that district and no known source of proof is located there. Volkswagen moved to transfer venue to the Dallas Division of the Northern District of Texas pursuant to 28 U.S.C. § 1404(a).

The Decision Below

The district court began by noting the plaintiff's choice of forum is a “paramount consideration.” The court held that to overcome the plaintiff's choice, Volkswagen must show that “the balance of convenience and justice *substantially* weighs in favor of transfer.”^[4] The court then weighed the traditional private and public interest factors involved in venue transfer motions and concluded that the factors did not favor transfer.^[5]

The Initial Fifth Circuit Rulings

In a brief, per curiam opinion, a divided Fifth Circuit panel affirmed the denial of transfer.^[6] The majority held that the district court did not clearly abuse its discretion. Judge Garza wrote a dissenting opinion, noting that “[t]he only connection between this case and the Eastern District of Texas is plaintiffs’ choice to file there; all other factors relevant to transfer of venue weigh overwhelmingly in favor of the Northern District of Texas.”^[7]

Volkswagen subsequently moved for rehearing en banc. The panel elected to treat the motion as one for rehearing. The panel granted the motion and withdrew its decision. The matter was subsequently reheard before a new panel, which found for Volkswagen and directed transfer to the Northern District.^[8] That panel held that the district court had inappropriately required Volkswagen to “show that the balance of convenience and justice *substantially* weighs in favor of transfer,” a standard typically applied to in the context of “the much stricter forum non conveniens dismissal standard.”^[9] In place of such a standard, the panel held that a movant need only show that transfer is appropriate “[f]or the convenience of parties and witnesses, in the interest of justice” - i.e., “good cause.” The panel went on to evaluate the private and public factors, concluding that “although the district court correctly enumerated these factors, the court abused its discretion by failing meaningfully to analyze and weigh them.”^[10] The panel’s analysis largely mirrors the en banc analysis, discussed in more detail below.

The plaintiffs moved for rehearing en banc, which the Fifth Circuit granted.^[11]

The Fifth Circuit En Banc Ruling

In a 10-7 decision, the en banc court found for Volkswagen and directed the district court to transfer the matter to the Northern District. The court first addressed what level of review to apply. Because a writ of mandamus is an extraordinary remedy, the court determined that it should apply scrutiny above the normal “abuse of discretion” review. Instead, the court held that to overturn a district court’s decision on a motion to transfer, an appellate court must find “an abuse of discretion that *clearly exceeds* the bounds of judicial discretion.”^[12]

The court found such an abuse of discretion here. The court began by correcting the underlying standard applied by the district court to the transfer motion. Rather than needing to show that “the balance of convenience and justice *substantially* weighs in favor of transfer,” the court held that the movant must show “that the transferee venue is clearly more convenient.”^[13]

Applying that more lenient standard, the court concluded that the district court’s treatment of the private and public interest factors was “patently erroneous.”^[14] Notable aspects of the en banc court’s analysis include:

- The district court had held that the distance between the witnesses and the Marshall courthouse - 150 miles - was not “far enough to weigh substantially in favor of a transfer.” The court held that this distance was sufficient to weigh in favor of transfer.^[15]
- The district court noted that Volkswagen had identified likely Dallas-based witnesses and filed affidavits from several indicating that travel to Marshall would be inconvenient, but discounted this argument because Volkswagen did not provide the witnesses’ anticipated testimony or detail how they were material. In a footnote, the court rejected the argument that it was necessary for Volkswagen to submit such affidavits.^[16]
- The district court held that “because of the advances in copying technology and information storage,” the location of sources of proof in Dallas “does not weigh in favor of transfer.” The court held that such an approach “reads the sources of proof requirement out of the § 1404 (a) analysis . . . despite the fact that this Court has recently reiterated that the sources of proof requirement is a meaningful factor in the analysis.”^[17]
- Though acknowledging that “residents of the Dallas Division of the Northern District of Texas have an interest in a case involving one of their fellow residents that arose out of an accident within the Division,” the district court found that “the citizens of Marshall also have an interest in this product liability case because the product is available in Marshall,” and found the factor neutral. The district court likewise concluded that jury duty for Marshall residents would not be a burden because “citizens of Marshall would be interested to know whether there are defective products offered for sale in close proximity to the Marshall Division and whether they are being exposed to these products.” The court found that such reasoning “stretches logic in a manner that eviscerates the public interest that this factor attempts to capture” and noted the same approach “could apply virtually to any judicial district or division in the United States.” The court held that the analysis should instead turn on “consideration of those actually affected - directly and indirectly - by the controversies and events giving rise to a case.”^[18]

