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SERTA SIMMONS BEDDING, LLC V. CASPER SLEEP INC.: AN EXAMPLE OF LAZINESS IN THE FEDERAL CIRCUIT'S CHOICE OF LAW ANALYSIS

Kaye Horstman[*]

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[*] Kaye Horstman is a 3L at Harvard Law School. She obtained her PhD in microbiology from New York University. Many thanks to Meera Midha for helpful comments and insight.

In *Serta Simmons Bedding, LLC v. Casper Sleep Inc.*,[1] the Federal Circuit vacated the district court's grant of summary judgment of non-infringement that issued after the parties signed a settlement agreement. More specifically, the court concluded, first, that a "binding settlement agreement generally moots the action even if the agreement requires future performance,"[2] and, second, that a district court maintains jurisdiction to enforce a settlement agreement "if the motion to enforce is filed before the case is dismissed and the proceedings are ongoing."[3] Although the court found case law from regional circuits persuasive in reaching these conclusions, the court put more importance on following or creating its own precedent. However, the court did not thoroughly analyze or explain why relying on its own precedent was appropriate for the questions presented. The court should justify which law it is applying on review, particularly when an issue potentially involves Federal Circuit law, federal regional circuit law, and state law. Stating that it is reviewing an appeal de novo without explaining which law is being applied on review could lead to confusing and inconsistent case law.

In September 2017, Serta Simmons Bedding, LLC and Dreamwell, Ltd. ("Serta Simmons") filed a patent infringement suit against Casper Sleep Inc. ("Casper") at the U.S. District Court for the Southern District of New York.[4] Serta Simmons alleged that Casper infringed various claims of three patents.[5] The three asserted patents, which belong to the same patent family, disclose adding selective reinforcements into channels in foam mattresses. These reinforcements allow the ability to control firmness at particular regions within a mattress.[6] The patents claim such mattresses and their methods of manufacture.

After the district court issued an amended claim construction order,[7] Casper filed three motions for summary judgment of non-

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[1] 950 F.3d 849, 850 (Fed. Cir. 2020).
[2] *Id.* at 853.
[3] *Id.* at 855.
[4] *Serta Simmons*, 950 F.3d at 850.
[5] U.S. Patent Nos. 7,036,173, 7,424,763, and 8,918,935; *Serta Simmons*, 950 F.3d at 851.
[6] U.S. Patent No. 7,036,173 col. 1 ll. 17–20.
[7] Corrected Principal Brief of Plaintiffs-Appellants Serta Simmons Bedding, LLC and Dreamwell, Ltd. at 8, *Serta Simmons*, 950 F.3d 849 (No. 19-01098).

infringement as to asserted product and method claims.[8] Casper filed these motions on May 18, 2018.[9] On June 18, 2018, a day before reply briefs were due,[10] the parties executed a settlement agreement and filed a Joint Notice of Settlement and Motion to Stay.[11] This settlement agreement required Casper to pay Serta Simmons $300,000 and to cease various manufacturing, marketing, and advertising activities for certain products by specified dates.[12] The joint notice to the court requested pending deadlines by stayed until July 5, 2018, at which point the parties would have filed dismissal papers.[13]

On June 20, 2018, without mentioning the settlement agreement, the district court issued an order granting Casper's motions for summary judgment on non-infringement.[14] The clerk did not enter a final judgment,[15] but the case terminated on the docket the same day the summary judgment order issued.[16] Casper then informed Serta Simmons that it would not make the payment described in the settlement agreement in light of the summary judgment order.[17] Serta Simmons filed two motions, the first to enforce the settlement agreement, and the second to vacate the summary judgment order because the case was mooted by the settlement agreement.[18]

The district court denied both motions. First, the district court held that the case was not moot at the time the summary judgment order issued because the parties intended to keep the case alive until they fulfilled obligations of the settlement agreement.[19] In addition, the parties had not filed a dismissal but a motion to stay.[20]

