From PI to IP: Yet Another Unexpected Effect of Tort Reform

Ronen Avraham
Professor in Law, The University of Texas at Austin
ravraham@law.utexas.edu | Bio

John M. Golden
Professor in Law, The University of Texas at Austin
jgolden@law.utexas.edu | Bio

Is there a connection between state-law tort reform and the explosive growth of U.S. intellectual property (IP) litigation? The literature has established that the number of tort claims in states with tort reform has gone down. How do personal injury (PI) plaintiff lawyers deal with the decrease in the demand for their services? Could a significant number of them end up shifting their practice toward IP law? Although David Schwartz's interviews with contingent-fee litigators have led him to suggest that "[m]ost lawyers whose practice consists of substantially all patent contingent litigation are primarily and historically patent litigators,"[1] there is pre-existing anecdotal evidence that some proportion of PI lawyers have switched substantially to IP.

Using data gathered from various sources, including Lex Machina and the Database of State Tort Law Reforms, we find more systematic evidence of a related proposition—namely, that state tort reform significantly and substantially increases copyright and patent filings in U.S. district courts in the states where tort reform has occurred. In contrast, the evidence does not indicate a similarly significant effect on trademark and trade-secret filings. One potential explanation for the apparently different results for copyright and patent as opposed to trade secret and trademark is that, to the extent tort reform has produced an increase in trademark or trade-secret filings, that increase has been concentrated in state courts, rather than federal district courts that have exclusive jurisdiction over patent and copyright cases. Alternatively, it could be that PI attorneys moving into other areas of practice are more likely to gravitate toward patent litigation and copyright litigation, rather than trademark litigation or trade-secret litigation, perhaps because patent litigation and copyright litigation offer more opportunities for lucrative suits brought by non-incumbent industry players (e.g., independent inventors or startup firms) who might be most likely to seek the services of former PI attorneys. Finally, it should be noted that the apparent differential growth of patent and copyright litigation in states that have undergone tort reform might not be explained substantially by a lawyer-based shift from PI to IP at all. Instead, the primary mechanism for such differential growth could be court-based: for example, a post-reform decrease in docket congestion could make a state's U.S. district courts significantly more attractive for IP filings, either directly by making litigation in those courts speedier or indirectly by freeing time for the courts to adopt rules for IP litigation that parties find attractive. This paper discusses such potential explanations and considers their plausibility in light of the paper's new empirical evidence as well as other available data.

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[1] David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, ALA. L. REV. (forthcoming), *available at* http://ssrn.com/abstract=1990651.