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CLIENT ALERT

An Appeal May Be Frivolous "As Filed," or Frivolous "As Argued," Either of Which May Warrant Sanctions

JULY 8, 2019

Westech Aerosol Corporation v. 3M Company, No. 2018-1699 (Fed. Cir. July 5, 2019)
The patentee brought suit for patent infringement, after which the Supreme Court issued its opinion in the *TC Heartland* case, finding that a corporation "resides" only in its state of incorporation for purposes of venue. After the alleged infringer moved to dismiss, the Federal Circuit decided the *In re Cray* case, holding that a defendant must have a physical place in the venue that serves as a regular and established place of business. The district court therefore dismissed for lack of venue, and the patentee appealed.

After the patentee filed its opening appeal brief, the alleged infringer moved for sanctions of attorneys' fees and double costs. The patentee replied that it had satisfied the pleading standards to survive a motion to dismiss, regardless of the lack of any pled facts supporting venue. The Federal Circuit affirmed the dismissal, holding that it is not "sufficient to parrot the language" of the venue statute in lieu of pleading actual facts to show proper venue. On the question of sanctions, the Federal Circuit found that the patentee's appeal was not "frivolous as filed" because the issue of who had the burden to show venue had not been settled—the Federal Circuit's *ZTE* decision holding that a plaintiff bears that burden had not yet issued. The appeal was, however, "frivolous as argued" given that the *ZTE* decision issued during the pendency of the appeal. Despite the fact that the appeal "borders on sanctionable," the Federal Circuit declined to issue sanctions, given the unique procedural posture.
A copy of the opinion can be found here

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