

Albright Transfer Drama Will Keep Eyes On Texas In 2022

By **Ryan Davis**

Law360 (December 17, 2021, 2:17 PM EST) -- The concentration of large amounts of patent litigation before Western District of Texas Judge Alan Albright, and the Federal Circuit's repeated criticism of him for hanging on to cases, has made guessing the next moves for the judge and the appeals court in 2022 a patent law parlor game.

As of Dec. 15, some 3,843 patent cases had been filed in the U.S. in 2021, and 875 of them, or 23%, were assigned to Judge Albright, according to data from Lex Machina. Patent owners have flocked to Judge Albright's Waco courtroom due to his policies, which they find appealing — such as rapidly scheduling trials and very rarely staying cases for America Invents Act reviews.

He also regularly denies motions by accused infringers, many of them Silicon Valley tech giants, seeking to transfer cases elsewhere. But the Federal Circuit has taken issue with that practice, ordering him to transfer nearly two dozen cases in 2021 and often calling his contrary rulings "a clear abuse of discretion."

In some cases, Judge Albright has granted transfer while taking swipes at the Federal Circuit's holdings. That has left attorneys wondering if the Federal Circuit will keep up its barrage of mandamus decisions targeting one judge, if Judge Albright will relent and change his handling of transfer requests, and if the drama could lead to fewer suits being filed in Waco.

"I still think this is a pretty major issue," said Jason Fowler of Covington & Burling LLP. "What it was looking like midyear was that the Federal Circuit has spoken, and maybe Judge Albright has taken this to heart, and we won't hear about this again. That is not how this has turned out."

After a handful of initial rulings ordering cases to be transferred out of the Western District of Texas, the Federal Circuit picked up the pace as the year went on, sometimes issuing multiple such rulings on the same day, suggesting an increasing level of irritation.

In one case, the appeals court did not order transfer but said it was "confident" Judge Albright would reconsider and decide on his own to move the case after reading its criticisms of his holding. When he refused to do so, the Federal Circuit granted a second mandamus petition ordering him to grant transfer.

The Federal Circuit's willingness to grant so many mandamus petitions ordering transfer seems to ensure that other defendants seeking to get out the Western District of Texas will file their own, said

Joseph Kuo of Saul Ewing Arnstein & Lehr LLP.

"It only seems to be picking up more steam, so that's going to be a major litigation tactic going forward," he said.

If 2022 is going to look any different in terms of Western District of Texas venue battles, the judge will likely have to make some changes in his handling of venue motions, Kuo said.

"It really depends on what Judge Albright is going to do," he said. "Is he going to relax his views on transfers or not? I don't have an answer to that question, and no one except Judge Albright would. So we'll have to wait and see."

Judge Albright declined to comment for this story.

Since the Federal Circuit began weighing in, there have been a few instances of Judge Albright granting transfers, sometimes reversing himself after the accused infringer filed a mandamus petition, perhaps suggesting that he's somewhat more open to such motions.

"I think we'll eventually reach some sort of equilibrium where Judge Albright will figure out exactly what he can do with these cases and what he shouldn't do," said Julie Goldemberg of Morgan Lewis & Bockius LLP. "The Federal Circuit is trying to provide that guidance, but we might not be there yet given the continued activity."

Whatever happens next, it seems likely that the coming year won't be quite as lively on the issue of Western District of Texas venue disputes, said Tamara Fraizer of Squire Patton Boggs LLP.

"I think that this can't go on forever. The parties involved are going to continue seeking transfer in those cases when it is appropriate, and I think Judge Albright is going to need to temper his position," she said.

Many of the Federal Circuit's rulings have faulted Judge Albright for not appropriately taking into consideration the inconvenience of witnesses and third parties of traveling to Waco for trial, often noting that the city does not have a major airport. Erin Gibson of DLA Piper said she's been pleased to see the appeals court taking that seriously.

"Some folks say cases so rarely go to trial that it won't really be an inconvenience for a witness, but that's just not the case, as someone who's tried a number of these cases," she said.

Especially during the pandemic, which by and large has not deterred Judge Albright from holding trials, witnesses leaving their family for weeks to fly across the country for a trial can be a real hardship, Gibson said, and "there's enough of those mandamus orders that collectively, I think it makes quite a statement."

Attorneys said they will keep a close eye on whether the venue disputes involving Judge Albright spur action from the court system, the U.S. Supreme Court or Congress. The leaders of the Senate's intellectual property committee asked Chief Justice John Roberts in November to order a study into the "extreme concentration" of patent cases before Judge Albright.

None of Judge Albright's venue cases has been appealed to the high court, although one patent owner whose case the Federal Circuit ordered transferred — accusing the judge of countenancing the

company's "venue manipulation" — said it plans to appeal to the justices.

Lawmakers could theoretically rewrite patent venue law, or the Western District of Texas could change its procedures to spread patent cases to other judges in the district rather than assign all suits filed in Waco to Judge Albright. But those options and a Supreme Court certiorari grant are always long shots.

Yet one burning question is whether some plaintiffs may become deterred from filing suit in the Western District of Texas in the first place, making it less of a hotspot.

The risk of suits being transferred elsewhere, or at least caught up in a back-and-forth with the Federal Circuit, may ultimately give some litigants pause. Yet Goldemberg suggested that since many of the patent cases filed in the district come from nonpracticing entities seeking a quick settlement, the venue issue won't serve as much of a deterrent.

"I think the advantages of being in front of Judge Albright if you're a patentee probably outweigh the fear of being transferred, so we're going to continue to see filings in the Western District of Texas," she said.

Other attorneys said the volume and vehemence of the Federal Circuit's rulings may make some plaintiffs consider filing in a place like the District of Delaware, where many companies are incorporated and venue usually isn't an issue in patent cases.

"As a plaintiff, you want certainty and predictability, so I think you would want to start looking really hard at filing cases where you know you can hold venue," Gibson said.

The borderline cases with questionable ties to the Waco area might not be filed there in the future given the risk of transfer, Fraizer said.

"Initially, they may have recommended filing in the Western District of Texas for almost any case in which a plausible position for venue could be made, but I think today they're thinking twice about that and taking a harder look," she said.

--Editing by Philip Shea and Sarah Golin.

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