

States Have the Right to Protect Businesses Against Non-Practicing Entities (NPEs)

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Addressing the issue of state efforts to reign in non-practicing entities, the U.S. Court of Appeals for the Federal Circuit found that it **lacked jurisdiction to hear cases** brought against a **non-practicing entity under Vermont's consumer protection act**. *State of Vermont v. MPHJ Technology Investments, LLC*, Case No. 14-1481 and *In re MPHJ Technology Investments, LLC*, Case No. 14-137 (Fed. Cir., Aug. 11, 2014) (Newman, J.).

MPHJ owns several patents related to network scanner systems. Through its subsidiary licensees, MPHJ wrote threatening letters to various businesses and non-profits operating in Vermont, asking the targets to either confirm it was not infringing MPHJ's patents or purchase a license. On May 8, 2013 Vermont's attorney general filed suit against MPHJ in Vermont state court alleging violation of Vermont's Consumer Protection Act. The AG stated that MPHJ's letters contained threatening, false and misleading statements. The AG sought civil penalties against MPHJ. MPHJ removed the case to the U.S. District Court for the District of Vermont asserting federal question and diversity jurisdiction. The AG sought remand while MPHJ filed a motion to dismiss for lack of personal jurisdiction and a motion for Rule 11 sanctions, claiming the AG's complaint was frivolous. After a hearing, the AG filed a conditional motion to clarify or amend its complaint and eliminate its request for a permanent injunction forbidding MPHJ from threatening Vermont businesses with patent infringement. The District of Vermont granted the motion to remand and did not rule on MPHJ's other motions. The district court held that the complaint "did not raise a substantial question of patent law" and accordingly belonged in Vermont state court. The district court rejected MPHJ's preemption defense, finding it was a defense to the allegedly unfair and deceptive practices and that a defense cannot provide a basis for federal subject matter jurisdiction.

MPHJ appealed, arguing that the district court abused its discretion by effectively denying MPHJ's motion for sanctions, by refusing to decide the motion to dismiss for lack of personal jurisdiction before deciding subject matter jurisdiction and by "effectively amending the Original Complaint and then declining to exercise jurisdiction over the complaint as amended . . . without first deciding a controlling question of preemption under the First Amendment and federal patent law."

The Federal Circuit declined to review, noting that 28 U.S.C. § 1447(d) provided that an order remanding a case to state court was not reviewable on appeal. The Court found that the district court had remanded the case on a § 1447 ground, namely that it did not raise a claim or question of federal

law. Thus, the Federal Circuit concluded it lacked jurisdiction to review the remand decision.

The Federal Circuit also denied MPHJ's argument that § 1447 was not relevant to the Federal Circuit's review of the district court's failure to address MPHJ's motions to dismiss for lack of personal jurisdiction and sanctions, noting that there was no exception to § 1447 for these motions.

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