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[8] *Serta Simmons*, 950 F.3d at 851.
[9] Corrected Principal Brief of Plaintiffs-Appellants Serta Simmons Bedding, LLC and Dreamwell, Ltd. at 8, *Serta Simmons*, 950 F.3d 849 (No. 19-01098).
[10] *Id.* at 10.
[11] *Id.* at 9–10; *Serta Simmons*, 950 F.3d at 851.
[12] *Serta Simmons*, 950 F.3d at 851.
[13] *Id.*
[14] *Id.*
[15] *Id.*; Corrected Principal Brief of Plaintiffs-Appellants Serta Simmons Bedding, LLC and Dreamwell, Ltd. at 12, *Serta Simmons*, 950 F.3d 849 (No. 19-01098).
[16] Principal Brief for Casper Sleep at 18, *Serta Simmons*, 950 F.3d 849 (No. 19-01098).
[17] *Serta Simmons*, 950 F.3d at 851–52.
[18] *Id.* at 852.
[19] *Id.*
[20] Corrected Principal Brief of Plaintiffs-Appellants Serta Simmons Bedding, LLC and Dreamwell, Ltd. at Appx16–17, *Serta Simmons*, 950 F.3d 849 (No. 19-01098).

Second, the district court held that under *Kokkonen v. Guardian Life Insurance Co. of America*[21] it lacked jurisdiction to enforce the settlement agreement after summary judgment.[22] On September 24, 2018, the clerk entered final judgment for Casper.[23] Serta Simmons appealed to the Federal Circuit.[24]

Writing for the unanimous panel, Judge Dyk vacated the district court's entry for judgment and directed the district court to enforce the settlement agreement, applying de novo review of Federal Circuit law.[25]

The court first addressed the effect of settlement on the case, holding that a "binding settlement agreement generally moots the action even if the agreement requires future performance."[26] The court's analysis relied on its prior decision in *Exigent Technology, Inc. v. Atrana Solutions, Inc*.[27] In *Exigent*, the parties signed an agreement to dismiss the case, although they had yet to negotiate final terms or sign a formal settlement agreement.[28] In that case, the Federal Circuit concluded that "the district court should have first determined whether the parties entered into an enforceable agreement" before granting summary judgment because the settlement would have mooted the action.[29]

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[21] 511 U.S. 375 (1994).
[22] *Serta Simmons*, 950 F.3d at 852, 854.
[23] *Serta Simmons*, 950 F.3d at 852; Corrected Principal Brief of Plaintiffs-Appellants Serta Simmons Bedding, LLC and Dreamwell, Ltd. at Appx21, *Serta Simmons*, 950 F.3d 849 (No. 19-01098). Casper also later filed a motion for fees and costs due to improper litigation tactics as to the settlement agreement. The district denied the motion because it was not an exceptional case. *Serta Simmons*, 950 F.3d at 852.
[24] *Serta Simmons*, 950 F.3d at 852. Casper also cross-appealed on the motion for fees and costs. *Id.* The Federal Circuit held the cross-appeal moot on account of the court's order to vacate the summary judgment order. *Id.* at 855.
[25] *Id.* at 852 (citing Sanofi-Aventis U.S., LLC v. Dr. Reddy's Labs., Inc., 933 F.3d 1367, 1372 (Fed. Cir. 2019); SUFI Network Servs., Inc. v. United States, 785 F.3d 585, 590 (Fed. Cir. 2015)).
[26] *Id.* at 853.
[27] 442 F.3d 1301 (Fed. Cir. 2006). The Federal Circuit's opinion in *Exigent* was also authored by Judge Dyk. For analysis suggesting that Judge Dyk's opinions favor a "broad scope of arising under jurisdiction," *see* Paul R. Gugliuzza, *Rising Confusion About "Arising Under" Jurisdiction in Patent Cases*, 69 Emory L.J. 459, 514–15 (2019).
[28] *Serta Simmons*, 950 F.3d at 852–53 (quoting *Exigent*, 442 F.3d at 1304); *Exigent*, 442 F.3d at 1304–05.
[29] *Serta Simmons*, 950 F.3d at 852 (quoting *Exigent*, 442 F.3d at 1312).

