

ESSAY

PATENT “TROLLS” AND CLAIM CONSTRUCTION

*Greg Reilly**

This Essay explores the largely overlooked relationship between claim construction and patent assertion entities (patent “trolls”) finding that claim construction problems and trends benefit patent assertion entities. First, the Federal Circuit is deeply divided as to the proper approach to claim construction. This split is a significant contributor to uncertain patent scope, which is widely-recognized as a core reason for the rise and success of patent assertion entities. Second, case law and commentary increasingly endorse an approach to claim construction that relies on the “general meaning” in the technical field with limited reliance on the patent itself. This approach increases the breadth and uncertainty of patent scope, the exact conditions under which patent assertion entities thrive. Unsurprisingly, patent assertion entities often rely on “general meaning” arguments. Third, the Supreme Court’s recent adoption of a more deferential standard of review for claim construction is widely praised. However, because patent assertion entities file in favorable district courts, like the Eastern District of Texas, deferential review increases both the benefits patent assertion entities receive from favorable districts and their incentives to file in those districts.

These connections suggest that those concerned by patent assertion entities should be more concerned with claim construction. Conversely, the impact on patent assertion entities is relevant to designing claim construction rules. Finally, the current state of claim construction undermines other efforts to combat patent assertion entities, which often depend on identifying low merit claims. The uncertain and potentially broad claim scope under current claim construction doctrine limits the number of patent assertions that will be deemed meritless, frivolous, or implausible at the time of filing (and perhaps even after claim construction!).

* Assistant Professor of Law, California Western School of Law; Visiting Faculty, Chicago-Kent College of Law (Fall 2015). Thanks to . . . for helpful discussions and comments on this and earlier versions of the project.