

## *Misjoinder—The Next Battleground*

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The law of permissive joinder of parties is the next battleground in the war occurring in patent infringement litigation. The issue is significant. Patent infringement litigation is notoriously complex and expensive, and the law regarding permissive joinder of parties plays a significant role in reducing or increasing the cost of patent infringement litigation. Proper joinder of multiple defendants in a single lawsuit provides for the efficient use of the parties' and the court's resources without undue prejudice to the defendants. Improper joinder of multiple defendants in a single lawsuit, however, does the opposite, unnecessarily increasing costs and severely prejudicing the interests of the defendants.

The issue is disputed. There is a split of authority in the various district courts around the country regarding permissive joinder of defendants in patent infringement litigation. On the one hand, the Eastern District of Texas and other courts apply a liberal standard that permits patent owners to name numerous defendants in one lawsuit if there is a "logical relationship" between various transactions. On the other hand, the Northern District of California and other courts apply a stricter standard that does not permit patent owners to name numerous defendants in one lawsuit unless the defendants engaged in "related activities" or "otherwise acted in concert." The Federal Circuit, to date, has not stepped onto the battlefield to address the dispute and weigh the merits of the competing standards.

The issue is timely. In 2008, the en banc U.S. Court of Appeals for the Fifth Circuit issued a significant opinion addressing the law governing motions to transfer venue, ultimately making it easier for defendants to obtain transfers based on allegations the forum is inconvenient. Since 2008, the U.S. Court of Appeals for the Federal Circuit has granted no less than five petitions for writ of mandamus ordering the Eastern District of Texas to transfer cases based on application of the standards identified by the Fifth Circuit in its en banc opinion, with the most recent opinion issuing this spring. In the meantime, plaintiffs seeking to prevent transfer increasingly have filed complaints in the Eastern District of Texas naming numerous defendants, for example including more than ten defendants spread across the country plus at least one local defendant. While this strategy has immunized these plaintiffs from motions to transfer, the strategy has also brought to the forefront the question of the appropriate standard to apply to the issue of permissive joinder of defendants.

In my article, I study the historical development of the law governing permissive joinder of parties, identify conflicting case law based on conflicting paradigms, analyze the costs and benefits of a liberal versus a more strict standard governing permissive joinder of parties, and advocate that the conflict in the case law be resolved in a way that balances the competing interests of plaintiffs, defendants, and the court system with a goal toward reducing the cost of patent infringement litigation.