Significance of the Decision

We expect this decision will lead to an increase in the number of change-of-venue motions in the Eastern District of Texas. Should those motions be granted, that would begin - together with the current docket conditions - to undercut the rationale for filing in the Eastern District. It is too soon to tell the actual significance of *Volkswagen*, however, as it remains to be seen how the judges in the Eastern District of Texas will apply *Volkswagen* and what the Federal Circuit will make of *Volkswagen* applied to patent cases.^[19]

Footnotes

[1] No. 07-40058, ___ F.3d ___ (5th Cir. Oct. 10, 2008) (en banc). The Fifth Circuit hears appeals from the Eastern District of Texas.

[2] The American Intellectual Property Law Association filed an amicus brief urging the Fifth Circuit to hold that the plaintiff's choice of venue is only the "presumptive starting point" for the venue analysis and that it should not otherwise be entitled to "substantive weight." On the other side, a group describing itself as an "ad hoc committee of intellectual property trial lawyers in the Eastern District of Texas" submitted a competing brief arguing that the motion to transfer was appropriately denied.

[3] *Volkswagen*, No. 07-40058 at 21.

[4] *Singleton v. Volkswagen of Am., Inc.*, 2006 U.S. Dist. LEXIS 65006, *5 (E.D. Tex. Sept. 12, 2006).

[5] The district court summarized the factors considered as follows:

The convenience factors weighed by the district court are the following: (1) the plaintiff's choice of forum; (2) the convenience of the parties and material witnesses; (3) the place of the alleged wrong; (4) the cost of obtaining the attendance of witnesses and the availability of the compulsory process; (5) the accessibility and location of sources of proof; and (6) the possibility of delay and prejudice if transfer is granted. The court also balances the following public interest factors: (1) the administrative difficulties caused by court congestion; (2) the local interest in adjudicating local disputes; (3) the unfairness of burdening citizens in an unrelated forum with jury duty; and (4) the avoidance of unnecessary problems in conflict of laws.

Id. at *4 (internal citation omitted).

[6] *In re Volkswagen of Am., Inc.*, 223 F. App'x 305 (5th Cir. 2007).

[7] *Id.* at 307 (Garza, J., dissenting).

[8] *In re Volkswagen of Am., Inc.*, 506 F.3d 376 (5th Cir. 2007).

[9] *Id.* at 380.

[10] *Id.* at 384.

[11] *In re Volkswagen of Am., Inc.*, 517 F.3d 785 (5th Cir. 2008).

[12] *In re Volkswagen of Am., Inc.*, No. 07-40058 at 7 (5th Cir. Oct. 10, 2008) (emphasis added).

[13] *Id.* at 14.

[14] *Id.* at 20.

[15] *Singleton*, 2006 U.S. Dist. LEXIS 65006, *7; *Volkswagen*, No. 07-40058 at 18.

[16] *Singleton*, 2006 U.S. Dist. LEXIS 65006, *8; *Volkswagen*, No. 07-40058 at 17-18 n.12.

[17] *Singleton*, 2006 U.S. Dist. LEXIS 65006, *11; *Volkswagen*, No. 07-40058 at 16.

[18] *Singleton*, 2006 U.S. Dist. LEXIS 65006, *12, *13; *Volkswagen*, No. 07-40058 at 19.

[19] It is notable that a prior Fifth Circuit decision that was thought to ease venue transfer motions - *In re Volkswagen AG*, 371 F.3d 201 (5th Cir. 2004) - has not seen wide application in patent cases.