In *Serta Simmons*, the Federal Circuit looked to precedent similar to *Exigent* from other circuits to support its holding, citing cases from the Fourth, Tenth, and D.C. Circuits along with unpublished decisions from the Fifth and Ninth Circuits.[30] The court also distinguished two Seventh Circuit cases cited by Casper, one because it "involved a settlement agreement that was not yet binding," and the other because the terms of the parties' agreement "potentially required further action by the court."[31] The court also stated that these Seventh Circuit decisions were not binding on the Federal Circuit.[32] Acknowledging that settlement agreements could be unenforceable, the court did not conduct its own review of enforceability here because there was no contention that the Serta Simmons-Casper Settlement Agreement was unlawful or against public policy.[33]

On the second issue in *Serta Simmons*, the Federal Circuit held that "under Federal Circuit law a district court has jurisdiction to enforce a settlement agreement that resolves patent infringement claims if the motion to enforce is filed before the case is dismissed and the proceedings are ongoing."[34] The Federal Circuit first distinguished the facts from those in *Kokkonen*. The Supreme Court in *Kokkonen* held that the district court lost ancillary jurisdiction over an oral settlement agreement because the motion to enforce it was filed after the proceeding concluded and the district court did not retain jurisdiction in its dismissal order.[35] According to Federal Circuit, *Kokkonen* "did not hold that a federal court cannot grant a motion to enforce filed *before* a dismissal of the case."[36]

In reaching its decision in *Serta Simmons*, the Federal Circuit stated that Federal Circuit law applied for determining district court jurisdiction "to enforce settlement agreements that resolve patent infringement claims."[37] However, the court cited precedent from

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[30] *Id.* at 853.
[31] *Id.* (citing Selcke v. New England Ins. Co., 2 F.3d 790, 791–92 (7th Cir. 1993); Gould v. Bowyer, 11 F.3d 82 (7th Cir. 1993); Brief of Defendant-Appellant Larry Bowyer, Gould v. Bowyer, 11 F.3d 83 (7th Cir. 1993) (No. 92-3697), 1993 WL 13036997, at *5).
[32] *Id.*
[33] *Id.*
[34] *Id.* at 855.
[35] *Id.* at 854 (citing *Kokkonen*, 511 U.S. at 381–82).
[36] *Id.* (emphasis added).
[37] *Id.* (citing Voda v. Cordis Corp., 476 F.3d 887, 892 (Fed. Cir. 2007); Mars Inc. v. Kabushiki-Kaisha Nippon Conlux, 24 F.3d 1368, 1371 (Fed. Cir. 1994)).

other circuits that concluded a district court could enforce a settlement agreement in a case that was still pending.[38] The court then stated that because its decision vacated the district court's judgment and summary judgment order, the case was still pending.[39] Thus, the district court below had jurisdiction to enforce the parties' settlement agreement.[40] The court concluded by remanding to the district court with instructions to enforce the agreement.[41]

The Federal Circuit's decision in *Serta Simmons* exhibits the court's murky analysis on subject matter jurisdiction and its choice of law. As a general rule, the Federal Circuit reviews patent-specific issues under its own precedent, but reviews procedural questions under the law of the regional circuit where the district court below was located.[42] In addition, the Federal Circuit, as with other federal courts, may also apply state law for pendant issues.[43] As a result, in one case the Federal Circuit (and a district court below it) may be required to apply the law of the Federal Circuit, the law of the regional circuit, and state law.[44] Furthermore, the Federal Circuit's jurisdiction includes review of decisions by a variety of other tribunals on cases defined by substantive law (e.g., takings claims against the federal government, disputes relating to federal government contracts, federal government employment actions, rejections of trademark registration, and issues of veteran benefits).[45] Due to the court's unusual position in applying multiple sources of law, it is insufficient for the Federal Circuit to state that it applies de novo review on appeal without stating which law it is using for its review.

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[38] *Id.* The Federal Circuit cited cases from the Second Circuit, the D.C. Circuit, the Third Circuit, and the First Circuit. *Id.*

[39] *Id.* at 855.

[40] *Id.*

[41] *Id.*

[42] Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1574–75 (Fed. Cir. 1984); Sean M. McEldowney, *The "Essential Relationship" Spectrum: A Framework for Addressing Choice of Procedural Law in the Federal Circuit*, 153 U. Pa. L. Rev. 1639, 1663–71 (2005) (summarizing the "evolution" of the Federal Circuit's choice-of-law-precedent on procedural issues and discussing its inconsistencies).

