

insights

TYPES NOT MAPPED YET March 09, 2021 | TTR not mapped yet | Anthony F. Blum

A race between West Texas and Delaware for the patent venue of choice

A new judge with patent experience, aggressive local patent rules and favorable jury verdicts have shifted the regular patent forums.

For years, the Eastern District of Texas was the venue of choice for thousands of patent owner plaintiffs, particularly non-practicing entities. In 2015, over four times as many patent suits were filed in the Eastern District (over 2,500) than the District of Delaware (less than 550), the district with the next largest number of filed patent suits. But that changed in 2017 when the Supreme Court issued its ruling in *TC Heartland*, which substantially tightened the venue requirements for patent cases by requiring alleged infringers to be sued either where they have a physical presence or in their state of incorporation. This made it more difficult to sue in districts where a defendant has no physical presence.

In the aftermath of *TC Heartland*, the District of Delaware supplanted the Eastern District of Texas as the patent venue of choice. Many businesses' choice to take advantage of Delaware's favorable corporate law now meant that their patent cases were filed in Delaware, as most patent plaintiffs did not want to have cases scattered about the country.

But things started to change at the end of 2018, after Judge Albright was sworn in as a district court judge in the Western District of Texas. Judge Albright was a patent specialist before joining the bench and is paying particular attention to patent cases. The large Western District of Texas encompasses Austin, San Antonio and El Paso, providing numerous targets for patent plaintiffs within the District, particularly given the large number of tech companies with presences within Austin.

New local patent rules, crafted by Judge Albright, streamlined patent litigation and attracted new cases. There is something for everyone in Judge Albright's approach: early requirements for more concrete infringement allegations, upfront claim construction, potential to delay discovery pending claim construction (which delays business impact on defendants), and a quick trial setting compared to many districts.

Judge Albright is the only judge in his division (Waco), meaning that plaintiffs who can justify venue in Waco are assured assignment to this rare federal judge that likes and is skilled in patent subject matter.

The positive impacts Judge Albright has had in elevating his district are apparent:

- While only 85 patent cases were filed in West Texas in 2017, 288 were filed in 2019 and over 850 in 2020.
- Cases in the Eastern District of Texas have dwindled—to less than 350 in 2019 and less than 400 in 2020.
- New filings in Delaware exceeded 1,000 in 2019 but dipped to 730 in 2020 - perhaps because some cases moved to West Texas.

Case filings are now split between Delaware and West Texas with the remainder scattered across the country. Whether West Texas or Delaware will become the patent venue of choice is still up in the air. While more cases were filed in West Texas in 2020, Delaware is leading in 2021 as of the end of February.

Texas' "open for business" attitude may also contribute to venue decisions. As illustrated by a recent staggering \$2 billion jury award for patent damages, Texas is hearing jury cases during the pandemic. Many other districts have all but stopped trying cases during the pandemic.



If your business is in an area where non-practicing entities are seeking to monetize patent portfolios, do not be surprised if your next case is filed in the Western District of Texas.

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