

As Albright's Patent Reign Ends, Where Will Cases End Up?

By Ryan Davis

Law360 (July 26, 2022, 10:17 PM EDT) -- New Western District of Texas rules on distributing patent cases mean Judge Alan Albright will soon no longer oversee a large swath of U.S. patent litigation. Here's a rundown of where patent plaintiffs may sue after the most popular patent venue effectively became off-limits overnight.

In 2021, 23% of all U.S. patent suits were filed in the Waco, Texas, courthouse where Judge Albright, a former patent attorney, encouraged litigants to bring cases. One judge handling so much patent litigation attracted scrutiny from senators and the U.S. Supreme Court, and the district's chief judge announced Monday that patent cases filed in Waco will now be randomly distributed to one of 12 judges.

Observers say that in the short term, the order means patent lawsuits will dry up in Waco, given the steep odds of drawing Judge Albright, who previously got every case filed there and appealed to plaintiffs with rapid trial schedules and deep patent knowledge. Moreover, most of the district's other 11 judges are unknown quantities when it comes to patent law.

"It's going to be very difficult for most plaintiffs to justify filing in the Waco division now, because you have complete uncertainty," said Michael Smith of Scheef & Stone LLP in Marshall, Texas. "You might get a judge in El Paso. You might get a judge in San Antonio. And with only a couple of exceptions, none of them have had substantial experience in any patent cases."

The influx of patent cases that had gone to Waco will now almost certainly be filed somewhere else, and attorneys said that while it's too soon to be sure where that might be, it is inevitable that the order will reshape the patent litigation map.

"This is a huge development. In my mind, it's probably the biggest patent story of the year so far, because it is going to dramatically change where patent cases are filed," said Paul Gugliuzza, a professor at Temple University Beasley School of Law.

There are several potential destinations for patent plaintiffs going forward, each with pros and cons that mean there's not an immediately clear front-runner for where patent cases that had been filed in Waco will end up, attorneys said.

Jacqueline Altman of Naman Howell Smith & Lee PLLC in Waco said that "there are a lot of logistical unknowns right now" but that "it will start to even out once people start to see how the other districts

are going to react to this."

Elsewhere in the Western District of Texas

Monday's random assignment order only impacts suits filed in Waco, so patent litigants can still file suits in other divisions of the Western District of Texas and know that the case will remain there. Prior to the order, there were already some patent suits filed in Austin, where many major tech companies have facilities, and the judges there are developing patent experience that may be appealing to litigants, Altman said.

If judges in the district are interested in patent cases and want to hold onto some of Judge Albright's docket, they could signal that to litigants by putting in place policies similar to those that made Waco a patent destination, she said. That could include issuing scheduling orders that take into account the events specific to patent litigation and aiming to run cases efficiently.

"I'm going to be curious to see if some of these other courts decide to adopt Judge Albright's procedures," Altman said. That would "make it so that people would feel comfortable filing in the Western District and say there are good procedures and there will be judicial efficiency."

There's nothing stopping the other judges in the Western District of Texas from following Judge Albright's lead, and that would mean they don't have to start from scratch on how to handle patent cases, said Julie Goldemberg of Morgan Lewis & Bockius LLP.

"But they might not want to make the entire district completely patentee-friendly, because they might not be interested in having more patent cases," she said. "So I think it'll just depend on the judge and what they want to do."

David Henry of Munck Wilson Mandala LLP in Dallas said, "I think patent litigation is not going to leave Texas. It's going to be dispersed, and I think other judges will probably follow Judge Albright's lead."

Yet even if the other judges in the Western District of Texas made a concerted effort to attract patent cases, there are factors that could still make the district unappealing for plaintiffs, Smith said.

The major cities in the district have heavier criminal and immigration dockets that take priority over civil matters and could make it difficult to quickly schedule trials, and even the judges in Austin don't have enough of a track record to give a sense of how they might rule, he said.

However, Smith raised the possibility that the other judges in the district could begin assigning patent cases that come to them to U.S. Magistrate Judge Derek Gilliland, a former patent litigator who works with Judge Albright in Waco, to handle most parts of litigation apart from trial.

That would be appealing to patent owners if it happened, and "then we've got a different environment and I'd have to recalibrate if I were a plaintiff," Smith said.

Eastern District of Texas

This neighboring district was once the undisputed king of patent litigation, collecting nearly half of all new suits at one point before the U.S. Supreme Court's 2017 TC Heartland ruling limited where patent

complaints can be filed. But with Waco off the table, litigants might give the Eastern District another look.

While it is no longer the top patent venue, the district remained comfortably in third place in 2021, amassing 11% of all new patent suits, behind only the Western District of Texas and the District of Delaware.

The judges there have a deep knowledge of patent law and are known for running cases efficiently, so "the Eastern District is always a consideration for venue," said Danielle Williams of Winston & Strawn LLP.

"With TC Heartland, I think there was an expectation that potentially no more cases were going to be filed in the Eastern District of Texas and that hasn't happened," she said.

The Supreme Court limited venue for patent cases to districts where the defendant is incorporated or has a regular place of business, which means some suits can't be filed in the comparatively rural Eastern District.

Yet Goldemberg noted that many of the suits in the Western District of Texas were against foreign defendants, who can be sued anywhere, and those cases, in particular, could now end up being filed in the eastern part of the state.

"I don't have a crystal ball, but I think some patentees may look back at the Eastern District of Texas again," Goldemberg said. "So that that forum might get hotter to the extent that they can file there."

Smith, who works in the Eastern District, was skeptical that many of the suits that had been filed in Waco could now move to Marshall, saying that under the Supreme Court's venue rules, "there's very much of a hard cap of how much filings can go up in the Eastern District after TC Heartland."

Delaware and California

After the Western District of Texas, the District of Delaware was the second most popular patent venue in 2021, amassing 22% of all cases, while the Northern and Central Districts of California placed fourth and fifth, respectively, with 11% of cases between them, and suits that had been destined for Waco may end up in those districts.

Since so many companies are incorporated in Delaware, "it's one place a patentee can file the case with confidence that there's not going to be a big fight about jurisdiction or venue," Gugliuzza said.

Many Waco defendants were tech companies based in California, so filing suits there may be an option for plaintiffs, he added, although "they might not choose that given that it's the home forum for a lot of these defendants, and the Northern District of California has a reputation for being relatively friendly to patent infringement defendants."

And Beyond

It's possible that the next patent hot spot might be a place no one has yet considered, much in the way that Waco was not on the patent map before Judge Albright's 2018 confirmation.

"Who's to say if a different judge might become attractive to patent plaintiffs, or not even a judge, a whole division or district?" said Brady Cox of Alston & Bird LLP in Dallas.

Gugliuzza said the next popular patent venue "might be somewhere new, and it's going to take some time for that forum to emerge."

"But if history has taught us anything, it's that patent plaintiffs will find that place, and they will flock there," he said.

--Editing by Jay Jackson Jr.

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