[43] *E.g.*, *Panduit*, 744 F.2d at 1575 (Fed. Cir. 1984) ("Reviewing pendent matters in light of state law is part of this court's jurisprudence.")

[44] *See* Adam E. Miller, *The Choice of Law Rules and the Use of Precedent in the Federal Circuit: A Unique and Evolving System*, 31 Okla. City U. L. Rev. 301, 329 (2006) (describing the facts of Ruiz v. A.B. Chance Co., 234 F.3d 654 (Fed. Cir. 2000) as presenting a "triple headed monster" where three different sources of law applied to the case).

[45] Roni A. Elias, *Towards Solving the Problem of A Substantive-Law Circuit in A Regional Appellate System: How to Reform the Jurisdictional and Choice-of-Law Rules for the Federal Circuit to Promote Uniformity and Predictability in Patent*, 98 J. Pat. & Trademark Off. Soc'y 40, 48 (2016) (summarizing representative issues heard by the Federal Circuit).

The facts of *Serta Simmons* were similarly complicated—a patent infringement suit with non-patent related questions of jurisdiction involving a settlement agreement. As described above, the district court proceedings initiated as a patent infringement lawsuit. On appeal, the questions presented to the Federal Circuit involved jurisdiction that were not related to patent law specifically: (1) whether the district court had jurisdiction to issue summary judgment after a settlement agreement, and (2) whether the district court had jurisdiction to enforce the settlement agreement. Further, the questions on appeal involved a settlement agreement, which, as a contract, is typically an area for state law.

Although the Federal Circuit did not address the merits of patent law issues in *Serta Simmons*, its own jurisdiction over the appeal is consistent with precedent.[46] Federal district courts have been granted exclusive original jurisdiction over cases involving patent law.[47] The Federal Circuit has been granted appellate jurisdiction over cases that originated under the patent-specific jurisdiction statute.[48] However, Federal Circuit *jurisdiction* is not coextensive with application of Federal Circuit *law*.[49]

The jurisdictional questions presented in *Serta Simmons* required more explanation as to the appellate court's choice of law than the court provided. The court's initial standard of review stated that it "review[s] de novo whether a case or controversy exists and

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[46] Christopher A. Cotropia, *"Arising Under" Jurisdiction and Uniformity in Patent Law*, 9 Mich. Telecomm. & Tech. L. Rev. 253, 268 (2003) ("The case law on this point gives the Federal Circuit jurisdiction over appeals from determinations on non-patent issues, as long as the district court's jurisdiction was based, at least in part, on a patent claim.").

[47] 28 U.S.C § 1338; Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 808–09 (1988) (holding that jurisdiction under § 1338(a) "extend[s] only to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law").

[48] 28 U.S.C. § 1295(a)(1); Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc., 599 F.3d 1277, 1282 (Fed. Cir. 2010) ("Under 28 U.S.C. § 1295(a)(1), this circuit has exclusive jurisdiction over an appeal from a final decision of a district court 'if the jurisdiction of that court was based, in whole or in part, on § 1338.'" (quoting Bd. of Regents, Univ. of Tex. v. Nippon Tel. & Tel. Corp., 414 F.3d 1358, 1361 (Fed. Cir. 2005))).

[49] Paul R. Gugliuzza, *Rising Confusion About "Arising Under" Jurisdiction in Patent Cases*, 69 Emory L.J. 459, 488–89 (2019) ("[M]any issues that frequently arise in cases over which the Federal Circuit indisputably has jurisdiction are—to the chagrin of many observers—not actually governed by Federal Circuit law." (citations removed)).

appl[ies] Federal Circuit law," citing its prior decision in *Sanofi-Aventis U.S., LLC v. Dr. Reddy's Laboratories, Inc*.[50] However, the statement in *Sanofi-Aventis* about de novo review related to "whether a case or controversy existed for the district court to enter a *declaratory judgment of noninfringement or invalidity*."[51] Declaratory judgment of patent issues is one type of jurisdictional question where the Federal Circuit applies its own case law.[52] However, *Serta Simmons* did not involve a jurisdictional question of declaratory judgment of noninfringement or invalidity. In fact, it did not involve a jurisdictional question specific to patents.

