

Patent Litigation Trends To Watch In 2023

By Ryan Davis

Law360 (January 2, 2023, 12:03 PM EST) -- The continuing fallout from a decision that changed how patent cases are assigned to Western District of Texas judges, and a Delaware judge's investigation into the funding and ownership of patent plaintiffs are set to continue commanding the patent world's attention in 2023.

Texas Case Assignments

Western District of Texas Judge Alan Albright attracted attention for single-handedly overseeing nearly a quarter of all U.S. patent cases in 2021, and that figure appeared set to plunge under a July order that changed how cases in the district are assigned. Yet the effect of the order has been less dramatic than expected, and attorneys will monitor how it evolves in the coming year.

Judge Orlando Garcia, then the district's chief judge, mandated that patent suits filed in Waco will be randomly distributed to the district's 12 judges. Judge Albright, the sole judge in Waco, who previously received every case, was known for policies that patent owners viewed as favorable, and that attracted a large volume of suits to his courtroom, drawing scrutiny from lawmakers.

When Judge Garcia's order was issued, there was speculation that the seemingly slim odds of drawing Judge Albright would lead patent owners to sue elsewhere. But four months on, Judge Albright still gets by far the most patent cases filed in the district, and the Western District of Texas remains the country's most popular patent venue.

From the date of the order through mid-December, Judge Albright received 49% of all the patent cases filed in the Western District of Texas, according to data from Lex Machina. That is apparently because he is assigned cases that are related to those already on his docket. No other judge got more than 12%.

Moreover, 20% of all patent cases nationwide have been filed in the Western District of Texas since the order was issued, more than any other court, although its share of cases dropped from the 25% it received in the six months before the order.

Judge Albright's share of all new cases nationwide has dropped from 24% in the six months before the order, far greater than any other judge, to 10% after it. He is now just slightly ahead of Judge Rodney Gilstrap of the Eastern District of Texas, with 8%, as the nation's busiest patent judge.

"At least for me, I was expecting to see more of a dramatic shift than what we saw," said Sarah Brooks

of Venable LLP.

She said attorneys will be watching closely how the filing trends develop, because "I think it remains to be seen whether the order will discourage plaintiffs from filing in West Texas." With Judge Albright still getting 50% of cases, "is a coin flip enough to discourage litigants from filing there?" Brooks said.

There are only so many cases on Judge Albright's docket, and at some point they will be resolved and suits will be filed by new plaintiffs, said Theo Angelis of K&L Gates LLP. When that happens, "I think we'll see an increasingly broad dispersion of cases," he said.

Judge Garcia's successor as chief judge, Judge Alia Moses, has retained the random distribution policy for patent cases. It will take six to 12 more months to get a clear sense of what the order will mean for patent litigation, said Douglas Nemec of Skadden Arps Slate Meagher & Flom LLP.

"I think sea change is a fair characterization," he said. "We don't know exactly what the impact will be. But I don't think there's any question the impact is significant."

Delaware Funding Probe

Delaware Judge Colm Connolly made waves in 2022 with new orders requiring patent plaintiffs to disclose whether their suits are being funded by third parties, as well as the identity of every one of their owners. The pushback from patent owners, and the potential impact on where cases are filed, will continue riveting attorneys and litigants in 2023.

Several patent owners have urged the Federal Circuit to shut down Judge Connolly's investigation, saying it exceeds his authority and reflects a bias against patent licensing companies. The appeals court has so far denied those requests, while the judge, who presides over one of the country's busiest patent dockets, has responded that his efforts are needed to uncover standing issues and potential conflicts of interest.

The orders requiring disclosure of information that is not usually available to defendants or the court "got absolutely everyone's attention. We all stood up and listened," said Julie Goldemberg of Morgan Lewis & Bockius LLP.

The judge has held hearings that have revealed eye-catching details about who owns several patent litigants, including some cases in which the true owner appears to do little more than sign paperwork to set up a company in exchange for a slice of the money generated by the suit.

Details about who owns or is funding companies that bring patent litigation are important because "it can affect many aspects of the case, starting at the beginning from whether standing is proper in patent litigation cases, all the way down to the settlement strategy," said Leslie Demers of Skadden.

Since several patent owners are seeking appellate intervention to shut down the probe, "we'll definitely be watching to see if we get any commentary from the Federal Circuit on disclosure requirements, and whether this trend towards more disclosure will continue in 2023," she said.

There is no current consensus among appellate courts about whether information related to litigation funding is protected by attorney-client privilege, "so if the Federal Circuit were to rule on whether it's protectable or not, that would definitely clarify things," said Brooks of Venable.

Meanwhile, attorneys will be monitoring whether the outrage that has greeted Judge Connolly's orders from some patent owners starts reshaping where patent suits are filed. Information about their litigation funding and ownership is "something that plaintiffs typically are very much not interested in providing," said Matthew Bernstein of Perkins Coie LLP.

The disclosure rules apply only in Judge Connolly's courtroom, not all of Delaware, but if they remain in effect, or possibly are adopted by the district's other judges, "I suspect there are going to be some patent owners who are unwilling to file cases in Delaware, so that's something to keep an eye on," he said.

Dawn of the Unified Patent Court

After years of delays and false starts, the European Union's Unified Patent Court is scheduled to launch in June, and provided it gets up and running as scheduled, is poised to usher in a new era of patent litigation in Europe.

The court is designed to allow patent disputes to be litigated across nearly two dozen EU nations through one proceeding, rather than with separate cases filed in multiple countries, as is currently the case.

"I think there's a lot of excitement because it just makes sense," said Goldemberg of Morgan Lewis. "There are European patents, so there should be a unified European court that is deciding what the claims mean."

It will also be less expensive for patent owners to litigate one case rather than several at once, but there is likely to be a fair degree of wariness of an entirely new court "because people just feel a little bit uneasy with change," she said.

There's an expectation that the court will get off to a slow start "because if I were a client thinking about where to enforce my IP right now, I'd be a little bit nervous to be case number one, just because you don't know what's going to happen," Goldemberg said.

While many large companies could be wary of being the first to try the new system, it may be appealing for nonpracticing entities that have traditionally focused their litigation efforts on the U.S., said Theo Angelis of K&L Gates LLP.

If it turns out the UPC issues injunctions barring sales of infringing products, which are challenging to obtain in U.S. courts, readily available for prevailing patent owners, the court could inspire more patent licensing companies to turn their attention to Europe, he said.

"We're all kind of holding our breath to see whether this is finally going to be the change where we start to see a good amount of NPE litigation brought in Europe," he said.

ITC Developments

The U.S. International Trade Commission is an important forum for patent litigation that sometimes flies under the radar, but the tribunal could shed more light on some key issues in the coming year.

The ITC launches an investigation into nearly every complaint it receives, not always into every infringement allegation contained in the filing, so "it's sometimes an opaque process," said Lisa Kattan of Baker Botts LLP.

A recent change will help litigants understand the commission's thinking, she said. The ITC began putting a letter to complainants in the docket explaining which allegations are not being investigated.

"That's not only really helpful for the parties in that investigation but also for the bar as a whole, to have a better understanding of the scrutiny that they give complaints, when allegations might be deficient and what types of things they're looking for," Kattan said.

In several recent decisions, the ITC has also delved into which companies qualify as "mere importers," who are not allowed to bring infringement suits at the commission. A "slight flurry" of cases presenting that scenario has flagged it as one the ITC is closely tracking, Kattan said.

"It does seem to be an issue that the commission has been really interested in exploring all the nuances of," she said.

--Editing by Peter Rozovsky.

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