The questions of whether settlement moots a case or whether a federal district court has jurisdiction to enforce a settlement agreement could arise in any federal court. Indeed, in *Serta Simmons* the court cites decisions from several regional circuits on the issues. In other cases, the Federal Circuit reviewed motions to dismiss for lack of subject matter jurisdiction applying the law of the regional circuit.[53] Likewise, the Federal Circuit generally reviews grants of summary judgment under the law of the regional circuit.[54] The main case the court relied on in its analysis in *Serta Simmons*, *Exigent*, did not state what standard of review was applied as to the district court's denial to vacate summary judgment and enforce the settlement agreement.[55] As a result, it is not clear why Federal Circuit law should apply to the jurisdictional issues presented in *Serta Simmons*.

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[50] *Serta Simmons*, 950 F.3d at 852 (citing *Sanofi-Aventis U.S., LLC v. Dr. Reddy's Labs., Inc.*, 933 F.3d 1367, 1372 (Fed. Cir. 2019).

[51] *Sanofi-Aventis*, 933 F.3d at 1372 (emphasis added) (citing Prasco, LLC v. Medicis Pharm. Corp., 537 F.3d 1329, 1335 (Fed. Cir. 2008) and 3M Co. v. Avery Dennison Corp., 673 F.3d 1372, 1377 (Fed. Cir. 2012)).

[52] Ted L. Field, *Improving the Federal Circuit's Approach to Choice of Law for Procedural Matters in Patent Cases*, 16 Geo. Mason L. Rev. 643, 668 (2009) (summarizing five procedural issues where the Federal Circuit has consistently applied its own law, rather than the law of the regional circuit).

[53] *See e.g.*, Madey v. Duke Univ., 307 F.3d 1351, 1358 (Fed. Cir. 2002); Pappalardo v. Stevins, 746 F. App'x 971, 973 (Fed. Cir. 2018) (unpublished). *But see* Microsoft Corp. v. GeoTag, Inc., 817 F.3d 1305, 1310–11 (Fed. Cir. 2016) (determining that Federal Circuit law should apply rather than Third Circuit law on a motion to dismiss counterclaims for lack of subject matter jurisdiction because the issue in the case required determining if the dispute arose under § 1338(a)).

[54] *See e.g.*, Unova, Inc. v. Acer Inc., 363 F.3d 1278, 1280 (Fed. Cir. 2004); Cheetah Omni LLC v. AT&T Servs., Inc., 949 F.3d 691, 693 (Fed. Cir. 2020); Molon Motor & Coil Corp. v. Nidec Motor Corp., 946 F.3d 1354, 1358 (Fed. Cir. 2020).

[55] *Exigent*, 442 F.3d at 1311–12.

The court in its later analysis stated that Federal Circuit law applies "in determining whether district courts have jurisdiction to enforce settlement agreements that resolve patent infringement claims."[56] For this proposition, the court cited two Federal Circuit opinions—*Voda v. Cordis Corp.*[57] and *Mars Inc. v. Kabushiki-Kaisha Nippon Conlux*[58]—neither of which relate to choice of law on enforcement of settlement agreements for patent infringement. The court went on to say the Second Circuit cases were not binding here, but were persuasive on this issue.[59] However, jurisdiction to enforce a settlement agreement could be the kind of procedural question on which the Federal Circuit *should* apply regional circuit law. The court looked to several circuits for application of *Kīkkonen*, suggesting that the issue is one of general applicability across the federal judiciary.[60] Further, the court's analysis does not indicate that the settlement agreement between Casper and Serta Simmons involved matter unique to patent law.

The court's statement on the standard of review related to the settlement agreement was similarly unsatisfying. At the outset, the court stated that interpretation of a settlement agreement was a question of law that it reviewed de novo, and cited the Federal Circuit opinion *SUFI Network Services, Inc. v. United States*.[61] However, *SUFI Network* related to breach of a contract with the Air Force and was an appeal from the Court of Federal Claims.[62] Contracts with the Federal Government involve a different choice of law than contracts between private parties.[63] In another recent decision, *Molon Motor &*

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[56] *Serta Simmons*, 950 F.3d at 854.
[57] 476 F.3d 887 (Fed. Cir. 2007). *Voda* included a question of supplemental jurisdiction over foreign patent claims. *Id.* at 891–92 (citing Mars Inc. v. Kabushiki-Kaisha Nippon Conlux, 24 F.3d 1368, 1371 (Fed. Cir. 1994)).
[58] 24 F.3d 1368 (Fed. Cir. 1994). The issue in *Mars* related to district court jurisdiction over Mars' claim of Japanese patent infringement. *Id.* at 1371.
[59] *Serta Simmons*, 950 F.3d at 854 ("While not binding, we find persuasive several Second Circuit cases holding that a district court has jurisdiction to enforce a settlement agreement when the proceedings are ongoing.").
[60] *See* Judge Morton Denlow & Jonny Zajac, *Settling the Confusion: Applying Federal Common Law in Settlement Enforcement Proceedings Arising from Federal Claims*, 107 Nw. U. L. Rev. 127 (2012) (arguing for a uniform application of federal common law for enforcement of settlement agreements as to proceedings with federal question jurisdiction).
[61] *Serta Simmons*, 950 F.3d at 852 (citing *SUFI Network Services., Inc. v. United States*, 785 F.3d 585, 590 (Fed. Cir. 2015)).
[62] *SUFI Network*, 785 F.3d at 588.
[63] *See* Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989) (commenting that "the interpretation of private contracts is ordinarily a question of state law"); Clearfield Tr. Co. v. United States, 318 U.S. 363, 366, 63 S. Ct. 573, 575 (1943) ("The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law.").

Coil Corp. v. Nidec Motor Corp.[64] decided in January 2020, the Federal Circuit the Federal Circuit analyzed a patent-related settlement agreement under state law, explaining that interpretation of a settlement agreement is a question of state law.[65] In *Serta Simmons*, the court remanded the case with instructions for the district court to enforce the settlement agreement without analysis of the agreement's legal enforceability under any law.

Overall, the Federal Circuit's decision in *Serta Simmons* demonstrates several concerning trends in its choice of law. The court relied on rule statements that did not directly support the issues presented. The court did not analyze whether it would have been appropriate to follow regional circuit law instead or set its own precedent regarding jurisdictional issues. And, the court neglected to consider any role state law should have in analyzing enforceability of an underlying contract. Regardless of whether the outcome of this case would be altered by different choices of law or standards of review, the Federal Circuit's current inexact approach to analyzing these issues raises federalism concerns[66] and confusion as to which law applies to an issue.[67] A more detailed choice of law analysis and more carefully considered case citations would benefit litigants, district courts, and the Federal Circuit itself.

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[64] 946 F.3d 1354 (Fed. Cir. 2020).

[65] Molon Motor & Coil Corp. v. Nidec Motor Corp., 946 F.3d 1354, 1358–59 (Fed. Cir. 2020) (citing *Volt*, 489 U.S. at 474); *see also, e.g.*, Unova, Inc. v. Acer Inc., 363 F.3d 1278, 1280 (Fed. Cir. 2004) (applying California law to the interpretation of a settlement agreement because contract interpretation is ordinarily a question of state law and because the agreement included a choice-of-law provision).

[66] Paul R. Gugliuzza, *The Federal Circuit As A Federal Court*, 54 Wm. & Mary L. Rev. 1791, 1864 (2013) ("According to recent opinions by some Federal Circuit judges, the court has improperly leveraged choice-of-law doctrine to expand the scope of federal common law and restrict the scope of state contract law. This dispute over choice of law might be the next doctrinal battle within the Federal Circuit's federalism relationship." (citing Abraxis Bioscience, Inc. v. Navinta LLC, 672 F.3d 1239, 1241 (Fed. Cir. 2011) (O'Malley, J., dissenting from denial of rehearing en banc); Abraxis Bioscience, Inc. v. Navinta LLC, 625 F.3d 1359, 1365 (Fed. Cir. 2010); *id.* at 1368 (Newman, J., dissenting))).

[67] Ted L. Field, *Improving the Federal Circuit's Approach to Choice of Law for Procedural Matters in Patent Cases*, 16 Geo. Mason L. Rev. 643, 645–46 (2009) (arguing that the Federal Circuit has inconsistently articulated and applied its choice of law rules, leading to confusion among litigants and district courts).